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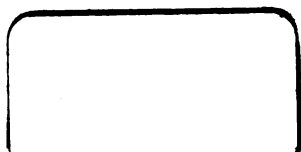
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REPORTS  
OF  
CASES AT LAW AND IN EQUITY  
DETERMINED BY THE  
**SUPREME COURT**  
OF THE  
STATE OF IOWA

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SEPTEMBER TERM, 1917

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BY  
**U. G. WHITNEY**  
REPORTER

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VOLUME 181

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1918

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By  
STATE OF IOWA

MAR 20 1919

## JUDGES OF THE SUPREME COURT.

---

FRANK R. GAYNOR, Chief Justice, Plymouth County.

\*HORACE E. DEEMER, Montgomery County.

SCOTT M. LADD, O'Brien County.

SILAS M. WEAVER, Hardin County.

WILLIAM D. EVANS, Franklin County.

BYRON W. PRESTON, Mahaska County.

BENJAMIN I. SALINGER, Carroll County.

†TRUMAN S. STEVENS, Fremont County.

---

## OFFICERS OF THE COURT.

---

H. M. HAVNER, *Attorney General*, Iowa County.

B. W. GARRETT, *Clerk*, Decatur County.

U. G. WHITNEY, *Reporter*, Woodbury County.

\*Died Feb. 26, 1917.

†Appointed May 1, 1917, to fill the vacancy caused by the death of  
Horace E. Deemer.

# JUDGES OF THE COURTS

during the time of these reports, from which appeals may be taken to the Supreme Court.

(NAMES ARRANGED IN ORDER OF SENIORITY OF SERVICE.)

## DISTRICT COURTS.

- First District*, two judges—HENRY BANK, JR., Keokuk; WILLIAM S. HAMILTON, Ft. Madison.
- Second District*, four judges—\* F. W. EICHELBERGER, Bloomfield; C. W. VERMILION, Centerville; D. M. ANDERSON, Albia; F. M. HUNTER, Ottumwa; SENECA CORNELL, Ottumwa.
- Third District*, two judges—HIRAM K. EVANS, Corydon; THOMAS L. MAXWELL, Creston.
- Fourth District*, three judges—† JOHN F. OLIVER, Onawa; † DAVID MOULD, Sioux City; GEORGE JEPSON, Sioux City; JOHN W. ANDERSON, Onawa (1915); W. G. SEARS, Sioux City (1915).
- Fifth District*, three judges—J. H. APPLGATE, Guthrie Center; WILLIAM H. FAHEY (1911), Perry; LORIN N. HAYS (1911), Knoxville.
- Sixth District*, three judges—K. E. WILLCOCKSON, Sigourney; JOHN F. TALBOTT, Brooklyn; HENRY SILWOLD, Newton.
- Seventh District*, three judges—A. J. HOUSE, Maquoketa; ARTHUR P. BARKER, Clinton; WILLIAM THEOPHILUS, Davenport; MAURICE DONEGAN, Davenport; F. D. LETTS, Davenport; † LAWRENCE J. HORAN, Muscatine.
- Eighth District*, one judge—RALPH P. HOWELL, Iowa City.
- Ninth District*, five judges—† HUGH BRENNAN, Des Moines; W. H. McHENRY, Des Moines; LAWRENCE DE GRAFF, Des Moines; CHARLES A. DUDLEY, Des Moines; WM. S. AYRES, Des Moines; HUBERT UTTERBACK, Des Moines.
- Tenth District*, three judges—† FRANKLIN C. PLATT, Waterloo; GEORGE W. DUNHAM, Manchester; CHAS. W. MULLAN, Waterloo; H. B. BOIES, Waterloo.
- Eleventh District*, three judges—R. M. WRIGHT, Ft. Dodge; † C. G. Lee, Ames; † C. E. ALBROOK, Eldora; H. E. FRY, Boone (1915); EDWARD M. MCCALL, Nevada (1915).
- Twelfth District*, three judges—C. H. KELLEY, Charles City; J. J. CLARK, Mason City; M. F. EDWARDS, Parkersburg.
- Thirteenth District*, two judges—A. N. HOBSON, West Union; WILLIAM F. SPRINGER, New Hampton.
- Fourteenth District*, two judges—D. F. COYLE, Humboldt; N. J. LEE, Estherville.
- Fifteenth District*, five judges—A. B. THORNELL, Sidney; ORVILLE D. WHEELER, Council Bluffs; EUGENE B. WOODRUFF, Glenwood; THOMAS ARTHUR, Logan; JOSEPH B. ROCKAFELLOW, Atlantic.
- Sixteenth District*, two judges—† FRANK M. POWERS, Carroll; M. E. HUTCHISON, Lake City; E. G. ALBERT, Jefferson.
- Seventeenth District*, two judges—B. F. CUMMINGS, Marshalltown; JAMES W. WILLETT, Tama.
- Eighteenth District*, three judges—F. O. ELLISON, Anamosa; MILO P. SMITH, Cedar Rapids; JOHN T. MOFFIT, Tipton.
- Nineteenth District*, two judges—ROBERT BONSON, Dubuque; JOHN W. KINTZINGER, Dubuque.
- Twentieth District*, two judges—JAMES D. SMYTH, Burlington; OSCAR HALE, Wapello.
- Twenty-first District*, two judges—WILLIAM HUTCHINSON, Alton; W. D. BOIES, Sheldon.

## SUPERIOR COURTS.

- Cedar Rapids*—CHARLES B. ROBBINS.
- Council Bluffs*—FRANK J. CAPELL.
- Grinnell*—PAUL G. NORRIS.
- Keokuk*—W. L. MCNAMARA.
- Oelwein*—JOHN R. BANE.
- Perry*—W. W. CARDELL.
- Shenandoah*—GEO. H. CASTLE.

\* Died, Oct. 11, 1914.

† Retired, Dec. 31, 1914.

‡ Resigned, April 27, 1914.

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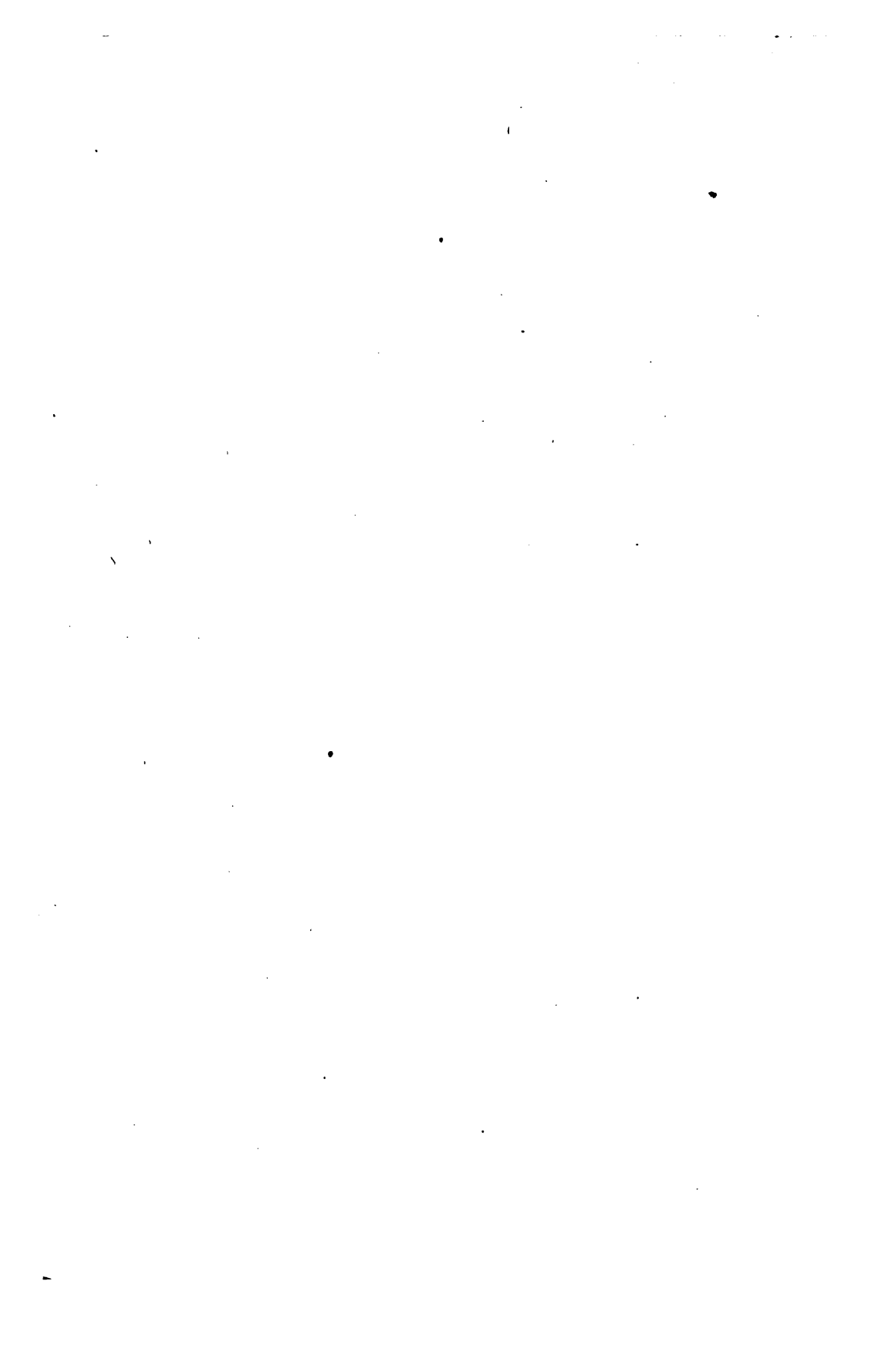
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## IN MEMORIAM.

### HORACE EMERSON DEEMER.

Court convened at 2 o'clock, P. M., December 12, 1917.

Senator Charles G. Saunders of the Council Bluffs bar presented to the court an address adopted by the bar of the Fifteenth Judicial District, relative to the life and public service of the late Horace Emerson Deemer.

Senator Saunders, and George Henry, J. C. Hume, and R. M. Haines of the Des Moines bar, and W. A. Helsell of the Odebolt bar, thereupon eloquently and feelingly spoke of the impressions made upon them by personal contact with Judge Deemer, and of his long and faithful service in behalf of the state.

The address adopted by the bar of the Fifteenth Judicial District was as follows:

Horace Emerson Deemer was born at Bourbon, Marshall County, Indiana, September 24, 1858, and he died at his home in Red Oak, Iowa, February 26, 1917. His school education was finished in the State University of Iowa, from the law department of which he graduated in 1879. During the same year, he and the late Joseph M. Junkin formed a law partnership at Red Oak, where he practiced his profession until his elevation to the district bench. In the year 1886, he was elected judge of the district court for the Southwestern Judicial District, and four years later, he was re-elected. Four years afterwards, the general assembly having provided for an additional judge of the Supreme Court, he was appointed by the governor to fill this position during the interim until the next election. At this

election, in 1894, he was elected to the same position, and every six years thereafter, he was re-elected as long as he lived.

During the course of his career, without neglecting his judicial duties, he had many avocations, among which may be mentioned his services as lecturer before the law classes of the State University of Iowa, where he was made honorary professor of jurisprudence. He was a member of the American Bar Association, and took an active interest in the work of that body. He was the author of several monographs on law subjects, and of a work on Pleading and Practice. He made many addresses on various subjects on public occasions before many kinds of societies, associations and the like. For this kind of services, he was greatly in demand, and nothing but his official duties ever prevented his responding to such a call. The work outside his judicial duties which probably enlisted his most thoughtful and active interest was the growth and greatness of the state library. As a member of the board having this subject in charge for many years, he devoted to it the thought, time and labor its importance demanded; and the library today stands as a monument to the services in which he bore so conspicuous a part.

Passing over such of his life work, in which a biographer may find a fruitful field, it may here be said of him that he did all things well. His work on the bench was of high grade. His industry was rarely equaled. His temper was equable and patient. His sense of justice was supreme. He always sought for the truth and the right. He held in unbounded respect the tribunal of which he was so long a member, and he had no aspiration so high as its honor. He was a sincere friend, an exemplary man, and a faithful judge, and he won a place in the esteem and affection of the public he served so long which consecration to duty always merits.



Justice Silas M. Weaver responded on behalf of the Court:

Someone has said that it matters not so much how a man lives as how he dies. A truer saying is, "It is less important how a man dies than how he lives." Tested by either standard, the life and death of Horace E. Deemer entitle him to high rank in the annals of the great state which he loved, and in whose service he spent nearly all his adult years. Not born to wealth, he lived to demonstrate how unessential is wealth to genuine success. Spurred by a lofty and honorable ambition, he early laid the foundation of a sound education, and before he had reached his majority, had been graduated from the law department of the University of Iowa, in the class of 1879. Soon thereafter, he entered upon the successful practice of his profession at Red Oak, Iowa, and in 1886, while still a very young man to attain such honor, he was elected judge of the district court, his district being one of the largest and most important in the state. Re-elected in 1890, his second term had not expired when, the legislature having provided for an additional member of this court, he was appointed by the governor to the position thus created, and, by successive re-elections, continued therein until the hour struck for his passing. His judicial service in the two courts covered a continuous period of more than thirty years, and it may truthfully be said that, in all these years, no political or personal enemy or carping critic ever gave public utterance to any question of his eminent fitness for the duties and responsibilities of the high office to which he had been called. Notwithstanding his prolonged official tenure, death came to him while still in the prime of mature age, with an apparent prospect of many years rich with promise still before him. Viewed from this standpoint, his taking off was untimely; and yet his life was well rounded out with a record of rare achievement.

As a judge of our court of last resort, he brought to the discharge of its duties a well trained and well informed mind, wide knowledge of the law, unimpeachable integrity and an absolute independence of every form of ulterior influence. He was never satisfied to write a case until he found, not a mere precedent, but what he believed to be the true principle governing its decision. He venerated the rules and doctrines of the common law, but he was not their blind worshiper. He appreciated the truth that law, in its true significance, is not an insensate petrification, but a living growth, a continuous evolution, keeping step with the development of our civilization, ever adjusting itself to the changing conditions which affect the lives, the needs and the happiness of our common humanity. His opinions already published and yet to be published will be found in nearly or quite a hundred volumes of our official reports, and are universally regarded by the bar and the courts as productions of an eminently sane, sound and well balanced judicial mind. Among the builders and expounders of the law in its present-day development, his name will long be remembered. He labored with tireless industry, and midnight, seldom found him taking the rest he imperatively needed. And here, in my judgment, we may recognize the cause of his collapse. The legitimate but grinding work inseparable from his official position, which he would not shirk; his determination not to neglect other and varied duties pertaining to good citizenship and the public welfare; the long nervous strain occasioned by sickness in his family, together made up a load under which he went down. If ever a man died of overwork and overstrain, that man was Judge Deemer. There is a point beyond which the strongest bow will not bend without breaking. There is a limit of endurable burden beyond which an additional feather's weight is as fatal as a mountain of lead. Judge Deemer had reached the limit of his

physical powers and failed to relax in time, and pitiless Nature would not be balked of her revenge.

Unlike some, Judge Deemer was not content with being simply a good lawyer and good judge, and nothing more. He was a man of versatile attainments and many activities. He was imbued with the spirit of true Americanism, and took a direct, personal interest in the public weal, in civics, in education and in all the varied movements of these modern days for the uplift and improvement of society in the state and nation. He was a reader and student of good literature, and, if we except the devoted men and women who for years have been in charge of the great storehouse of books which the state has gathered here at its seat of government, it is literally true that the magnificent success attained by these three excellent institutions, the Iowa State Library, the Historical Department and Museum, and the Law Library, is more largely due to his patient and unremitting care and guardianship than to any other person in our state. His helpful personality and wise counsel will be sadly missed in all the various lines of endeavor in which for so long a time he had been a large factor.

Nor can we let this occasion pass without mention of the deep sense of personal loss which the death of Judge Deemer has brought home to the surviving members of this court. We knew Judge Deemer as probably no others outside of his own family knew him. We had lived in close personal touch with him during all our several years of service on this bench, and learned to appreciate the strength of his manhood and the fine qualities of his mind and heart. He was a clean man. He wanted no advantage which must be accomplished by craft or indirection. His standard of personal honor was of the highest. He stood for the best ideals in public life and in good citizenship. His unusual familiarity with the rules, customs and

traditions of the court not only made him strong in council, but a source, also, of ready aid and assistance to his juniors in experience. The work of the consultation room leads inevitably to differences of opinion and earnest discussion. If it did not, the time given to the consideration of cases would be worse than lost. Like most strong men, Judge Deemer was a man of strong convictions, and not easily driven or persuaded to abandon a position once taken; but no matter how strenuous the debate, no one ever for a moment questioned his perfect sincerity. The picture of his familiar face and figure is indelibly impressed upon our memories. His place at the council table will be filled, but we cannot cease to cherish thoughts of his helpful presence or the influence of his stimulating personality. Dead though he be, as soon or late all must die, he still lives. He lives in the enduring record of his work as a jurist; in the organized efforts for human betterment which he promoted; in the state institutions whose development bears the impress of his helpful hand; in the lives of the young to whom his career has been and will continue to be an inspiring example; and in the hearts of those who loved him. His toils are over; his rich reward is begun.

"Life's labor nobly done;  
Life's battle bravely won;  
He rests."

And in the words of the Great Apostle, "His works do follow him."

Chief Justice Frank R. Gaynor, in ordering the proceedings spread upon the records of the court, said:

For myself, I cannot speak of a long or intimate personal acquaintance with our dead friend. To me he has always been the jurist, standing secure among the fore-

most in the ranks of the great profession to which he dedicated his life and his service.

As I observed him, he was a plain man, sincere in purpose and quick to respond to the call of duty; as a friend, loyal and just; wise in counsel, without ostentation; true to his convictions of right, and ready, even to the sacrifice of personal considerations, to enter the conflict in its behalf.

His work speaks for itself. He was well grounded in the principles of the law, having worked while others slept. Keen and analytical in his handling of facts, he administered justice according to the law, and never hesitated to use the surgeon's knife when the exigencies required its use, yet withal tender of the unfortunate and quick to respond to the cry of the distressed.

One of God's noblemen has passed from among us. We mourn his loss,—the loss of a wise counselor and friend. "This man was better than he knew."

I join in the resolutions so eloquently presented, and order that they be spread upon the records of this court as a lasting testament, not, however, as a full, but as our fullest, expression of the esteem in which he was held by this court and the members of this bar.



REPORTS  
OF  
CASES AT LAW AND IN EQUITY  
DETERMINED BY THE  
SUPREME COURT  
OF THE  
STATE OF IOWA  
AT  
DES MOINES, SEPTEMBER TERM, 1917

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CAMMACK & SON, Appellees, v. WILLIAM WEIMER, Appellant.

**PLEADING: Amendments—Shifting From Equity to Law—Effect.**

- 1 It is permissible, in a purely equitable action, to so amend as to convert the same essential cause of action into one purely at law. Right to change of forum is the only result.

**CONTRACTS: Action for Breach—Pleading—Express Contract Ex-**

- 2 cludes Quantum Meruit. *Quantum meruit* and evidence thereunder have no place in an action wherein the record shows beyond question that the parties had expressly agreed on the amount of compensation.

**APPEAL AND ERROR: Review—Presumption—Conmingling**

- 3 Quantum Meruit and Express Contract. Prejudicial error results from receiving evidence and submitting instructions as to *quantum meruit* when the record shows beyond question that the parties had *expressly* agreed as to the amount of the compensation, even though the court, in submitting the theory of

*quantum meruit*, limited recovery to the amount actually agreed upon.

EVANS, J., dissents.

**ESTOPPEL: Grounds of Estoppel—Inconsistent Conduct—Belated**  
4 **Objections.** One who has employed an *expert* to supervise certain work, in accordance with definite plans and specifications, is not estopped from objecting to the sufficiency of the results of such supervision by the fact that he was present during the progress of the work and then made no objections.

*Appeal from Hardin District Court.*—J. L. KAMRAR, Judge.

MONDAY, MAY 14, 1917.

REHEARING DENIED SATURDAY, SEPTEMBER 29, 1917.

ACTION to recover compensation for services rendered under an express contract of employment to oversee and superintend the reconstruction, alteration and repair of a certain dwelling house owned by the defendant. Verdict and judgment for the plaintiff. Defendant appeals.—*Reversed.*

*D. C. Chase and Williams & Huff*, for appellant.

*W. W. White and Davis & Cameron*, for appellees.

GAYNOR, C. J.—We set out only so much of the issues as are necessary to an understanding of the matters herein disposed of.

On the 12th day of September, 1914, the plaintiffs filed an amended and substituted petition at law, in which they allege that, on or about the 1st day of June, 1911, they entered into an oral contract with the defendant, by the terms of which the defendant employed them to make certain alterations and improvements upon the residence property of the defendant, located in the town of Radcliffe; that these alterations and improvements were to be made according to the orders, directions and instructions given them by the defendant as the work progressed; that, among



other things, they were to remodel, rebuild and improve the dwelling house, put in a cellar under the house, build porches, steps and walks, paint and plaster the building, and put on a new roof; that, for their personal labor in connection with the building of the house, they were to receive the customary compensation; that the defendant has fully paid the plaintiffs while employed in said work for all ordinary manual labor performed by them under said contract. It is further alleged that, in addition to the manual work so to be performed, the plaintiffs were employed to oversee and superintend the work upon the property, purchase such material as was necessary, at the defendant's expense, look after the employment of labor, and generally oversee and superintend the work and see that it was done properly, and for this service, they were to receive a sum equal to 8 per cent of the total cost of the labor and material furnished and expense in connection therewith; that, in pursuance of the contract, they furnished the labor and material, all of which was paid for by defendant at a total cost of \$8,707.60; that plaintiffs have fully complied with all that was required of them by the contract, and the defendant is indebted to them for superintending and overseeing the work a sum equal to 8 per cent of the total cost, or \$696.60. For this they ask judgment.

In a second count to the petition, plaintiffs reiterate the facts herein set out in the first count, and ask to recover the fair, reasonable and customary value of the services rendered by them in overseeing and superintending the work, and ask on this count the same as prayed for in the first count.

It appears that this action was commenced originally in equity, and the plaintiffs sought to have established and foreclosed a mechanics' lien against the property upon which the work was done. Upon the filing of this

1. PLEADING:  
amendments:  
shifting from  
equity to law:  
effect.

amended and substituted petition, defendant appeared, and filed a motion to strike it from the files, on the ground that the action, having originally commenced in equity, presented a new and separate cause of action, distinct from that alleged in the original petition, and not germane thereto. This motion was overruled. This presents the first complaint urged here.

It is not well taken. The ground is not tenable, as is apparent from an examination of the two pleadings. The change is only in the forum. The same cause was first presented in equity, and equitable relief prayed for. This amended and substituted petition presents a cause of action based upon the same facts, without any claim or basis for claim for equitable relief. That this is allowable, see *Barnes v. Hekla Fire Ins. Co.*, 75 Iowa 11; *Newman v. Covenant Mut. Ins. Assn.*, 76 Iowa 56; *Rohrbach v. Hammill*, 162 Iowa 131.

To this petition, then, the defendant filed an answer, in which he admits the employment of the plaintiffs to make alterations and repairs on his dwelling house, denies that the contract was as set out by the plaintiffs, and alleges that the agreement was that plaintiffs should personally superintend the repairs and construction, and would do the work in a good, first class, workmanlike manner, and in accordance with certain plans and specifications then furnished them by the defendant; that, upon the completion and acceptance of the work by the defendant, defendant would pay plaintiffs' firm a bonus of 8 per cent upon all material and labor that went into the construction of the dwelling house, not, however, including the following items: (1) All interior decoration, painting of every kind, both labor and material. (2) All cement work. (3) All plumbing and heating, and all work in connection therewith. (4) All plastering and mason work. (5) All material used in the

garage, and labor on the same. (6) All material purchased by the plaintiffs themselves and used by them on other buildings than the dwelling house. (7) Any shingles except those used upon the dwelling house.

It was expressly agreed that the plaintiffs should give their entire time to overseeing the purchasing of material and seeing that the same complied with the specifications, and personally supervising all work upon the house, and seeing that the same was done according to the specifications furnished them. Defendant says that plaintiffs failed to supervise the work as agreed, and failed to do the work in a workmanlike manner, and failed to complete it within the time specified in the contract; that the defendant furnished the material on demand of plaintiffs, paid all bills promptly, and performed all parts of his contract.

To simplify the case, it may be well to say, at this time, that the record discloses that the plaintiffs were employed to superintend and supervise the construction of this building; that the building was constructed at a total cost shown by the following stipulation: The cost of labor and material in the home premises of the defendant was \$8,130.84, exclusive of heating and plumbing, and the cost of the shingles that went into other buildings was \$559.86. To further simplify, we may say that the allegation of the plaintiffs' petition that the work was to be done "according to the directions and instructions given them by the defendant as the work progressed," is not supported by the evidence. It appears that the real contract was that the work was to be performed according to the plans and specifications furnished them by the defendant at the time the contract was entered into.

2. CONTRACTS :  
action for  
breach : plead-  
ing : express  
contract ex-  
cludes *quan-*  
*tum meruit*.

The record as finally made shows, and both parties agree, that the contract provided that plaintiffs were to receive 8 per cent of the total cost of the reconstruction and repair of this building, except certain matters which, though a part of the cost or connected with the reconstruction, defendant claims were not to be estimated and included in figuring the total cost on which plaintiffs' compensation of 8 per cent was to be figured.

So, in this last analysis, the controversy between the plaintiffs and the defendant centers around this proposition, so far as the plaintiffs are concerned: What work in connection with the building did the contract cover? On what work and material entering into the construction of the building was plaintiff entitled to receive a commission of 8 per cent? Both agree that the work was to be done according to plans and specifications furnished by the defendant to the plaintiffs. Both agree that plaintiffs were to have 8 per cent of the cost of said building, except as to items disputed by defendant hereinbefore set out in his answer. It is apparent, therefore, that a contract was made between these parties, and the method of computing the compensation fixed by the contract. The only difference is as to the work to be considered in connection with the reconstruction of the house in estimating this compensation. When that was settled and determined, the compensation was fixed at 8 per cent. However, upon the trial, the court seems to have recognized the right of the plaintiffs, notwithstanding the admitted contract, to prove what the services were reasonably worth in superintending and overseeing the matters covered by their contract, whatever that might be; and of this, complaint is made.

The court submitted both counts of the petition, the right to recover on the contract and the right to recover on *quantum meruit*, and permitted witnesses, over the ob-

jection of the defendant, to testify as to what the services of the plaintiffs were reasonably worth in supervising and superintending the reconstruction of this building.

This is the second error assigned, and we think it is well taken. The mere pleading of a claim upon *quantum meruit* does not entitle the plaintiff to prove what his services were reasonably worth, in the face of a record showing conclusively that there was an express contract between the parties fixing the compensation. Where parties agree upon the compensation to be awarded for services, that agreement controls and governs the parties in the assertion of any rights, and fixes the measure of compensation.

There is some dispute as to the terms of the contract in respect to the work to be covered by the contract. There is no dispute as to the method of ascertaining the compensation when the other is ascertained. When the work was performed, the compensation was fixed on the basis of 8 per cent of the actual cost of the work covered by the contract. That was a fixed rate of compensation, and yet, in face of this, the court allowed witnesses to testify as to what such services were reasonably worth. In *Prouty v. Perry*, 142 Iowa 294, 298, Division 2 of the opinion, this court said:

"The parties did contract with reference to compensation. If the services rendered were within the scope of that contract, there was no *quantum meruit* involved. It is true that the terms of the contract were general. The amount of labor to be performed was necessarily more or less uncertain, but the nature and scope of it were reasonably defined. The amount of compensation to be received was more or less uncertain, but the measure and the method of its ascertainment were reasonably defined."

So here, the amount of work was uncertain. The sum to which plaintiffs might ultimately be entitled was uncer-

tain, but the method of its ascertainment was fixed by the contract and controlled the parties, and no evidence as to what it was reasonably worth, whether more or less or the same as the contract price, was competent to be received or to be considered by the jury.

In the case at bar, the amount asked under the *quantum meruit* count, of course, is the same as that asked under the count based on the contract, and the *quantum meruit* count does not ask for more than was asked for in the count on the contract; but evidence was permitted to go to the jury tending to show that the services were worth more than the contract called for—more than the party would be entitled to under the terms of his contract. This was clearly incompetent.

3. APPEAL AND  
ERROR: re-  
view: pre-  
sumption:  
commingling  
*quantum mer-*  
*uit* and ex-  
press contract.

It may be argued that this was not prejudicial, because the court instructed the jury, on the second count of the petition, that they might allow plaintiffs the reasonable value of the services rendered, but *not to exceed 8 per cent* of the actual cost. It may be argued, therefore, that this evidence was without prejudice, inasmuch as both parties agreed that the measure was to be 8 per cent. This argument does not appeal to us, for the reason that we recognize in juries a disposition to adjust the burden of losses that may follow even the faithful performance of a burdensome contract. Further, the disposition to do equity, which we find in most jurors, is appealed to. In this case, it is claimed that plaintiffs did not perform their contract according to its terms. This sort of testimony serves as a basis of adjustment in the minds of the jury, and suggests a balancing off of the loss which the plaintiffs sustained because of the inadequacy of the consideration in their contract, against the loss resulting to the defendant for a failure to perform the contract according to its terms; and thus a door for speculation is opened

to the jury that ought to be kept closed. Even though the contract is improvidently made, and the consideration is less than it ought to be,—less than is reasonable,—yet the contract controls, and the rights of the parties must be ascertained and determined by the contract. We think there was clearly prejudicial error in the admission of this testimony, and for that reason the cause must be reversed.

In view of another trial, it is well for us to say that, so far as the plaintiffs' claim is concerned, their duty to the defendant was that of overseers and inspectors, superintendents of the work to be done for the defendant under the plans and specifications submitted. They were selected as experts on these lines, and their services secured and paid for because of the benefits which were supposed to flow to the defendant by reason of their superior skill and knowledge in respect to the matters entrusted to them. The house could be built without an overseer or inspector. It therefore became their duty to exercise that skill and learning which is required of one in that business in the neighborhood, and to give time and attention to see that the work was done substantially according to the plans and specifications. It was their duty to see that the work was done in a good, workmanlike manner. From the nature of the contract, the law implies a duty to exercise that skill, diligence, care and learning that are usually employed to bring the work to a successful issue. It follows, therefore, that the court was wrong in saying, as a general proposition, that, if the defendant was present and saw the work progressing, and made no objection, he would be estopped to make objection now. Defendant had a right to rely upon the plaintiffs to perform their contract. To perform their contract required that they superintend and oversee the work, to the end that, when finished, it might comply with the plans and specifications which were their

4. ESTOPPEL:  
grounds of  
estoppel: in-  
consistent con-  
duct: belated  
objections.

guide as to what was required to be done to make the contract complete. The workmen were under their control and supervision. The material was purchased by them, and should have been purchased to comply with the plans and specifications. The workmen were chosen by them, and it was their duty to supervise their work, inspect it, and see that it was done substantially as called for by the plans and specifications. See *Smith & Nelson v. Bristol*, 33 Iowa 24. Of course this would not be true as to changes from the plans and specifications made on the direction of the defendant, or at his request. Such changes would not be subject to this rule; nor could the plaintiffs be holden liable for any defects in the plans and specifications. An acceptance of the building, when completed, would not constitute a waiver of any of the defendant's otherwise just and legal claims. This was the defendant's home. He was occupying it. He could not do other than accept it; and such acceptance does not relieve the plaintiffs from responsibility for the faithful performance of their contract.

There are other errors assigned, but, as we are satisfied that they will not arise on another trial, we do not take the time to dispose of them now. Indeed, some of the errors could not reasonably arise again, upon a fair presentation of the record on another trial.

For the errors pointed out, the cause is—*Reversed*.

LADD, SALINGER and STEVENS, JJ., concur.

EVANS, J., dissents.



CITIZENS STATE BANK OF PANORA, Appellee, v. EVA R. SNYDER et al., Appellants.

**JUDGMENT:** Conclusiveness—Judgment in Forcible Detention as Bar to Subsequent Action. A judgment in forcible entry and detainer that plaintiff was not entitled to possession of part of the property embraced in a foreclosure decree because of want of service on defendant in the foreclosure action, bars a subsequent action for the possession based on the same foreclosure proceeding.

*Appeal from Guthrie District Court.*—W. H. FAHEY, Judge.

TUESDAY, APRIL 3, 1917.

REHEARING DENIED SATURDAY, SEPTEMBER 29, 1917.

THIS appeal involves whether the trial court erred in refusing to hold that an earlier judgment estopped plaintiff from maintaining a suit to recover possession of real estate.—*Reversed.*

*Robbins & Smith*, for appellants.

*J. R. Mount and Brown & Batschelet*, for appellee.

**JUDGMENT:** conclusiveness: judgment in forcible detention as bar to subsequent action. . .  
SALINGER, J.—In a petition filed on April 16, 1914, plaintiff asserts that it is the absolute and unqualified owner in fee simple and entitled to the immediate possession of certain described real estate, and charges that defendant wilfully and unlawfully withholds the possession of same, and demands judgment for immediate possession. It bases this claim upon a sheriff's deed, the culmination of the foreclosure of a mortgage. Defendants answer: First, that said foreclosure did not divest the defendant Eva R. Snyder of her title, because no original notice was served upon her; second, that plaintiff is estopped

to maintain its suit for the following reasons: After the execution of said sheriff's deed, plaintiff began an action before a justice of the peace, wherein it sought, by action of forcible entry and detainer, to dispossess defendant of part of the land involved both in said foreclosure and in the instant suit; that, in said forcible entry and detainer action, plaintiff based its right to possession upon that foreclosure; that said action was certified to the district court and there became an equity suit; and that therein the district court entered a judgment dismissing the plaintiff's claim. The trial court directed a verdict against the defendant. Its action cannot be sustained if this plea of estoppel is well made. The sole question we have is whether the judgment in the forcible entry and detainer action works the estoppel which defendant asserts.

The plaintiff tells us that, in the foreclosure suit, there was a finding that notice was duly served, and that such finding is conclusive. In other words, it asserts that the judgment in the foreclosure suit conclusively establishes that plaintiff obtained title by the sheriff's deed. We may assume, for the sake of argument, that this was so on the day the sheriff's deed was executed. But, as one judgment upon due notice is no more conclusive than another judgment upon like notice, it must follow that the last judgment entered controls, so far as collateral attack is concerned. Assume that, on the day the sheriff's deed was delivered, the foreclosure judgment had settled that it was on due notice, and that the deed conveyed title. But what if the later judgment in the forcible entry and detainer action determined that there was no notice in the foreclosure suit, and that plaintiff did not have title? Assume that this last is an erroneous decision, and still it is, at most, merely an erroneous judgment. The court had full jurisdiction in the action of forcible entry and detainer. Its action has not been appealed from or otherwise directly

attacked. The attack on that judgment now made by plaintiff is collateral. If the judgment entered in the forcible entry action determines that defendant still has title, it cannot avail plaintiff that the earlier judgment in foreclosure determined to the contrary. Where two valid judgments conflict, the last controls. Defendant relies on the second judgment. As to whatever is decided by it, it controls here. It remains but to be seen whether the judgment in the forcible entry case so deals with a matter involved in both it and the earlier foreclosure judgment as that the one in the forcible entry case estops the parties to relitigate title. The only difference in the two suits is that, while plaintiff's claim of title is based upon the same thing in both actions, the first involved all of the land conveyed by the sheriff's deed, while the last involved but a part of the same land. We have held that there is a distinction between an adjudication and an estoppel to relitigate things before litigated. There is an adjudication in strictness when a suit is repeated. But short of that, there may be an estoppel which defeats an action because some fact which is controlling in both actions was litigated and set at rest in the first action. By way of illustration, it has been decided that, if it be claimed that two promissory notes were obtained by a fraud, and on that defense plaintiff fails of a recovery in a suit upon the first note, he cannot prevail in a suit upon the second one. This has been held and elaborated so often as that we see no need to cite authority.

We are of opinion that the trial court should have held that the determination in the suit for forcible entry and detainer estops the plaintiff to assert in the present suit that defendant is unlawfully holding possession of the land in controversy in the present suit. It follows that the trial court was in error, and its judgment is—*Reversed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

GODFREY DURST, Appellee, v. WILLARD A. PUFFETT, Appellant.

**WATERS AND WATERCOURSES:** Diversion—Injunction—Evidence. Equity will enjoin the continued diversion, to the injury of another, of the waters of a natural watercourse. Evidence reviewed, and held insufficient to establish such diversion by any act of defendant.

*Appeal from Woodbury District Court.*—J. W. ANDERSON, Judge.

TUESDAY, JUNE 19, 1917.

REHEARING DENIED SATURDAY, SEPTEMBER 29, 1917.

ACTION to enjoin the obstruction of a natural watercourse, and the diverting of the natural flow of the water in its natural channel, to the prejudice of the plaintiff. Decree for the plaintiff in the court below. Defendant appeals.—*Reversed.*

*F. L. Ferris*, for appellant.

*C. N. Jepson* and *J. F. Stecker*, for appellee.

GAYNOR, C. J.—This action is to enjoin the defendant from maintaining an obstruction in what is claimed to be a creek or natural watercourse, whereby the natural flow of the water in the creek is interrupted and the waters diverted from their natural course, to the prejudice of the plaintiff.

The plaintiff's and the defendant's land joins. Plaintiff's land is on the west. They are divided by a fence running north and south, about one-half mile in length. The plaintiff's land is in Section 18 and in the west half of Section 17. The dividing fence runs through the center of 17.

WATERS AND  
WATERCOURSES:  
diversion: in-  
junction: evi-  
dence.

Defendant's land is to the east of this fence, and therefore in 17. The creek in question, we may assume for the purposes of this case, is a natural watercourse. It starts north and east of plaintiff's land, but through plaintiff's land runs practically due west to the fence; thence over defendant's land across a highway to a ditch on defendant's land, by which the water from the creek is carried still farther west and emptied into what is known as Oregon Creek; thence carried by Oregon Creek in a northwesterly direction to the Little Sioux River.

The plaintiff claims that the appellant obstructed the flow of the water through this creek at the division line, by placing rocks in the bottom of the creek at that point, the effect of which, plaintiff says, is to obstruct the free flow of the water and cause it to spread out and over plaintiff's land to his damage. The defendant claims, however, that he has not obstructed the natural flow of the water in this creek, and says that whatever damage the plaintiff has sustained has been caused by the natural overflow of water from streams and other causes.

This is practically a fact case. Much learning has been expended in effort to make it appear that, under the law of this state, if surface water from the dominant estate uniformly and habitually flows over a given course, having reasonable limits in width, onto the servient estate, the owner of the dominant estate has no right to cause this surface water to be discharged upon the servient estate in any other way, or in greater quantities, than it would so flow in the course of nature. Further, that a natural watercourse is not necessarily a channel with banks, but it may be such in contemplation of law, even though there are no banks, if the water uniformly flows in a certain line within reasonable limits; that a watercourse is the natural line of flowage. We are further told that it is not necessary that this watercourse be the result of natural causes; that it

may be aided by the hand of man, and if, so aided, it thereafter becomes a living, flowing stream of water for the requisite length of time, it becomes a watercourse, and equity will interfere to restrain diversion of the water.

These contentions have their support in *Pascal v. Donahue*, 170 Iowa 315; *Jontz v. Northup*, 157 Iowa 6; *Bramley v. Jordan*, 153 Iowa 295; and *Falcon v. Boyer*, 157 Iowa 745. So we have abundant authority for saying that the stream or creek or watercourse in controversy is a watercourse, and we will so treat it in the discussion of this case.

We have authority for further saying, on the assumption that this is a natural watercourse, that equity will enjoin the continued diversion of the waters from this creek from its natural course on plaintiff's land.

This brings us to a consideration of the facts as disclosed in this record. While the record discloses that plaintiff owns about 520 acres of land in Sections 17 and 18, west of the line running north and south through the center of Section 17, and defendant's land is all east of this line in 17, we have only to deal with so much of the land of either of these parties as lies in Section 17.

The plaintiff owns the east half of the northwest quarter, and the southwest quarter of the northwest quarter, and the northwest quarter of the southwest quarter, of Section 17. The defendant owns all of the northeast quarter of 17. The obstruction complained of is where the creek crosses the fence line between the land of the plaintiff and the land of the defendant, just north of the center of Section 17. There is a road running in a northeasterly and southwesterly direction across the southeast quarter of the northwest quarter of 17, cutting off about 2 acres in the southeast corner of this 40. The general character of the land that lies to the east and south of this highway is partly farm land, but mostly pasture. The southeast quarter

of the northwest quarter of Section 17 is rough. This is the 40 through which the highway runs, and there is quite a fall from the east side of this 40 to the west side towards the lateral ditch that serves as an extension westward of the creek. There is a bridge on this highway over this creek or lateral. This lateral was constructed about the year 1913, and was constructed to receive the waters from the creek coming from the defendant's land. The lateral continues west until it empties into what is known as Camp, or Oregon, Lake. This lateral is a part of a drainage system regularly established. The creek referred to starts at the top of the hill, about a mile and a quarter back of plaintiff's land. There are other little creeks or draws that empty into this creek.

At the point where the creek enters the Durst land, it is about 10 feet deep. Going eastward along this creek from the fence line that divides the land, the ditch has high banks, perhaps 4 or 5 feet. As this creek approaches the place where it is claimed this dam is constructed, it becomes shallow. At this point, defendant was accustomed to cross the creek, having land on both sides of the creek, and, as the bottom of the creek was soft, rendering it difficult to pass through with a team, he placed rocks on the bottom to make a solid base on which to cross from one side of the creek to the other. This is what the plaintiff denominates a dam, which, he claims, obstructs the flow of the water. The banks at this point seem to have been lower than at any other point on the creek line, and for this reason it was selected by the defendant as a place to cross from one side of the creek to the other to cultivate his land. The creek just west of the fence on plaintiff's land, west of where it is claimed this obstruction is, has well-defined banks, and receives a large amount of water from the hills.

The filling in the creek that causes overflows on plaintiff's land, so far as we can gather from this record, which

is not entirely clear, is west of this stone crossing, and on plaintiff's land. It seems to be assumed by the plaintiff that all the debris and all the filling that are found and described by the witnesses, west of this stone crossing, are due to the stone crossing; but there is nothing in the record that sustains any such assumption. It is also claimed that willows have grown up in this creek west of this stone crossing on plaintiff's land, and that the growth of these willows is due to this stone crossing. The evidence shows that the water coming down the creek from the east passes over this rock bottom quite as readily as it would without rocks. One witness for the plaintiff testifies that the water passes over these rocks pretty fast. This same witness says that trees and things have grown up and the channel is in pretty bad shape west of this stone crossing on plaintiff's land clear down to the bridge on the highway. It appears that, immediately west of this so-called dam, there is a drop of about 6 feet to the bottom of the creek; that the water going over the stone crossing has washed out the creek below to the west. It appears that vegetation and debris of various kinds were found by some of the witnesses west of this stone crossing on plaintiff's land. It is assumed that all this was the result of this stone crossing, while the evidence, considered from any fair standpoint, shows that the crossing had nothing to do with it; that it was the result of overflows and washings from the surrounding country, and not from any water diverted from its natural flowage in this creek.

The whole controversy on plaintiff's part seems to rest on the assumption that this stone crossing is the cause of what appears to us to be due to conditions existing on his own land, to which it is not shown that the stone crossing has contributed in the least. There is no evidence that this stone crossing has diverted any water from the natural channel, or that any of the conditions found west of the



stone crossing can be attributed to its existence. Surely not the willows that are growing in the creek or along the banks of the creek; surely not the logs and driftwood; for if it reached the creek, it would have been carried just the same without the stone crossing as with it, if carried by the creek. In fact, there is no evidence that any of the conditions found west of this stone crossing on plaintiff's land are produced or brought about or even contributed to by the existence of this stone crossing. Nor does it appear that plaintiff has suffered or is likely to suffer any damage by the continued existence of this stone crossing. No witness pretends to say that any water has ever been thrown out of the channel of this creek by the reason of this stone crossing, onto plaintiff's land.

We find no substantial basis in the record for the granting of the writ in this case, and the case is therefore —*Reversed*.

LADD, EVANS, and SALINGER, JJ., concur.

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A. E. GATES, Appellee, v. J. G. WIRTH, Appellant.

**LIFE ESTATES: Taxes—Levies After Termination of Estate—Who Liable.** A life tenant (*pur autre vie*) is not liable to the remainderman for taxes assessed before but levied after the termination of the life estate.

*Appeal from Jasper District Court.*—HENRY SILWOLD,  
Judge.

MONDAY, JUNE 18, 1917.

REHEARING DENIED SATURDAY, SEPTEMBER 29, 1917.

ACTION by the remainderman against a life tenant to recover for taxes assessed but not levied during the exist-

ence of the life tenancy. After the expiration of the life tenancy, the plaintiff, the remainderman, paid the tax, and now seeks to recover from the life tenant the amount paid. Judgment for the plaintiff in the court below. Defendant appeals. Opinion states the facts.—*Reversed*.

*J. E. Cross*, for appellant.

*Tim J. Campbell*, for appellee.

GAYNOR, C. J.—Defendant was the owner of a life estate in a tract of farm land, consisting of about 240 acres. The continuance of his estate rested upon the life of one A. C. Gates. Gates died August 15, 1913, thereby terminating the life estate. The plaintiff is the remainderman. The life tenant failed to pay the taxes for the year 1913. The land went to sale, and the remainderman redeemed from the sale, and then brought suit against the life tenant for the amount paid in redeeming it. The land was listed and assessed in January, 1913, for that year. The plaintiff recovered in the court below. The defendant, the life tenant, appeals.

LIFE ESTATES:  
taxes: levies  
after termina-  
tion of es-  
tate: who  
liable.

The question here is whether or not a life tenant is liable for taxes *assessed* before but levied after his estate terminated. Before entering upon a discussion of this question, it is well that we have before us at least the substance of our statutes bearing on the question of taxation.

It is provided in Section 1350 of the Code of 1897 that property shall be taxed each year; that personal property shall be listed and assessed each year, in the name of the owner, on the 1st day of January. Real estate shall be listed and valued in each odd-numbered year.

Code Section 1352 provides that each assessor shall enter upon the discharge of the duties of his office immediately after the second Monday in January, and shall enter

upon the assessment rolls the several items of property required to be entered for assessment, and shall personally affix values to all property assessed by him.

Code Section 1353. When the name of the owner of any real estate is unknown, it shall be assessed without connecting therewith any name, simply designating unknown owners at the head of the page; and the real estate of persons deceased may be listed as belonging to the estate or his heirs, without enumerating them.

Code Section 1305. All property subject to taxation shall be valued at its actual value, which shall be entered opposite each item, and shall be assessed at twenty-five per cent. of such actual value, and this is to be taken and considered as the taxable value of the property, and shall be the value at which it shall be listed, and upon which the levy shall be made.

Code Section 1303. The board of supervisors at its September session shall levy taxes upon the assessed value of the taxable property.

Code Section 1400. Taxes upon real estate shall be a lien thereon against all persons except the state. Taxes due upon personal property shall be a lien upon any and all real estate owned by such person, or to which he may acquire title. As against a purchaser, such liens shall attach to real estate on and after the 31st day of December in each year.

Code Section 1403. It shall be the duty of every person subject to taxation to attend at the office of the treasurer, at some time between the first Monday in January and the first day of March following (that is, following the levy), and pay his taxes in full; or one half thereof before the first day of March succeeding the levy, and the remaining half before the first day of September following.

That is, taxes are due and payable on the 1st of January following the levy, but do not become delinquent, and penalty for failure to pay does not attach if paid as indicated in the above statute.

Considering real estate from the viewpoint of the taxing power, it is apparent that all lands afford permanent and substantial basis of revenue for governmental purposes. All lands are subject to taxation for that purpose, and for all time. As soon as lands pass out of the hands of the government, and a citizen becomes vested with title or ownership therein, no account is necessarily taken of the individual in whom the title rests, when we come to consider the *right* of the government to tax the property to meet the expenses of government. That right inheres in the government, independent of the relationship of any particular individual to the land or to the title. The land itself, independent of the title held by individuals, is subject to taxation. The statute, however, points out the method to be pursued by the government in subjecting lands to the payment of taxes, so that the burden may be equitably distributed. It is apparent that the right of the government to subject lands to the payment of taxes for governmental purposes is in no way affected by the *character* of title under which it is held by the citizen.

When the machinery of government is called into action, for the purpose of securing this revenue out of lands, the first step required by the statute is that the lands be listed, but to someone as owner. In listing, the government itself is not concerned as to who is in fact the owner. It is listed as against the party as owner whose name appears upon the records; or, if the owner is unknown, then without connecting any name; or if it was the real estate of a deceased person, it is listed as belonging to the estate of his heirs, without enumerating them.

All lands, broadly speaking, are subject to taxation, and

the listing and assessing is for the purpose of fixing a basis for an equitable apportionment of the burden on the particular lands. It therefore becomes the duty of the assessor, under the statute, to list the land under proper subdivisions for that purpose. The listing and valuation are only initial steps leading up to the imposition of the annual burden upon the particular tract. The valuation fixed by the assessor may be reviewed by the board of equalization, and a valuation finally fixed to each tract or any particular tract such as will secure a just and equitable distribution of the burden upon all taxable property within the district.

When the land has been thus listed and the valuations finally fixed, the roll is passed to the board of supervisors. It then becomes necessary for this board to ascertain the amount of revenue needed for governmental purposes for the particular year, and the board fixes the per centum and makes the levy on the basis of the value fixed. Thereafter, by mathematical calculation, a definite and ascertained burden rests on each tract of land for the purposes of governmental revenue for that year. Not until the board of supervisors has acted does the owner of the land rest under any obligation to contribute any particular amount, in order to discharge his land from the obligation to contribute revenue to the government for that year. The amount, not being fixed, cannot be known until the board of supervisors has acted. The amount to be paid and the obligation to pay that particular amount is then fixed for the first time, and it then, as between the landowner and the state, becomes a lien upon the particular property against which the tax is lodged, and that lien continues, if we may call it a lien, as a claim against the land on the part of the state until discharged. The obligation, however, does not mature until the 1st of January, and this obligation may be discharged at any time between January and April, without

penalty to the landowner. The taxing power, therefore, is not concerned in any controversy that might arise between one holding a life estate in lands and one entitled to the remainder upon the expiration of the life estate. That is a matter for adjustment between the parties holding these different titles. The tax on land is not, in a strict sense, an obligation imposed upon the owner of the land, except in so far as the payment of the tax is essential to protect his rights in the land. So far as the state is concerned, it is not a debt that may be enforced by personal action against the landowner, no matter what his title may be. The tax, when finally levied against the land, is not a debt or personal obligation of the landowner. It is a burden imposed by the government without his consent. The burden is imposed upon the land. He may discharge this burden. If he does not discharge it, the land itself is the only source from which payment may be secured that is open to the state.

We are not, in this case, however, concerned with the rights of the governing body to secure its revenue from lands, nor the method pursued by it in procuring this revenue. The governing body having this plenary power to secure revenue from lands for governmental purposes, the law steps in between title owners and regulates their duties to protect the land from sequestration; and so the rule has been established that, as between one holding a tenancy in land for his own life or for the life of another, and the remainderman, the obligation to pay the amount charged against the land and to protect the land from governmental sequestration rests primarily upon the life tenant; and the law says to the life tenant, "It is your duty to protect the land from sequestration, to the end that the remainderman's title may be preserved to him upon the expiration of the life estate." Upon sequestration by the governmental power, all titles pass,—the title of the life tenant and the

remainderman. To protect it from this, however, either party may discharge the burden of the tax. It is the duty of the life tenant, therefore, to discharge, during the continuance of his tenancy, any burden that is laid upon the land in the way of taxes during the continuance of his estate.

As said before, the land was subject to be taken for any tax that might be imposed by the government at any time and for all time. This right attached to the interest in the life estate as well as to the estate out of which it was carved. The life tenant is in possession, receives the use and profits, and so it is considered equitable and just, as between him and the remainderman, that the burden of tax imposed during the time he so enjoys the property, should be discharged by him; but he is required to discharge only those burdens which have become definitely ascertained and fixed upon the land before the expiration of his tenancy. The listing and the valuation by the assessor is not the *imposition* of the burden, and, in and of itself, casts no burden upon the land other than the general burden that rests on all lands by reason of the general rule that makes it always subject to taxation and consequent sequestration.

The listing and valuation by the assessor is for the purpose of laying the foundation for the ascertainment of the annual tax *to be levied* against the land. It is, as it were, the foundation for ascertaining the equitable burden that the land must bear for governmental purposes for that year; or, in the case of real estate, for two years. This can be fixed and determined only when the board of supervisors holds its annual session in September. No specific burden rests upon the land before the board acts. The owner of the land was not called upon to pay any specific amount until that time. It then became for the first time a specific burden, dischargeable on the 1st of January following. Thereafter he was given until the 1st of April to pay it

without penalty, and discharge his land from the burden. If the tax was not paid by the 1st of April, a penalty attached, and then if it was not paid at all, the land itself was subject to sale, to discharge the obligation.

From the statutes hereinbefore set out, and what we have just said, the following is apparent:

All property in the state is subject to taxation for governmental purposes. The action of the assessor in listing and fixing a valuation on property is only the initial step towards the ultimate fixing of a burden of taxation on specific property for the year or years for which it is assessed. The burden does not attach until the board of supervisors in September have ascertained the amount necessary to be raised for governmental purposes, and have fixed the per centum of tax necessary to raise that amount, based upon the assessor's valuation. The amount assessed against any particular piece of land is ascertained and determined on the basis of the per centum fixed by the board of supervisors, calculated on the valuations as finally fixed. No one is under obligation to pay taxes until after the levy has been made; that is, until the amount chargeable is charged to the specific property. The duty to pay the amount thus fixed does not arise until the 1st of January following.

The duty to pay, in order to discharge the land, as between title owners, rests, generally speaking, on the owner of the land at the time the annual tax to be levied is actually ascertained, fixed and levied, and this obligation to pay in no event arises until the work of the board of supervisors is completed, in September. This is the first time that the specific annual tax for the year became a lien upon the property, and this is the first time that an obligation rested on anyone to discharge the tax in order to free the land from the burden.

It follows, therefore, that, inasmuch as the estate of the life tenant in this case expired before any levy of taxes



had been made for that year, before the burden of taxes for that year was imposed upon the real estate in question, he was under no obligation to discharge the taxes for that year for the benefit of the remainderman. The tax in question did not come into existence as an enforceable claim against the land until the remainderman came into possession of the land, freed from the burden of the life estate. The amount of the tax was not and could not be ascertained and determined until after the expiration of the life estate. No lien for the taxes for that year rested upon the land until after the expiration of the life estate. No tax was due until after the expiration of the life estate. To hold that the life tenant's obligation to pay taxes dates from the time of the assessment, is to hold that, if lands were assessed in odd years, and the life tenant continued in possession for the odd year, and his estate ceased at the expiration of the odd year, he would still be holden for the tax for the even year following, because it had already been assessed by the assessor for that year before the expiration of the life tenancy.

Although the taxes are assessed in September by the board of supervisors, yet as to a purchaser the lien does not attach until the 31st day of December following. We are not prepared to hold that this statute applies and should govern the question here under consideration, but by analogy we feel justified in saying that, if the title of the life tenant ceased before there was any levy of taxes for that year, before any lien attached in favor of the state for that year, before the taxes could have been paid by the life tenant for that year, the life tenant ought not to be holden, as between him and the remainderman, for the payment of the taxes for that year. As said in *Brodie v. Parsons*, (Ky.) 64 S. W. 426:

"It is well settled that the burden of paying current taxes is upon the tenant for life, rather than upon the re-

maindorman (citing authorities). It is urged that this rule should not be applied because the life tenant died on the 27th of January, before the taxes for the year were payable, and that she did not enjoy the rents for the entire year covered by them. We think otherwise. The taxes became a *lien on the land on the 15th day of September*. The liability for their payment depends on the state of the title *at that time*, and, being fixed then, is not affected by the death of the life tenant before the expiration of the year for which the taxes were levied. A purchaser of property on the 27th day of January would not be required to pay these taxes. The remainderman is entitled to receive the property free of all charges which the law casts upon the life tenant; for otherwise he would take the property with the burden, and the life tenant, not being liable for any taxes levied before the death of the testator, C. B. Parsons, would be governed by a different rule at the close of the tenancy from that applied at the beginning."

It will be noted from this case that the duty of the life tenant to pay is fixed by the date of levy, the date when the tax became a lien. If his estate expires before that date, he is not bound for the taxes; if after, he is liable. See also *Penn's Est. v. Penn's Est.*, (Ky.) 87 S. W. 306.

Our attention is called to *Adams v. Snow*, 65 Iowa 435. It is thought that some language used in that case supports plaintiff's contention in this; but not so: The language used was in discussing the statute requiring notice of the expiration of the time for redemption from tax sale to be served on the one in whose name the property was "taxed," and it was held that this meant the person in whose name it was assessed; that, for the purposes of that statute, the word "taxed" should be understood as meaning "assessed." After lands are listed and assessed to the person named, and the assessment is returned to the auditor, they are regarded as "taxed" to him. The listing and assessing are done in or-

der to subject the land to *taxation*, and, when done, the land is "taxed," *within the meaning of the statute*, to the person named as the owner in the tax book. The court said:

"The assessing, listing and levy are separate and successive steps in the imposition of taxes. They are all intended to accomplish that end. The land, as it were, is first designated and brought within the exercise of the *jurisdiction of the taxing power* by the assessor; the other steps are intended to determine the amount of the tax, and are proceedings to enforce the authority to tax, the first exercise of which was the assessment. Lands are thus subjected to taxation by the assessment, and when assessed are to be regarded as taxed. \* \* \* The taxes, we will presume, were levied before the expiration of the time for redemption, which was in October. The statute requires the taxes to be levied in September. We will presume the levy was made in that month. It thus appears that, at the time the deed was made by the treasurer, the land was 'taxed' to the plaintiff."

This case simply holds that, under the statute requiring notice of the time of the expiration of the period of redemption from tax sale to be served upon the person in whose name the land is "taxed," the word "taxed," as used in the statute, should be construed to mean "assessed." The fact in that case is that it was not only assessed but taxed before notice was served. To the same effect is *Heaton v. Knight*, 63 Iowa 686, in which it is held that, under this statute, requiring notice of expiration of the time of redemption to be served upon the person in whose name the land is "taxed," the word "taxed" should be construed to mean "assessed." The court said:

"Under the statute, a listing and an assessment of land by the assessor should be *construed* as taxing for the

purpose of the service of the notice which must precede execution of a treasurer's deed."

We are not aided in this investigation by decisions from other states to any material extent, nor has the matter ever been directly determined by this court.

It must be borne in mind that, as to the taxing power, in so far as titles are affected by the levy of the taxes, the levy involved the title of the remainderman as well as the title of the life tenant; that, upon a failure to pay the taxes, a sale for taxes would divest the whole title. The life tenant's title having been wiped out before the levy, no title remained in him to be affected by the levy. The title then was fully invested in the remainderman. The duty of the life tenant to protect that title rested on him only so long as his title continued. It ceased with the expiration of his title. His title expired before any tax was levied.

We are satisfied that the court erred in holding the life tenant liable for the taxes on the land after the expiration of the life tenancy. The case is therefore—*Reversed*.

LADD, EVANS and SALINGER, JJ., concur.

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DAN W. HASKELL, Appellant, v. L. H. KURTZ COMPANY,  
Appellee.

**MASTER AND SERVANT: Warning and Instructing Servant—**

1 **Self-Evident Dangers.** A master is under no duty to warn a servant of dangers self-evident to anyone, skilled or unskilled.

**PRINCIPLE APPLIED:** Plaintiff was employed in a shipping department, but, on the occasion in question, was directed to wash the second story windows. He knew where he could get all that was necessary to do the washing. From the inside of the room, he washed several windows in perfect safety by raising the lower and dropping the upper sash. The upper sash

of the last window was so gummed with paint that he could not get it down with his hands, and the lower sash, though hung with weights, did not remain stationary when raised. *He made no attempt to get a chisel or other suitable tool with which to lower the upper sash.* He raised the lower sash, stepped out upon a 6-inch ledge, took hold of the lower part of the upper sash with his left hand, and proceeded to wash the upper sash with his right hand. When in this position, the lower sash, from its own weight, commenced to descend. This is the first time he knew that the lower sash would not remain stationary. His left hand was about to be caught by the descending sash, and he did not have time to release his hold and grab the descending sash. The descending lower sash broke his hold on the upper sash. Result, a fall and injury. *Held, plaintiff (a) was guilty of contributory negligence, and (b) the danger was so self-evident that no duty devolved on the master to warn.*

**NEGLIGENCE: Contributory Negligence—Self-Evident Place of**  
**2 Danger—Safety Appliances.** A servant may not escape guilt of contributory negligence, when he deliberately places himself in a self-evident place of danger, because of the lack of safety appliances which he made no effort to secure, and which evidently might have been had for the asking.

PRINCIPLE APPLIED: See No. 1.

**MASTER AND SERVANT: Warning and Instructing Servant—**  
**3 Change of Employment—Effect.** Merely directing a servant to do that which he was not employed to do imposes no duty to warn of the dangers which may be encountered. *The character of the work determines whether the master is under a duty to warn.*

PRINCIPLE APPLIED: See No. 1.

*Appeal from Polk District Court.—W. H. McHENRY, Judge.*

SATURDAY, MAY 12, 1917.

REHEARING DENIED SATURDAY, SEPTEMBER 29, 1917.

ACTION to recover damages on account of personal injuries suffered by plaintiff while in the employ of the defendant, alleged to have been due to the negligence of the defendant, to which no negligence on part of the plaintiff

contributed. A verdict for defendant was directed, and this is an appeal from that order.—*Affirmed.*

*Woods & Cabbage*, for appellant.

*Miller & Wallingford*, for appellee.

SALINGER, J.—I. A careful analysis of the errors relied upon for reversal, when made in the light of the whole record, narrows what we have for decision. Concede, for present purposes, that washing windows was not within the scope of the plaintiff's employment. That is not material, if it appears that he did wash all but one of the windows without injury or danger of injury, and but for his own fault could have washed all in safety. Concede the abstraction that the employer must furnish a safe place to work, must warn and instruct, and must furnish such proper tools and appliances as are required to avoid the dangers of employment, and that, therefore, abstractly speaking, evidence that there are such tools and appliances should be received. The fact remains that all but one window was washed in safety, though no instruction or warning was given and no special safety appliance nor requisite tools furnished. The injury to plaintiff came from a fall while he was washing a particular window. In washing this window, he did not pursue the method which he had employed in washing those on which he did his work without injury and in safety. If he had used the same method throughout, he would have suffered no injury, though neither warned nor instructed, and though not furnished with special tools or safety appliances. His complaint narrows to a claim that, when he reached the window whose washing led to his injury, he was unable to use the methods that had proved safe in washing the other windows, and that his inability to continue the safe

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warning and in-  
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dent dangers.

method was due to the negligence of the defendant, and that his fall is traceable to that negligence without contribution thereto on his part. Reduced to its lowest terms, his complaint is that said one window was kept in a condition that made it perilous to wash it, in the absence of warning, instruction and the furnishing of proper tools and safety appliances, and that no safe place was provided wherein to do the work of washing said window. It may be conceded again, for the sake of argument, that the work of plaintiff was not done in a safe place; that a warning would have made plaintiff more careful; and that, had he had certain safety appliances, he would have suffered no injury, though not warned and though working in an unsafe place. But if it be true that plaintiff chose an unsafe work place when he might have refused to work unless furnished a safe one, or true that he was reasonably able to obtain a safe place to work in and chose to work in an unsafe one, or that, were it not for his fault, he would have suffered no injury, though not warned or instructed, and though no tools or safety appliances were furnished, then he must fail of a recovery, without inquiry into the fault of defendant.

1-a

Passing these generalities, we address ourselves to the concrete situation. We agree with appellant that, when he was directed to wash windows at all, this amounted to an instruction to wash the outside as well as the inside of the sash. When he reached the window whose washing caused his injury, he found the upper sash stuck tight with paint, and found or believed himself unable to lower it. If he had been able to lower it, he could have washed the outside sash from inside the room, and washed it in perfect safety, even as he had by the same method washed others. He made no attempt to secure any tool to aid him in lowering this sash. What he did do is thus stated by himself:

"I saw that I couldn't get it down to reach over from the top, so I assured myself that I could get a good hold of it. The window was in two sashes, which were hung on weights and balanced in such a manner that the upper sash would, or at least should, remain in the position in which it is left until it is moved; and the lower sash when raised would operate in the same manner. To all appearances, the lower sash was normal. I raised it up far enough to climb to a position on the ledge to which I must get to do the work, raising it (the lower sash) as high as it was necessary to climb out."

When he got out, he stood on a cement ledge five or six inches wide, and held onto the lower part of the upper sash with his left hand and worked at the upper sash with rags held in his right hand. He continues:

"The lower sash began to slide down, and I was standing and had my hand up and I couldn't reach it in time to stop it without letting go the hold I had. The window brushed down past my fingers. Until the time it reached the bottom, it had pushed my fingers from the upper sash and left me with no purchase and with but a small space for my feet, and I started to fall, and when I started to fall, I fell away from the window, caught myself in time to turn and light on my feet, and that is all I know. The lower sash of the window began to slide down, and I was standing and had my hand up, and I couldn't reach it in time to stop it without letting go the hold I had. I put my fingers under the edge of the upper sash, and that some way this inside window slipped down \* \* \* with my fingers in there between. They were just about touching the glass. Whether or not my fingers did hold the inner sash from coming down depends on what the pressure on the inner sash might be. \* \* \* I did not turn around; I never let go my hold for an instant. I could have let go with



one hand and taken hold of the bottom of the window sash, but I didn't do that."

II. Assume, for the sake of argument, that the employer was negligent in keeping the upper sash so that it could be moved down only by the aid of some tool, and in keeping the lower sash in such condition that, when raised, it would not stay up. On this assumption, plaintiff would have suffered no injury if there had not been this negligence. But if the plaintiff was negligent in going where he did and attempting to do his work from where he placed himself, then the assumed negligence of the employer becomes at once immaterial. That is to say, the plaintiff cannot recover even though the defendant was in said respects negligent. The narrow question at this point is whether the plaintiff is guilty of contributory negligence. In essence, his avoidance is: (1) That the work done by him was without the scope of his employment, which was to work in the shipping room of defendant; (2) as to work outside of that scope, it was the duty of the employer to give him due warning and instructions of perils that plaintiff would or might encounter in doing such work; (3) the employer failed in his duty to furnish proper tools and appliances which would have safeguarded plaintiff against such perils.

3. MASTER AND SERVANT: warning and instructing servant: change of employment: effect. Washing windows was not within the scope of the original employment of the plaintiff. But the naked fact that, upon request of the employer, an employee consents to do what he was not originally employed to do, imposes neither the duty to warn or instruct, nor to furnish safety appliances. This duty does not exist because of change of employment. It arises because the scope of the new employment is of such character as that there should be warning and furnishing

of proper tools and safety appliances. If the new employment is not hazardous, needs no special skill or appliances, and involves nothing in the way of danger that is not self-evident to all, if there be danger, this duty cannot arise merely because the employment was changed. If one employed to keep books be requested to wrap up groceries, and engages in that work, there is no requirement to warn or instruct against peril, nor to furnish tools and appliances to safeguard against danger. Where there is no danger, or none not as apparent to any employee as it is to his employer, the duty does not arise, because the reasoning that formulated the duty is inapplicable. A request to take on a different employment and acceding thereto makes, for the purposes of this rule, an original employment. If, on an original employment, there would have been no duty to warn and to furnish appliances, there is no such duty as to a new employment created by changing a former one by mutual consent. The material thing is not that a different employment was entered into, but the nature of that new employment.

This plaintiff is an adult of more than average intelligence. When he found a window that would not lower, no warning given in advance would have made that fact more patent. No skill or experience was required to bring home to him that he was unable to lower the sash. No advance warning would have made clearer than it was to any human being with ordinary faculties and power to reason that it was dangerous to meet the inability to lower the sash by stepping upon a 6-inch ledge placed just below the second story of a building. Assume that plaintiff could not foresee that when he did go upon the ledge the lower sash might or would fall. If he had done what he reasonably could do when he found the upper sash immovable, the tendency of the lower sash to drop would not have affected him. His care or want of care must be dealt with at the point when

he went upon the ledge, and relied upon the hold on the sashes which he took. While he claims that the offer to furnish him appliances was very limited, it appears that he was told "to get what he needed. He knew where it was." The man sent to work on the same job says, as a witness for plaintiff, that the one who directed them to do the work did not tell them where to get what was needed "because we knew where to get everything that was necessary to wash the windows. We knew what we wanted and got it." It appears, however, that all that they got was a couple of buckets, some rags and towels, some soap and some Bon Ami. It is conceded that the upper sash could have been lowered by some simple instrument usable as a pry or lever, such as an ordinary chisel, and it is answered that plaintiff was not a carpenter. Any adult of average intelligence must be charged with knowing, though not a carpenter, that a sash stuck by paint could be lowered by inserting a simple edged tool where it would act at a lever. We may concede that plaintiff was not negligent in failing to provide himself with such tool in the beginning. But when he found the condition the upper sash was in, it is doing no violence to reason to hold that he knew without warning or special experience that such a levering would, in all probability, lower the upper sash so that he might wash it safely as he had others. Why should he have a recovery because he refrained from asking for such a tool, and instead elected to place himself in a dangerous position? Assume that the highest degree of care would have induced the employer to furnish in advance appliances that insure absolute safety in washing these windows. What prevented the plaintiff from refusing to place himself in a self-evident danger instead of demanding such appliances before proceeding further with his work?

We are constrained to hold that one who finds that he cannot lower a window so that he may wash the same

from inside the room, deliberately steps upon a ledge six inches wide, from which a fall to the street below will work great injury, with no precaution save the hold which plaintiff took, is in no position to recover for an injury which results, even though, had there been due care on the part of the employer, the plaintiff would have had no occasion to leave safety on the inside for clearly apparent danger on the outside. We question whether there was any evidence to go to a jury on the issue that the lower sash was in fact negligently hung; but we do not go into that question, because we are proceeding, in effect, on the assumption of such defect, by making this decision turn upon the presence or absence of contributory negligence.

Almost every conceivable phase of the law of negligence, contributory negligence, assumption of risk, duty to furnish safe place, duty to furnish proper appliances, and duty to give adequate warning, is exhaustively presented by both parties. But there stands out that the verdict was directed because the trial court believed plaintiff had failed to prove that he was free from contributory negligence, and that, if this ruling is justified, we have no occasion to go beyond so finding. Little in the briefs has been helpful in solving this controlling question, and we have been forced to an independent investigation which seems to us to sustain the order below, and upon which investigation we find this:

It must appear that the master knew of or ought to have known of the danger, and that the servant did not know and had not equal means with the master of knowing of such danger by ordinary care. *Crown Cotton Mills v. McNally*, (Ga.) 51 S. E. 13. One employed to work in a saw mill is not entitled to be warned unless the employer knows or should know that warning is necessary. *Sladky v. Marinette Lumber Co.*, (Wis.) 83 N. W. 514. The duty to warn and instruct even with respect to the use of machin-

ery extends only to those dangers which the master knows, or has reason to believe, the servant is ignorant of. *Stodden v. Anderson*, 138 Iowa 398; *McCarthy v. Mulgreiv*, 107 Iowa 76; *Kerker v. Bettendorf Metal Wheel Co.*, 140 Iowa 209; *Johanson v. Webster Mfg. Co.*, (Wis.) 120 N. W. 832. We said, in *Mericle v. Acme Cement Plaster Co.*, 155 Iowa 692, that, before a master is required to warn a servant, especially an adult, it must appear that the servant, because of his inexperience or otherwise, was without knowledge of the perils about to beset him, and also that the master is aware of such want of information or has reasonable grounds to believe it is wanting. Failure to give warning and instruction will not base a recovery, unless it appear that the servant had not equal means of knowing with the master. *Harte v. Fraser*, 130 Ill. App. 494; *Pinkley v. Chicago & E. I. R. Co.*, (Ill.) 92 N. E. 896; *Hendrix v. Vale Royal Mfg. Co.*, (Ga.) 68 S. E. 483; *Ahern v. Amoskeag Mfg. Co.*, (N. H.) 71 Atl. 213. We said, in *Hanson v. Hammell*, 107 Iowa 171, at 176, that the well-settled rule is that, if the employee knows, or may reasonably be supposed to know, the dangerous character of the temporary work to which he is called, the employer is not negligent in requiring the work without explaining its character. And we cite *Wormell v. Maine Cent. R. Co.*, (Me.) 10 Atl. 49; *Rummell v. Dillworth*, (Pa.) 2 Atl. 355; *Cahill v. Hilton*, (N. Y.) 13 N. E. 339; and *Newbury v. Getchel & Martin Lbr. & Mfg. Co.*, 100 Iowa 441.

In *McCarthy v. Mulgreiv*, 107 Iowa 76, the holding is that the duty to warn and instruct does not arise as to dangers known to the servant, or so open and obvious as, by the exercise of ordinary care, he would have known of them. *Kerker v. Bettendorf Metal Wheel Co.*, 140 Iowa 209. is that, where a person of mature years undertakes any employment, the master may assume that he has, or claims to have,

sufficient experience to know and appreciate the dangers ordinarily incident to the undertaking. We say, in *Harney v. Chicago, R. I. & P. R. Co.*, 139 Iowa 359, that, unless something suggests to the master that a warning is necessary, he is justified in acting on the assumption that the servant understood the dangers to which he was exposed, and would take appropriate precautions to safeguard himself. In the case of an adult of apparently usual intelligence, the employer may assume, unless informed to the contrary, that he has common knowledge, and need not give specific warning. *Johanson v. Webster Mfg. Co.*, (Wis.) 120 N. W. 832. In *Whalen v. Rosnosky*, (Mass.) 81 N. E. 282, plaintiff, a bright boy 17 years old, employed as an errand boy, was injured while attempting to open some wooden packing cases with a hammer and a hatchet, which are proper tools for such work. His employer told him he could get the cover off quicker by hitting the hatchet under the cover than by the method which he was employing. After a few strokes, a piece of steel flew off and injured plaintiff's eye. He was given no warning of the danger, but it was held that there was no duty to warn, because the work was one of the common operations of everyday life, and free from complexity.

There need be no warning against what should be evident to one possessed of ordinary intelligence. So it was held that the failure to instruct an adult servant of average intelligence as to the manner in which he should use a wrench in screwing nuts on a rod so as to avoid falling in case the wrench should break, is not negligence. *Garnett v. Phoenix Bridge Co.*, 98 Fed. 192. And so of a failure to inform that a probable result of striking a mass of steel with a sledge hammer might be the flying asunder of particles of steel. *Sabere v. Benjamin Atha & Co.*, (N. J.) 68 Atl. 103.

Though there was change of employment, there is no liability for injury resulting from causes open to the observation of plaintiff which it required no special skill and training to foresee were likely to occasion him harm. *Cummings v. Collins*, 61 Mo. 523, approved in *Hanson v. Hammell*, 107 Iowa, at 176; and see *Cole v. Chicago & N. W. R. Co.*, (Wis.) 37 N. W. 89. There is no case for the plaintiff where his evidence fails to show that the work directed to be done required more skill or knowledge than he possessed. *St. Louis R. Co. v. Austin*, (Tex.) 72 S. W. 212. Change of employment alone is not sufficient. The change is immaterial, unless there are dangers incident to it which, in consideration of his known inexperience or some matter of occult nature, the master should have pointed out to him and did not. *Ft. Smith Oil Co. v. Slover*, (Ark.) 24 S. W. 106. In *White v. Owosso Sugar Co.*, (Mich.) 112 N. W. 1125, a laborer in a sugar factory was called from his regular work to aid in raising an iron plate; he and a colaborer lost control of the plate and a corner passed into the shaft, where it was struck by a descending bucket, injuring the laborer; and it was held that, though the work may have been outside the scope of plaintiff's employment, there was no negligence in failing to warn him of the danger resulting from the plate's being struck by the buckets.

In *Meyers v. Bennett Auto Supply Co.*, 169 Iowa 383, plaintiff had been a competent bricklayer for ten years, and was laying brick and terra cotta over the face of a concrete building. Certain "cups" for electrical fixtures were nailed into the forms, and after the concrete hardened and the forms were removed, four nails protruded in part from the cups. These had to be broken off in order to lay the terra cotta ornaments. Plaintiff came to some of these nails for the first time in his experience, and asked the foreman what to do, and the foreman said, "Take your ham-

mer and knock or cut them off;" and nothing else was said. It was not in the line of a brick mason's work to break off nail ends, but plaintiff with his own hammer struck one of the nails, it broke, flew into his eye and destroyed it, and we hold that the task and the tool were of such elementary simplicity that no duty arose to warn or instruct, and say:

"That the broken end of the nail will fly in the direction toward which it is struck is an obedience to the same law that operates upon a piece of concrete or brick under the same circumstances. It was self-evident to any workman, whether skilled or unskilled, and no amount of skill and experience could make it more evident. The employer could have no reason to believe that the plaintiff did not know it." Further, "The task and the tool were of elementary simplicity. Instruction could have added nothing;" and the master was under no duty to warn a servant of dangers self-evident to anyone, skilled or unskilled.

It follows from what has been said that the order of the district court must be—*Affirmed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

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MARY L. HEMINGER et al., Appellees, v. M. JOSEPHINE CARNEY et al., Appellants.

**DEEDS:** Action to Set Aside—Fraud and Undue Influence—Breach  
1 of Condition. Evidence reviewed, and held wholly insufficient to set aside the execution of a deed for fraud, undue influence, or breach of conditions.

**JUDGMENT:** Conformity to Proof—Agreement for Support. Judg-  
2 ments not in conformity to the proofs of either party are necessarily erroneous. So held on the issue as to what was contemplated in an agreement for support of parents.



*Appeal from Van Buren District Court.*—D. M. ANDERSON,  
Judge.

SATURDAY, JUNE 23, 1917.

REHEARING DENIED SATURDAY, SEPTEMBER 29, 1917.

SUIT to set aside and rescind a contract and deed. A counterclaim was interposed, and, on hearing, both the petition and counterclaim were dismissed. Both parties appeal, the appeal of defendants being first perfected.—*Modified and remanded.*

*Walker & McBeth*, for appellants.

*J. C. Calhoun and A. L. Heminger*, for appellees.

LADD, J.—I. The plaintiffs had lived on the farm in controversy since 1858, with the exception of two short intervals, and had there reared their family of six children.

Two sons had died, one leaving a son and the other a daughter. Their son Fred had operated the farm on a sort of partnership basis for several years prior to 1905 or 1906, when he sold to a neighbor 66 acres of his farm adjoining, and 44 acres thereof to his mother, from whom he had purchased the entire tract some years previous, and went to Canada. Plaintiffs took care of the farm from then on until about the first of March, 1912. Owing to the weight of years, the husband, Valentine, wrote to Fred that they would sell the place to him for \$13,000, reserving the occupancy of the house during their lives. Fred declined the offer, and proposed to pay \$11,000. This was not accepted, and, when an account of this was given to Mrs. Carney, who then lived at Charleston, Illinois, by her sister, Mrs. Fowler, who was visiting her, the former sent word to plaintiffs that she and her husband would like the opportunity to buy the farm. Thereupon, plaintiffs addressed the following letter to Mrs. Carney:

1. DEEDS: action  
to set aside:  
fraud and un-  
due influence:  
breach of con-  
dition.

"Keosauqua, October 11, 1910. Dear Children;- I understand by Emma's letter you would like to have the farm. The farm is worth about \$15,000. You can have it for \$10,000 and what we owe you. You can pay for it on those terms at our death. Emma \$3,000; Amos \$4,000; Fred \$1,000; Blanch \$1,000; George's boy \$1,000. And if the last two die before you pay it the proceeds to be divided equal. Or if you wish you can have it made in payments. We want to hold the farm for life. We want \$300 a year rent and for you to pay the tax. You will not have to furnish anything in the house or kitchen unless you wish while ours last. We will give you our best cow. We want you to keep one horse for us to drive. We intend to sell everything else. If you should want anything you can come and buy it. We will make you a deed for the farm at once. We will have enough to pay our funeral expenses. I could sell the farm for more than that, but your Ma will not. Let us know at once what you will do, as we want to sell our stuff at once. I cannot tend to it.

"Dear Daughter; If you take the farm we will expect to live with you the rest of our lives, and expect you to board us free of charge. The farm ought to rent for \$500 or more. Your Pa wanted to go to town but I do not want to go. I guess I have wrote enough. Love to all.

"Mary L. Heminger.

"V. Heminger."

Shortly afterwards, Mrs. Carney and her husband visited her parents, and as they were on the way back, arranged to take the farm. Another son, an attorney at law, Amos, prepared the contract, and it was forwarded to the Carneys for signature. It did not meet their approval, and they had an attorney at Charleston prepare another contract, which was forwarded to defendants and was signed by them. The terms were substantially those of the letter, save that

but \$3,000 was to be paid Amos, and the \$1,000 to be used for the care of plaintiffs, if required, and if not, to be divided between Amos, Mrs. Fowler, and Mrs. Carney. The plaintiffs thereupon conveyed the farm, containing 224 acres, to the defendants, the deed containing a condensed recital of the main features of the contract and reserving a life estate in the grantors. The Carneys went into possession in February, 1911, and this suit to set aside the contract and deed because of having been obtained by undue influence and breaches of the terms thereof, was begun August 7, 1913.

We have examined this record with care, and agree with the trial judge in the conclusion that the evidence does not warrant the relief prayed. In disposing of these issues, the opinion of the district judge is so pertinent that we quote excerpts therefrom with approval:

"There seems to have been no trouble during the first year. Beginning in 1912, more or less differences arose between the plaintiffs and the defendants. When they moved onto the place, the defendants purchased considerable of the property thereon belonging to defendants, and gave their notes for it at a low rate of interest. They did not pay these notes when they became due, and this caused considerable feeling. They were eventually paid. They got through the year 1912, and in the spring of 1913, Amos Heminger took charge of the business for the plaintiffs and tried to make an amicable adjustment. The defendants in the meantime had built a new barn on the place, had rebuilt a great deal of fence, and had done some clearing and had improved the place generally. They could not agree upon a settlement, and the upshot of the controversy was the bringing of this suit, in August, 1913. The first question to determine is whether the contract was obtained by fraud and undue influence practiced upon the plaintiffs by the defendants. From what has been said, there can be but

one answer to this question. The plaintiffs were getting old. They were both in the full possession of their mental faculties. They were desirous of making provision for their declining years, and at the same time wishing to preserve their estate so that their children and grandchildren would get the benefits of it. They wanted some member of their family to buy the farm. They first offered it to Fred, with whom they could not make terms. \* \* \* Aside from the \$2,000 which was allowed them over and above their prospective share of the estate, they were paying all the farm was worth. The farm had been offered to Fred for \$13,000 and refused. They were to pay \$300 per year rent and board plaintiffs, and the board was worth from \$8 to \$10 per week. This would be paying from \$800 to \$1,000 per year for the farm, and that was more than it was worth, aside from the prospect of a rise in its value and the opportunity to improve it. The plaintiffs had full knowledge of the contract, had the advice of Mrs. Fowler and their son Amos, who both approved it, and in addition made a contract which was advantageous to them and their estate. There was no overreaching by the defendants; everything was fair and aboveboard; and the only conclusion that can be arrived at upon this question is that there was no fraud nor undue influence in entering into the execution of the contract. \* \* \* The next and important question in the case is as to whether the defendants have breached the contract to such an extent that the deed may be set aside and the contract rescinded. The plaintiffs complain of many small incidents of neglect and mistreatment, and rely upon them as a breach of the contract. One is in taking down a coverlid which was being used as a door curtain and not putting it back, allowing the curtains to become dirty and dusty, not furnishing good wood for fuel, turning their horse out of the barn, not feeding the horse, not inviting them into the Carney's side of the house to visit their com-

pany, in having nothing but fried mush for breakfast on one occasion and telling Mrs. Heminger that she could eat that or nothing, not having chicken when they wanted it, and a number of other incidents of like character and trivial in their nature. The defendants explain some of these away, and others they confess and excuse, on the ground that Valentine Heminger is of high temper and domineered over them and cursed them so that they did not feel like going out of their way to do things for him. The board furnished was good, as is shown by all the witnesses that testify. Mr. Heminger is rather high tempered and domineering, and there was considerable temper upon the other side. They clashed occasionally, and the defendants too frequently did not stop to think that the plaintiffs were old people and had but few years to be with them. They should have been and should be indulgent with them and should put up with their peculiarities. If the mother wanted a coverlid up for a door screen instead of a lace curtain, she should be allowed to have it so. If they wanted to use their old stove instead of a new one, they should be allowed that privilege. If the father wanted to smoke in the house, he should be allowed to do so, even at their inconvenience. Old people have their ideas and ways fixed, and they cannot be changed like children, and should be indulged in them. The defendants should have thought more about the comfort of the plaintiffs and less about their little differences, and, had they done so, this lawsuit with its discord and unpleasantness would not have occurred. The main trouble is that Mrs. Carney is a Heminger, and pitting one Heminger against another is like striking steel against steel. In order that a contract of this character should be set aside, there should be some substantial breach. A great accumulation of little things long continued might amount to such substantial breach. There has been no substantial breach in this case. There have been a number of incidents that have

been unpleasant. Plaintiffs have been responsible for some of them, and the defendants have been responsible for others. Taken all together, they do not amount to enough to set aside the contract nor to rescind it. This airing in court has given vent to some of the pent-up feelings, and with what the court has said and found as to the \$2,000 item, the probabilities are that the future relations of these parties will be much more harmonious. The old people should be furnished a comfortable, pleasant and agreeable home during the few remaining years of their lives, and for what they are getting it is up to the defendants to provide it, and this they should do, not only as a matter of dollars and cents, but in fulfillment of that filial love which a daughter owes to her parent and which she in turn expects when the sands of life are about run out and she arrives at a time when kind words and attention from her children are worth more than all the world besides."

This disposes of this portion of the case to our entire satisfaction.

II. The defendants interposed a counterclaim for services rendered in washings done for plaintiffs and extra care bestowed while sick. The trial court construed the contract as contemplating such services to be rendered for the \$2,000, and included in the decree this clause:

2. JUDGMENT:  
conformity  
to proof:  
agreement for  
support.

"The court further finds and it is so ordered and decreed that the item of \$2,000, stated in the contract as allowance to the defendant M. Josephine Carney on the purchase price of the farm in payment of indebtedness owing to her from the plaintiffs, was in fact intended as and for extra care and expense of keeping and caring for the plaintiffs over and above their board and lodging. And it is therefore ordered and adjudged that the counterclaim or expense account of the defendants, claimed for washing

and extra care of the plaintiffs, is disallowed and dismissed."

The evidence does not warrant the conclusion reached. The consideration named in the contract is \$15,000. Of this, \$9,000 was to be paid to the children and grandchildren upon the death of the survivor of plaintiffs, and \$1,000 as stated above. Mrs. Carney's share was computed at \$3,000. With reference to the remaining \$2,000, the contract recited that:

"It is agreed that said M. Josephine Carney shall be allowed \$2,000 on the purchase price in payment of any claim she may have against the parties of the first part at present time."

This was repeated later on and also contained in the deed, and, with reference thereto, Mrs. Casey testified that she had taught school for 6 or 7 years and let her father have her earnings in excess of what she spent and that her father executed a mortgage securing the repayment thereof; and that, shortly after she moved to Charleston, she sent the mortgage and a release thereof to her father upon his request, to enable him to sell the property covered thereby, he promising to return a note for the amount; and that the note was never received; and that this was the basis of the quoted clause in the contract. The record of a chattel mortgage, dated December 21, 1885, from father to daughter, was introduced in evidence. The letter offers the farm "for \$10,000 and what we owe you." Her father testified:

"I will tell you exactly what I meant by 'any claim she might have against me at that time.' You know where there is a lot of children you give one more than you do the other, and it makes hard feelings. I put that in there to throw them off."

He denied ever having owed her anything or ever having executed a chattel mortgage to her, and declared that

if he did, it was settled, and he did not remember having written for a release. It is apparent that neither party tendered evidence supporting the theory of the court, and it cannot be upheld. The testimony of Mrs. Carney is strongly corroborated by the letter, contract, deed and mortgage; and the circumstance that the land was not worth to exceed \$13,000 when the contract was made is as consistent with her testimony as with that of her father. In either event, there is no occasion to amend the agreement. Under the contract, defendants were to furnish board and lodging, and anything more than these and not incidental thereto, defendants were not required, under the terms of the contract, to supply. Whether, in view of the situation, they might recover for services rendered Mrs. Carney's parents, in the absence of an agreement, express or implied, to pay therefor, and the amount they should recover, were not passed on by the trial court, and the cause will be remanded for the entry of a decree not inconsistent herewith, and for such accounting. As the court should have found for defendants on all the issues, all the costs of the trial should have been taxed against plaintiffs, and the decree will be modified in this respect also. The plaintiffs have departed this life since the appeals were taken, and, to facilitate final adjustment, it may be as well to allow either of the parties to amend the pleadings so as to include in the accounting all matters prior to the death of plaintiffs, the allowance on the counterclaim in no event to exceed the \$1,000 mentioned in the contract for the especial use of plaintiffs.—*Modified and remanded.*

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.



OLLIE E. HULL et al., Appellants, v. JOHN B. MITCHELL,  
Appellee.

**EVIDENCE:** Presumptions—Confidential Relations—Undue Influence—Deeds. The presumption that one occupying a close and confidential relation with another exercised undue influence in securing from such other a deed to valuable property, constitutes substantive evidence of the fact, and such presumption is very materially strengthened by a showing: (a) that grantor was very sick at the time; (b) that grantor was without business experience; (c) that the consideration was inadequate; and (d) that the circumstances strongly indicated that grantor was imposed on in the transaction. Evidence reviewed, and held insufficient to overcome the presumption.

**PRINCIPLE APPLIED:** A widow, under a devise from her husband, owned 240 acres of land, of a value of from \$36,000 to \$48,000. She had no business experience, had no adequate knowledge of values, had never made even the ordinary domestic purchases, seldom left the farm, and had never ridden on a railway train. After her husband's death, she allowed two of her sons to farm the land absolutely as they saw fit. Even her meager wants were poorly supplied by these sons. She survived her husband ten years, though in constantly failing health. She was very sick and in much pain during the last two months of her life, though rational until shortly before her death. A year prior to her death, she executed a will devising her property equally to her several children, with one exception. One month before her death, she deeded the entire farm to defendant, one of the sons who had farmed the land, for a consideration of \$18,000. No security was furnished. Defendant gave his personal note for \$18,000 at 4 per cent, due 15 years after date. A printed provision in the note under which the payee might declare the entire sum due for nonpayment of interest, and one in regard to attorney's fees, were scratched out. The note provided that the mother should have a home on the farm during her lifetime. Evidently, the defendant had for years been planning to secure this deed. He had offered "to divide" with another heir if the deed could be secured. When the deed was executed, a physician was called in to determine whether the mother was competent to execute it. The deed was drawn by an attorney evidently acting in the interest of defendant. His testimony as to what then occurred carried

an odor of improbability. *Defendant, since the father's death, had been his mother's sole and absolute manager, and had the fullest control of all her affairs.*

*Held*, not only to raise a presumption that the deed was secured by undue influence, but that the record did not overcome such presumption.

**WITNESSES: Credibility—Interest and Bias—Attorney as Witness.**

- 2 The act of an attorney in combining the character of attorney and witness in a proceeding in which he is actively interested, and in which his testimony is vital, is a positive breach of professional ethics.

*Appeal from Mahaska District Court.*—K. E. WILLCOCKSON,  
Judge.

SATURDAY, APRIL 7, 1917.

REHEARING DENIED SATURDAY, SEPTEMBER 29, 1917.

SUIT to set aside and cancel a conveyance resulted in the dismissal of the petition. Plaintiffs appeal.—*Reversed.*

*Burrell & Devitt* and *S. V. Reynolds*, for appellants.

*D. W. Hamilton* and *L. T. Shangle*, for appellee.

- LADD, J.—Evaline Mitchell died February 6, 1913, at the age of 79 years. Her husband had departed this life on January 30, 1903. Eight children survive her, being the plaintiffs, defendant, and William, Llewellyn and Elmer Mitchell. Since suit was begun, Amy Timbrel has withdrawn therefrom. The decedent conveyed to the defendant, on January 2, 1913, 240 acres of land, described as the S. E.  $\frac{1}{4}$ , the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  and the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , of Section 28, in Township 77 North, Range 16 West of the 5th P. M.
1. EVIDENCE: presumption: confidential relations: undue influence: deeds.

The sole issue raised by the pleadings is whether the execution of this deed was procured by the exercise of undue influence on the part of defendant. The consideration

named in the deed was \$18,000, but the land was fairly worth, according to five witnesses called by defendant, \$150 per acre, while three witnesses called by plaintiffs estimated its value at from \$175 to \$200 per acre, and two others at \$175 per acre. No security other than a promissory note was given for the payment of the consideration, and the note was in words and form as follows:

"No. . . . . Oskaloosa, Iowa, January 2, 1913.

"On or before the 2nd day of January, 1928, for value received, I promise to pay Evaline Mitchell or order Eighteen Thousand Dollars with interest at 4 per cent per annum from date until paid, payable annually. Should any of said interest not be paid when due, it shall bear interest at the rate of 4 per cent per annum from time the same becomes due, payable annually, ~~and upon a failure to pay any of said interest within thirty days after due, the holder hereof may elect to consider the whole note due, and it may be collected at once. If suit is brought to enforce the collection of this note, a reasonable attorney fee shall be allowed and taxed up with the costs in the case. If the holder of this note is willing, we consent that a Justice of the Peace shall have jurisdiction for collection of the same.~~

Maker has option of paying any amount upon principal of this note at any time.

"\$18,000.00

John B. Mitchell.

"Payable at home of payee."

The last sentence was written, and all else printed, except the signature. It is to be noted that the interest rate is 4 per cent per annum, and interest due and unpaid to bear interest at the same rate; but the printed portion authorizing the payee to declare the note due 30 days after failure to pay interest matured, was stricken out, and also

the attorney's fee clause. The defendant might then delay the payment of interest and principal for 15 years after the conveyance of the land, and the only provision for care and support left to the decedent after the transaction was the clause in the deed reserving to her "a home upon said premises the same as I have heretofore enjoyed since the death of my husband, without charge." Prior to his death, the husband is shown to have transacted all business for the family, buying all household supplies, even the wearing apparel of his wife and children. She seldom left the farm, and had never ridden on a railroad train. After the husband's death, she continued on the farm as before, and did not go to New Sharon and Oskaloosa, their trading points, more than half a dozen times during the 10 years prior to her death. Though left the 240 acres of land in controversy by her husband, she never leased it, but allowed her sons William and defendant to operate the same, without any agreement as to the income. After 2 or 3 years, defendant, according to his story, bought her chickens and cattle; but could not say how much or when he paid for them. He testified that her hogs and one horse died, leaving as her only personal property the horse "Old Kentucky," which survived her at the ripe age of 32 years; that all chickens and stock on the place during the 7 or 8 years before her death belonged to him and William; that he gave her what money she wanted; that she had \$150 when taken sick, which she told him to get so as to pay those who helped care for her, but that he had used the money in doing so. Other evidence disclosed that she left only 15 cents in her pocketbook, and had repeatedly complained of not having been provided with money with which to buy clothing.

When Llewellyn Mitchell left the farm does not appear, but it was several years prior to decedent's death. Defendant was the youngest child, and helped in the house, had

charge of all business transactions after his father's death, and "spent a good deal of time hunting, fiddling, dancing and trapping." The evidence tended to show that decedent was rational until shortly before her death, but without experience in business matters, and knew little concerning the values of property. She began failing in health when her husband died, and was taken with her last sickness in November, 1912. On December 11th, Dr. Childress found her "suffering a great deal of pain," and testified that "she was desperately ill. I didn't know that she would die, but I didn't know how long she would live." He says further that "she got weaker physically of course, constantly, until she finally died." Dr. Phillips, her regular physician, began treating her November 13, 1912, and called frequently until her death. She had been afflicted with a varicose ulcer near the ankle. He testified that she was suffering from this and senile gangrene when he first called; that she suffered much pain nearly all the time, but more at night, and that, owing to her age and loss of sleep, she became worn out; that opiates were administered to relieve her from pain; that her circulation was bad and her arteries hardened on account of old age, and that she got worse gradually.

What we have said indicates the situation and the condition of the decedent January 2, 1913,—without business experience, weak of body, borne down by pain, and looking to the defendant, who had dominated her activities for years, for care and support. According to his sister Mrs. Momyer, decedent was entirely under the influence of William and defendant, and defendant had proposed to this sister, on December 25, 1912, that if she would help him buy the place for \$40 an acre, he would divide with her, or if she could get decedent to sell for \$40 an acre, he would pay her. Mrs. Crookham, another sister, testified that, on the day her mother died, she had said to defendant:

" 'There is going to be trouble from this,' I said; 'you know a deed like this cannot stand, the shape ma was in; you know this place is worth \$200 per acre;' and he said, 'I reckon I know it is worth \$200 per acre.' I said, 'If you wanted this place you ought to have got her to deed this place to you while she was capable of making a deed;' and he said, 'I have been trying for ten years.' "

The defendant was asked whether he said to Mrs. Momyer that he would divide with her if she would get her mother to sell the land to him at \$40 an acre, and he answered:

"I never remember of it. I never said it at any time. I did not at any time make any proposition to anybody to buy the farm at \$40 per acre."

He admitted having a conversation with Mrs. Crookham, but swore that the farm was not worth to exceed \$75 per acre; that he had not talked with his mother as to its value; but, on cross-examination, he was asked:

"Didn't you say to her that you could not afford to pay more than \$75 an acre? A. I didn't state it just that way. Q. You don't believe now it is worth more than \$75 an acre? A. I don't believe I do. \* \* \* Q. The fact of the matter is you never talked to her? A. I talked to her. I never said what the land was worth. Q. You never had any opinion as to what it was worth? A. I never had any opinion except \$18,000. Q. You said the land was worth \$18,000? You said you could pay \$18,000 and that is what it was worth? A. She said she didn't want me to give any more than I wanted to. Q. She did say to you, and she said to your sister and Mrs. McIntosh, that she wanted you to pay for that land what it was worth? A. She didn't say that to me. Q. You claim you paid all the land is worth? A. I paid all I thought I could pay."

If defendant had been kind to his mother, he also had

enjoyed with William the use of the farm without other consideration than providing for her meager wants, and that she did not think him entitled to any preference over the other children appears from her will, executed February 11, 1912. That therein she should have denied Mrs. Momyer the benefit of her bounty on the specious ground that she had been remembered by her afflicted sister, to whom she had opened her home, but emphasizes her inability to measure claims on her bounty. In the will she directed: (1) the payment of debts, expenses of last sickness, burial, and settling her estate; (2) the release of all claims for rents against defendant and his brother William; (3) bequeathed to her daughter Jennie Momyer the sum of \$200, saying that she gave no more because of this daughter's having received the estate of another daughter, deceased (Mae Mitchell); and (4) left the residue of the estate, share and share alike, to Llewellyn, Elmer, William and John (defendant), Ollie Hull, Addie Crookham and Amy Timbrel. Though expressing in the most solemn manner her purpose of distributing her estate share and share alike to her children, with one exception, she appears to have changed her mind within eleven months, and to have concluded to give more than half to one and permit him to share with the others in what remained! Mrs. Landstrum related that she accompanied Mrs. Hull, a daughter of decedent's, in calling on her, January 25, 1913, and that:

"They asked her if she wanted Johnny to have more than the others, and she said 'No.' She said that he didn't pay her enough. At this time she was bedfast. She was poor and evidently was wasted away a good deal since I had seen her last."

Much of the testimony given by the daughters of decedent was incompetent, under Section 4604 of the Code, and for that reason is not referred to. The record leaves no doubt that decedent desired the farm to continue in the

family, and, to accomplish this, was willing to sell it to defendant for less than she would require of a stranger. Dr. Phillips testified that she said, in the evening the deed was made, that she "wanted to get rid of being bothered with it," and wanted to "sell it to John. \* \* \* didn't want the worth of it." He had been sent for to pass on whether she was competent to make the deed. How she had been troubled with the farm does not appear, for William and defendant had always managed it to suit themselves. The record, in short, shows that this woman was without business experience; that she had a scant appreciation of values; that defendant had been amply compensated in the use of the farm for all he had done for her; that she had gradually become weaker under the weight of years and disease, and had for many years depended entirely on defendant for the management of her estate and the transaction of all of her business,—so entirely that she did not participate therein. In other words, he was not only her agent but the absolute manager, and had full control of all her affairs, and this relation warrants the presumption that he procured the execution of the deed by undue influence. *Drefahl v. Rabe*, 132 Iowa 563. This presumption, arising from the confidential relation of agency, is greatly strengthened by proof of her physical condition, inexperience in business matters, and her entire reliance on him, want of adequate consideration, and the nature of the transaction. *Fitch v. Reiser*, 79 Iowa 34; *Spargur v. Hall*, 62 Iowa 498; *Curtis v. Armagast*, 158 Iowa 507.

No evidence tending to rebut this strong presumption was adduced, other than that of the attorney who prepared all the papers referred to, and it only remains to ascertain whether this is sufficient to meet and put in equipoise such presumption of undue influence. See *Graham v. Court-right*, 180 Iowa 394. He had been in charge of the

2. WITNESSES:  
credibility:  
interest and  
bias: attorney  
as witness.



defense from the beginning, and actively participated in the trial. He must have been aware, even before employment, not only that he would be called as a witness, but of the controlling importance of his testimony. The impropriety of undertaking to unite the character of counsel and witness has been adverted to in other decisions. *Alger v. Merritt*, 16 Iowa 121; *Fletcher v. Ketcham*, 160 Iowa 364. Without further comment on this breach of professional ethics, it is enough to say that the assumption of the dual relation has an important bearing on the credibility of the witness. *Ross v. Ross*, 140 Iowa 51. He testified to having advised the making of the will by decedent to avoid trouble with her daughters over her omission to exact any rent from defendant and William for the use of the farm, but that the terms of the will were in accord with her wishes; that he had never met her previous to that time; that he was at her home December 14, 1912, and that, while he was there, she talked to him about the value of the farm, her right to sell it after having made a will, whether she could do so for less than it was worth, whether she had mental capacity so to do; and that she then said she was willing to sell to defendant at \$100 per acre, and that "we couldn't get much out of John (defendant). He didn't think he could pay that much;" and, advising her to think the matter over, and saying he would return whenever she wished, he departed. By whom he was called does not appear; but, in about two weeks, defendant dropped into his office, and remarked that "he guessed she had made up her mind." The witness could not go then, and, some days later, telephoned defendant to meet him at Lacy in the afternoon of January 2, 1913. Llewellyn met him instead, and they reached the house at about 8 o'clock. Dr. Phillips was sent for to pass on decedent's mental condition as being such that she could execute a

deed, and, according to the witness, decedent inquired of defendant what he thought he could pay for the land, and defendant said he thought he could pay \$75 per acre, and would not undertake to pay \$100 per acre, and this was all he would say; that she concluded to sell it for that, and that then the witness directed all but decedent to leave the room, when he asked her:

“‘Are you selling this farm to Johnny because you want to sell it, or are you selling it because he wants to buy it; because,’ I said, ‘if you don’t want to sell this place you don’t have to.’ I said, ‘You need not think you need to make a deed here this night because I have come here to make a deed;’ and I said, ‘I can take my deed and go away, just as I did before.’ She said she had always wanted Johnny to have the place, and the place was run down and not fixed up and she could not do that, and if she sold it to Johnny, he would go ahead and fix it up. I says, ‘Grandma, you remember when I was here before and I told you I thought this place was worth \$150 an acre. Dr. Phillips thought it was not worth that much; he put it at \$125 an acre. I am nearer right than he is, and whatever price you sell it to Johnny for less than \$150, you can figure you are giving him just that much.’ She said, ‘I want to sell it to him at a price I know he can pay for it, and at a price that is not too low to make the rest dissatisfied.’ I said, ‘Grandma, that is an awful hard thing to do.’ I said, ‘Grandma, this thing of selling your home is a pretty serious proposition. I have known lots of people to sell their homes and get full price for them and afterwards been sorry for it.’ I said, ‘If you are going to wake up tomorrow morning and wish you hadn’t done it, you want to call it off right now; it will be too late to do it then.’ She said ‘No;’ she had thought about it and she was satisfied; and I said, “Up to this time you have had the boys

here, these boys have been living with you. If you sell this place to Johnny, it will be their home then, and instead of the boys living with you, you will be living with them, and that may not be as pleasant. Johnny may get married and bring some wife in here, and conclude you was in the way;' and she said, 'You put it in that deed that I am to have a home here just as I have had as long as I live.' I stopped making any objections then, and was satisfied that it was her sincere wish to make the sale, and I went and opened the door and told the rest of them they could come in."

He then called the others in, and prepared the deed and note, and they were signed and delivered. On cross-examination, he was asked, "Who did you represent? A. Nobody's attorney there;" and he explained that he understood it to have been his duty to see that Mrs. Mitchell understood what she was doing.

"Q. You are entirely familiar with the custom and practice where a man sells land to another? A. Yes, sir. Q. How the vendor protects himself? A. Yes, sir. Q. You never suggested that Mrs. Mitchell take a mortgage back to protect herself? A. Yes, sir. She would not take a mortgage from her own son. I had a blank mortgage with me. I told her about it. I said, 'Grandma, if you were selling this farm to a stranger, you would take a mortgage back.' But she would not take a mortgage from her own son. Q. But, of course, if you are selling it to your own son, a mortgage is entirely unnecessary? A. She didn't want to take a mortgage. Q. She didn't want to take a note? A. Yes, she wanted the note. Q. She had no objections to taking a note from her son? A. None whatever. Q. She didn't want to secure that note by a mortgage on the property? A. No, sir; she didn't want any mortgage. Q. You are familiar with the ordinary form of promissory note? A. Yes, sir. Q. They

are printed generally in a regular form? A. Yes, sir. Q. I will ask you if you think that, in scratching out that printed portion of this note for \$18,000 you did that—you did erase that printed form for protecting the interests of the old lady? A. When anyone comes into my office, a couple of people to make a contract, I make their contract out for them the way they want it made, and I was making a contract for the two people here. They were making their own contract, and I scratched out what I was directed to scratch out."

He then explained that defendant wanted to pay only 3 per cent, but that she wanted 4 per cent, and testified that:

"That was the arrangement between them. He was to pay 4. Q. The 4 per cent interest, and you also struck out of the note the clause which provides on failure to pay interest it makes the whole sum due? A. That is stricken out. Q. In other words, this note as it was originally printed provided that, on the failure to pay the interest—the annual interest—when due, the whole sum became due, and you cut that out, protecting the old lady's interest? A. I do not think that was a protection to her interest to cut it out. Q. Why did you do that? A. Because it was their arrangement. Q. In other words, she wanted to arrange a contract whereby, if he didn't pay her this 4 per cent annually, she could not force him to pay it to her for 15 years? A. I do not know as that was said, anything of that sort, there. \* \* \* Q. You cut the acceleration clause that is in the usual notes, in notes which are going to run for years? A. I cut that out. Q. Will you say that you did that at the old lady's request? A. I cut it out to comply with their mutual arrangement. Q. In other words, what the old lady wanted to do is to sell that farm for less money than she ought to, and make it impossible to enforce the payment of the principal and interest? A. They talked over how much

money the old lady wanted, and the interest was figured up as \$750 a year, and John said she could have that much money, and any time she wanted more he would get it for her."

He admitted having advised a person who had refused to inform him what she knew about the case and did not wish to testify:

"If you don't want to tell anything on the witness stand, don't tell them (plaintiffs or attorneys) about it; they won't know how to ask you about it."

It is not to be overlooked that the alleged conversation with decedent in private cannot be contradicted by any witness; that he has a remarkable memory for details, and that he does not relate the conversation had in negotiating the terms of the note and concerning security therefor, stating his conclusions. Moreover, others must have been present during such negotiations, for he testified that all had been invited to come into the room, and yet none of these corroborated his story of the arrangement between decedent and defendant concerning the terms of the note. That he should have allowed decedent to accept a note, unsecured, on which neither principal nor interest could be collected within 15 years, without protest on his part, casts some doubt on his pretense of having undertaken to protect decedent's interests. That he should have gone from Oskaloosa to the home of decedent on December 14, 1912, and again on January 2d, following, without being employed by anyone so to do, is a little hard to believe. A settlement was made with one of defendant's sisters shortly before the trial, in which she was paid her supposed share of the note and promised an additional amount, which, with that paid, would be equal to her share of the estate if the deed should be set aside; and the agreement prepared by

this witness recited that it was "further based upon the consideration and is conditional upon the fact that the said Amy Timbrel shall not in any way seek to set aside said deed and sale of Evaline Mitchell to John Mitchell, or make any objections to the probaton of the will of said Evaline Mitchell."

This sister, though testifying freely as to all matters of which she was incompetent to speak, under Section 4604 of the Code, was unable to remember anything to defendant's disadvantage. These matters cast doubt on the story of the witness, and, though in a general way he may have told the truth, the situation was such that he labored under a powerful temptation to embellish in order to meet the necessities of the occasion. He did not undertake to do so, however, as to the execution of the papers. The terms of the note were such, in connection with its acceptance without security, as to cast suspicion on the entire transaction, and the evidence leaves no doubt that such terms were dictated by defendant. And, as to them, the testimony of the attorney confirms rather than rebuts the presumption of undue influence. Nor are we inclined to the view that any explanation of value by this attorney freed decedent from the dominating influence of the defendant. Notwithstanding the attorney's talk as to the value, on December 14th, he found her, little more than two weeks later, fully persuaded to sell at \$25 less per acre than she was then asking, though that was a third less than the property was worth. Defendant reported, several days before, that he "guessed she had made up her mind." No effort was made by defendant to show how this came about. He carefully refrained from telling his mother what the land was worth.

It may be that the attorney said all he claims to have said to decedent, but, if so, this may have been done in a manner so indifferent as not to arouse her to the need of protecting her own interests as against the influence of

him in whom she had reposed the most implicit confidence, or it may be that the decedent, aged and decrepit, racked with pain and in her last sickness, was not brought to a full appreciation of the consequences of the transaction. Whatever the attorney may have said, everything he did was inimical to the interests of decedent and in the interest of defendant, and, in the light of this record, it is all but incredible that he was acting for anyone other than defendant. In any event, we are fully persuaded, from a careful examination of the record, that his testimony ought not to be accorded probative force sufficient to meet the strong presumption of undue influence arising from the relations existing between the parties to the deed.

The trial court should have set the deed aside, and to enable it so to do, the decree is—*Reversed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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MARGARET A. JOHNSON, Appellee, v. CITY OF AMES, Appellant.

**MUNICIPAL CORPORATIONS: Streets, Etc.—Defects—Non-Negligent Defects—Depressions.** Defects in municipal sidewalks are, *as a matter of law*, non-negligent when of such character, in view of their location and use, as not to attract the attention of the proper public authorities and cause them, as ordinarily cautious and prudent persons, to anticipate danger therefrom to pedestrians. *Depression* of three inches held non-negligent.

**PRINCIPLE APPLIED:** Plaintiff, after witnessing a parade, started for a near-by park, where there was to be speaking. She, along with a dense crowd of people moving in the same direction, was walking on the cement sidewalk of a street which was one of the two most traveled streets generally used in going to the park. The blocks of cement were about 4 feet square, and of a thickness of about 4 inches. This 4 inches

was made up of a concrete base of about 3 inches and a top layer of cement about 1 inch thick. In the center of one of the squares was a space, apparently somewhat circular in form, and about 2 feet across, where the 1-inch top layer had worn, peeled or broken off, and from the outer edges of this space the foundation or base had been worn down and toward the center thereof until the depression was 3 inches deep at the center. There had been broken pieces of cement in this depression, but they had been ground down by travel, so that, at the most, the bottom of the depression was in a condition of *undefined* roughness. This defect had existed for several years. With the crowd of people immediately preceding and following her, plaintiff, not knowing of this depression, stepped therein. In some manner twisted her foot, fell, and was injured.

*Held, as a matter of law*, no actionable negligence was established against the city.

*Appeal from Story District Court.*—E. M. McCall, Judge.

WEDNESDAY, MAY 16, 1917.

REHEARING DENIED SATURDAY, SEPTEMBER 29, 1917.

ACTION for damages consequent from falling because of a defective sidewalk resulted in a judgment for plaintiff. The defendant appeals.—*Reversed*.

*John Y. Luke*, for appellant.

*R. E. Nichol, C. G. Lee and I. R. Meltzer*, for appellee.

MUNICIPAL  
CORPORATIONS:  
streets, etc.:  
defects: non-  
negligent de-  
fects: depres-  
sions.

LADD, J.—The governor was to speak at the park in Ames in the afternoon of July 28, 1914. Mrs. Lou Johnson, a relative of plaintiff's husband's, who had died shortly before, and Evelyn Valen, daughter of a sister-in-law of plaintiff's, telephoned plaintiff to meet them down town and attend a band tournament which appears to have preceded the address. She did so and, after waiting a while, according to her story:

"The parade with Governor Clarke went by, and it



seemed like the whole town started for the park. Everybody was moving towards the park in kind of a procession. When we came to the Story County Bank, there was an awful jam, so it divided, and part of the crowd went up Main Street and some went up Douglass Avenue. I went up Douglass Avenue with Dora and Evelyn. We went a whole block north and then turned east at Fifth Street, and we were walking along with the whole crowd; of course, there was an awful jam around us, pushing along, and I stepped into a bad place in the walk and dropped onto my knees in a twist—I didn't drop straight down—I didn't fall sprawled out, but just dropped on my knees, and I was hurt so bad I didn't have much recollection of anything more for—oh, a little while, a few minutes, not long."

In this action she claims damages, alleging that:

"There was a depression in the sidewalk from two to four inches deep at the place where she fell, and there were broken pieces of concrete in said depression and around the edges thereof. And it is her belief that she stepped partly upon a broken piece of concrete and slipped therefrom; the same caused her to fall. That she was walking along said walk, immediately following some other pedestrians, and was unable to observe said defective condition of the walk, and did not know of the same, until she slipped and fell."

She also alleged notice and want of care on the part of the city and freedom from fault on her part. Defendant contends that the evidence failed to show negligence on the part of the city, and that the judgment should be reversed on that ground. The defect, such as it was, had existed for several years, and it was for the jury to say whether the city was charged with notice of its existence. Evidence tended to show that Fifth Street was one of the two most traveled streets between the business portion of the city and the city park; that there was a cement walk, along

which plaintiff and her companions were walking; that the blocks in the cement walk were about 4 feet square and about 4 inches thick; that there was a layer on top, one half of an inch to an inch thick on the concrete below, and that this layer had been peeled off. Thus far, there seems to be no controversy. But several witnesses in behalf of defendant testified that this layer was all that had been removed, and that the surface of the concrete below was smooth. On the other hand, witnesses in behalf of plaintiff testified that, on each side of the depression, the fall was abrupt for about an inch, and that the concrete was worn down toward the center of the square, extending its entire width, depth being estimated at from  $2\frac{1}{2}$  inches to 3 inches. Hart testified that this center was  $2\frac{1}{2}$  to 3 inches deep, and was through to the ground, though the water may have washed dirt in, and that:

"Close to the walk the surface was broken off, and after the surface was off, there was a kind of a sand or cement foundation, and that right in the center of the walk, or the broken part of the walk, it was worn quite a little deeper, and I should judge about a foot from the edge of the walk the surface was off, and for about a foot to the center of that it was worn through to the ground."

Mrs. Russell thought more than the top layer gone, and estimated the cement removed to a depth of 2 or 3 inches. Haines swore to a like depth, and that after rains he had walked that way in the dark and stepped in water settled there, and that it ran over the tops of his low shoes. Kooker estimated the depth at  $2\frac{1}{2}$  to 3 inches. The plaintiff and her companions thought the depth  $2\frac{1}{2}$  to 3 or  $3\frac{1}{2}$  inches.

Attention has been directed to enough evidence to show that there was room for the jury to reject the evidence adduced in behalf of the city, and find that more than the top layer had been removed, and that the concrete had been

worn or taken away to the depth of  $2\frac{1}{2}$  inches or slightly more at the center of the square. Though some evidence indicated that there had been broken pieces, these appear to have been removed or ground down in travel so that, at most, it might have been found that the surface of the concrete was "rough," without any indication of the nature of such roughness nor of the pieces or particles of concrete lying in the depression. In deciding whether a case was made for the jury, we are to assume that the concrete had been broken or worn at the center so that the depression was as much as, but not to exceed, 3 inches deep. No case precisely like this has been presented to this court. The depth of the hole in the sidewalk considered in *Platts v. City of Ottumwa*, 148 Iowa 636, was not stated, the court merely saying that:

"It is shown beyond all reasonable doubt that there was a depressed place or hole in the walk, and it was of such depth or extent that a person stepping into it unexpectedly was liable to fall or be thrown down."

In *Overton v. City of Waterloo*, 164 Iowa 332, a piece of the walk about 12 inches wide and 18 inches long and 3 inches deep was out of a cement sidewalk, but negligence on the part of the city was not questioned. In *Cooper v. City of Oelwein*, 145 Iowa 181, the edge of a block was from  $1\frac{1}{2}$  to  $1\frac{3}{4}$  inches higher than the surface next to it, and the district court submitted to the jury the issue as to the city's negligence. Whether allowing a street to be in that condition would constitute negligence was not considered, as judgment had been entered for defendant. In *Patterson v. City of Council Bluffs*, 91 Iowa 732, at the point where a new brick walk joined an old plank walk there was a perpendicular offset of nearly 4 inches, and with reference thereto the court said:

"That such an offset is more or less dangerous is amply demonstrated by the accident to the plaintiff. Whether

such an offset is so dangerous as that to permit it is negligence depends upon the surrounding circumstances, such as the proximity of lights, the amount of travel, and the like. We think it was for the jury to determine, in the light of the circumstances, whether the city was negligent in permitting this offset."

See, also, *Hanson v. City of Anamosa*, 177 Iowa 101.

The decisions elsewhere are conflicting. In *City of Key West v. Baldwin*, (Fla.) 67 So. 808, the fall in the walk was 4 or 5 inches, and the issue of negligence was held to be for the jury. In *Bieber v. City of St. Paul*, (Minn.) 91 N. W. 20, where it appeared that the walk was constructed of hexagonal cement blocks, one of which had become out of level, about 6 inches from a stone step leading to the entrance of a store, the outside was depressed an inch and a quarter, and the inside a little less, and, as the street was much used, the question of the defendant's negligence was held to have been for the jury. But Lewis, J., dissenting, observed that:

"One may count such depressions, projections, and inequalities by the hundred all along the business as well as the residence streets in this and other cities. Common prudence never has required any such limit as is set down by the decision in this case. The time may come when the people will require that degree of perfection in respect to streets and walks which is adopted in public parks or in the private grounds of the wealthy, but, according to the standard now prevailing, by common consent the wayfarer should assume the responsibility and risk of danger to be encountered in walking into the yawning gulf of destruction presented by a cement block in the sidewalk depressed on one side to the extent of an inch and a quarter."

The case is an extreme one, and, notwithstanding the peculiar circumstances, seems contrary to the current of authority. See *Terry v. Village of Perry*, (N. Y.) 92 N. E.

91; *Haggerty v. City of Lewiston*, (Me.) 50 Atl. 55; *Burroughs v. City of Milwaukee*, (Wis.) 86 N. W. 159; *Isaacson v. City of Boston*, (Mass.) 80 N. E. 809.

The decisions on defects, such as holes or depressions in walks, will be found collected in notes to *Elam v. City of Mt. Sterling*, (Ky.) 20 L. R. A. (N. S.) 512, 634; *City of Lexington v. Cooper*, (Ky.) 43 L. R. A. (N. S.) 1158; and *Mayor, etc., v. Crook*, (Miss.) L. R. A. 1916 A, 482, 490. An examination of them discloses that the great weight of authority is against the inference of neglect on the part of the defendant city. Thus, in *Beltz v. City of Yonkers*, (N. Y.) 42 N. E. 401, the depression was about 2 feet 6 inches long by 7½ inches wide, and 2½ inches in depth, and the court, in holding that the city, in allowing such depression, was not negligent, said:

"There are very few, if any, streets or highways that are or can be kept so absolutely safe and perfect as to preclude the possibility of accidents, and whether, in any case, the municipality has done its duty must be determined by the situation, and what men knew about it before, and not after, an accident. When the defect is of such a character that reasonable and prudent men may reasonably differ as to whether an accident could or should have been reasonably anticipated from its existence or not, then the case is generally one for the jury; but when, as in this case, the defect is so slight that no careful or prudent man would reasonably anticipate any danger from its existence, but still an accident happens which could have been guarded against by the exercise of extraordinary care and foresight, the question of the defendant's responsibility is one of law. Assuming that the defendant's officers were men of reasonable prudence and judgment, could they, in the reasonable exercise of these qualities, have anticipated this accident, or a similar one, from the existence of this depression in the walk? They could undoubtedly have re-

paired it at very little expense, but the omission to do so does not show or tend to show that they were negligent, unless the defect was of such a character that a reasonably prudent man should anticipate some danger to travelers on the walk if not repaired. If the existence of such a defect is to be deemed evidence of negligence on the part of a city, then there is scarcely any street in any city that is reasonably safe, within the rule, and when accidents occur, the municipality must be treated, practically, as an insurer against accidents in its streets. The law does not prescribe a measure of duty so impossible of fulfillment, or a rule of liability so unjust and severe. It imposes upon municipal corporations the duty of guarding against such dangers as can or ought to be anticipated or foreseen in the exercise of reasonable prudence and care. But when an accident happens by reason of some slight defect, from which danger was not reasonably to be anticipated, and which, according to common experience, was not likely to happen, it is not chargeable with negligence."

In *Jackson v. City of Lansing*, 121 Mich. 279 (80 N. W. 8), the depression was in an artificial stone walk  $1\frac{1}{2}$  to 2 feet in area, and sloped toward the center, which was  $1\frac{1}{2}$  to 3 inches deep, the south side being abrupt with a depth of  $1\frac{1}{2}$  inches, and the court declared the city not liable for an injury suffered from stepping into the depression. In *Mayor v. Crook*, *supra*, brick had gotten out of place, leaving a depression 3 inches deep, and the city was held not liable. In *City of Louisville v. Haugh*, (Ky.) 163 S. W. 1101, the hole was between two rails of a street railway track, and according to the witnesses, other than the assistant city engineer, was 6 or 7 inches deep; but he testified that, when measured about a year later, it was but  $2\frac{1}{4}$  inches deep. An instruction that if it was no more than  $2\frac{1}{4}$  inches deep there would be no recovery, was refused, and in approving the ruling, the court declared that:

"The distinction between a hole in the street which would render a street unsafe and a hole that would not do so is a thing practically impossible to define. The depth of the hole alone would not control such characterization. Its shape, its size, its location with reference to the conditions and extent of public travel, and many other considerations would enter into the determination of the question of the effect of such hole upon the safety of the street, and would make the inquiry as to whether such hole amounted to a want of ordinary care upon the part of the city peculiarly a question for the jury."

The same thought was expressed in *Baxter v. City of Cedar Rapids*, 103 Iowa 599, where the plaintiff caught her foot on an obstruction, in the way of one of the planks at a street crossing, projecting from 1½ to 3½ inches above the walk. The defendant requested an instruction that:

"If the crosswalk was only raised about 2 inches above the sidewalk, to which it was an approach, then the crosswalk was reasonably safe. \* \* \* A simple rise of 2 inches from a sidewalk to a crosswalk would not be such an obstruction that you could find that it was not in a reasonably safe condition."

In holding that the instruction was rightly refused, we said, speaking through Robinson, J.:

"Whether an obstruction or other defect in a walk is of a character to make the municipality which permits it to exist responsible for it, does not necessarily depend upon the size of the defect, but upon the effects which may reasonably be apprehended from it upon persons who use the walk in a proper manner. These will vary with the circumstances of different cases, and whether the municipality is liable for a defect in its streets or walks will, as a rule, be a question of fact, to be determined by the jury under the instruction of the court, and not a mere question of law, to

be determined by the court alone. The evidence in this case authorized the jury to find that the defect in question was of a serious character, even though the plank which tripped the decedent was not more than 2 inches higher than the sidewalk, and the instruction under consideration was properly refused."

The facts of the case readily distinguish it from that at bar, for, in the nature of things, an obstruction extending above the surface of a sidewalk is more likely to interfere with travel than a slight depression below the surface. This is illustrated by the Michigan cases. An obstruction more than 2 inches above the walk is said to be sufficient to carry to the jury the issue of negligence on the part of a municipality, but not so where the elevation of the obstruction is less than 2 inches. *Baker v. City of Detroit*, 166 Mich. 597 (132 N. W. 462). On the other hand, a depression of 3 inches is held to furnish no evidence of negligence. *Jackson v. City of Lansing*, supra. It is a matter of common knowledge that no sidewalk is perfect, and that inequalities exist in the surface of the sidewalks of every city. The defects are of infinite variety. Depressions in concrete or stone walks are common. Absolute safety is not required; only the exercise of reasonable care,—that which an ordinarily prudent man would exercise under like circumstances in maintaining sidewalks in a reasonably safe condition,—is exacted of the city. Not every defect, even though it may cause injury, is to be attributed to municipal carelessness. A perfect level cannot be required. Slight inequalities cannot well be avoided. As was said in *Bigelow v. City of Kalamazoo*, 97 Mich. 121 (56 N. W. 339) :

"Even in our most prominent thoroughfares, paved in the most approved manner, curbs must be carried, and at the crossings they are from 2 to 6 inches higher than the pavement. The curb must be left bare; and inattentive people be liable to stumble, or, as is frequently done, a plank



is placed upon an incline, upon which pedestrians carelessly advancing are liable to slip. In either case there is the minimum of danger. The walk is not absolutely safe, but it cannot be said that it is not in a reasonably safe condition. The same is true of nearly all of our alley crossings. Gutters are necessarily left for the passage of water. These crossings are not absolutely safe, but they may be reasonably so. Neither streets, sidewalks, nor crosswalks can be constructed upon a dead level. People are liable to stumble over a Persian rug upon a parlor floor, and streets cannot be made less dangerous than drawing rooms."

The same thought is well expressed in *Keen v. City of Mitchell*, (S. D.) 157 N. W. 1049, where the court, in holding that a depression in the street 6 or 7 inches deep and 12 feet wide might not be found to constitute negligence on the part of the defendant city, observed that:

"It seems to be generally held that a municipal corporation is not liable for every accident that may occur within its limits. Its officers are not required to do every possible thing that human energy and ingenuity can do to prevent the happening of accidents or injuries to the citizens. The law does not require that the city shall do more than keep its streets in a reasonably safe condition. The obstructions or defects, to make the corporation liable, must be such as are in themselves so dangerous that a person exercising ordinary prudence could not avoid injury in passing them. It is only against defects in streets of sufficient gravity to justify a careful and prudent man in anticipating danger from the existence thereof that a municipality is bound to guard. Cities are not required to keep their streets free from irregularities and trifling defects. It is the duty of a municipality to see that all its streets, open for travel, are kept in repair and free from obstruction, and this duty has been performed when the way is without ob-

struction, or such structural defects as would endanger the safety of travelers in the exercise by themselves of ordinary care."

That one has suffered injuries in traveling over the street does not, of itself alone, justify the inference that the street is negligently defective, nor that the pedestrian has been careless. Such injury may have been purely accidental, even though occasioned by some want of perfection in some portion of the highway, without fault of the traveler. Such may have been the situation in the case before us. In any event, we are persuaded that the proof was not such as to warrant a finding that it was due to any want of ordinary care on the part of the defendant. Had the sidewalk been made originally with such depression, the city could hardly have been thought negligent. When constructed, the walk was level, and the depression was occasioned by the action of the elements, or possibly the hand of man, and we seem not to have reached the time when even ordinarily prudent men are so vigilant as to anticipate every possibility of accident, though we seem to have come dangerously near declaring municipalities insurers of the safety of pedestrians, and exacting perfection in the maintenance of the walks by cities. If the depression was rough, the respect in which it was rough was not disclosed, and if there were small pieces of concrete therein, they were not shown to be such as to render the way dangerous. Undoubtedly, the depression constituted a defect in the walk, but that alone was not enough. It must have been a defect of such a character as, in view of its location and the use made of the walk, to attract the attention of the officers of the city and cause them, in the exercise of that degree of caution an ordinarily prudent person would exercise under like circumstances, to anticipate danger therefrom to the pedestrian passing along the walk; and we are of opinion

that the defect was not such as thus to put the city on its guard. The city was not at fault, and the judgment is—  
*Reversed.*

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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C. J. JOHNSON, Appellant, v. W. V. DOUBRAVSKY, Appellee.

**BROKERS:** Commission—Procuring Cause of Sale—Conclusion of

- 1 **Witness.** The conclusion of a witness that he did not purchase certain property by reason of anything said or done by a broker is not controlling on the question of the efficient cause of the sale if the facts and circumstances relating to what the broker did say and did do fairly justify a different conclusion.

**BROKERS:** Commission—Attempt by Broker to Prevent Sale—

- 2 **Failure of Proof—Directed Verdict.** A broker who is content to show the reasonable value of services in *fully* effecting a sale may not recover when the record reveals the fact that the broker carried his services to the point of bringing the seller and purchaser together, that thereupon dispute arose between the seller and the broker as to the commission to be paid in case of a sale, and that the broker then made no further effort to effect the sale, but actively attempted to prevent it. This is true because, conceding, *arguendo*, that he might recover the value of his services up to the point of time when he sought to defeat the sale, the record was barren of evidence of *such* value.

**EVIDENCE:** Opinion Evidence—Value—Improper Inclusion of

- 3 **Facts.** An opinion as to the total unitemized value of several items of services is wholly nullified when it appears that some of the items included in the estimate are material but wholly unallowable.

*Appeal from Linn District Court.*—W. N. TREICHLER,  
Judge.

WEDNESDAY, JUNE 20, 1917.

REHEARING DENIED, SATURDAY, SEPTEMBER 29, 1917.

ACTION at law in which plaintiff seeks to recover a commission alleged to be due for finding a buyer for land of defendant. A verdict was directed against plaintiff and he appeals.—*Affirmed*.

*L. M. Kratz*, for appellant.

*J. C. Leonard* and *O. N. Elliott*, for appellee.

SALINGER, J.—I. The petition alleges that, on or about September 26, 1911, plaintiff entered into oral contract wherein it was agreed plaintiff should undertake to find a purchaser for a certain 12-acre tract of land belonging to defendant, and located near Cedar Rapids; that, if he found one, defendant would pay a commission; that thereupon plaintiff saw one Leibold, went to said tract with him, showed all of it to him, told him the price asked by defendant, undertook to close the sale with him and made further appointments with him in continuance of these negotiations; that Leibold went direct to defendant and they effected a sale and purchase to Leibold for \$4,150; that the reasonable commission for the services rendered by plaintiff is \$128.75, and it has not been paid.

The answer denies all not admitted; admits Leibold went to defendant and that he sold the tract to him for \$4,150; avers the sale was made without assistance from plaintiff, and that plaintiff tried to prevent the sale by word and act, has thereby waived any right to commission, and is barred and estopped to claim one.

In the sustained motion to direct verdict, defendant asserted and he now asserts that the following matters are established by the evidence introduced by plaintiff:

(a) There was no contract between the parties wherein plaintiff was employed by defendant to sell the property in question.

(b) Plaintiff was not the procuring cause of the sale, and the purchaser was procured and the sale made wholly by and through the efforts of defendant.

(c) If a contract was made it was to sell at a price fixed therein, and plaintiff had no buyer who was ready, willing and able to pay that price.

(d) Plaintiff, instead of furthering the sale, tried to prevent it.

(e) He was not the agent of defendant, but of Leibold, who bought of plaintiff, and so acted in the interest of the buyer as that he may not have a commission from defendant, because of bad faith.

(f) If there was ever a contract, plaintiff revoked it and rescinded same three or four days before any sale was consummated; and that no contract existed at the time defendant made sale. Further, it was and is claimed that there is no competent evidence to show what the claimed services are reasonably worth, and hence nothing upon which a recovery of plaintiff could be based.

It appears in evidence that plaintiff saw an advertisement of defendant offering certain property of the defendant for sale and asking intending purchasers to call at the office of the Star Printing Company; that thereupon plaintiff called on defendant and asked him the price of the advertised tract; that the upshot of the talk was defendant advised plaintiff that a Mr. Russell might examine the property at any time and that plaintiff should bring on a buyer whom plaintiff claimed he might induce to buy, and as quick as he could; that plaintiff answered he would get word to this buyer as quick as he could; that thereupon plaintiff went to look at the property and then induced one Leibold, who finally bought, to come and have dinner with plaintiff, and arranged with him that after dinner he would take Leibold out to see the property of defendant; that after dinner he showed him some lands for sale, but Leibold

declined to purchase; that thereupon plaintiff showed Leibold the land owned by defendant. It seems that while the defendant's tract was being inspected Leibold saw a sign, tacked to a telephone pole, which made the same offer found in the advertisement of the defendant which originally led defendant to see plaintiff, and Leibold remarked to the plaintiff that this was the piece which had been in the morning paper. Leibold was well satisfied with the land owned by defendant except as to price, which he thought "was a little steep," and plaintiff said to him not to be discouraged at the price; that, when they went to the owner and talked to him, he would make the price right to Leibold. Leibold and the plaintiff then made an appointment to meet in the Globe Hotel the next morning and go from there. It seems Leibold, too, had seen said advertisement in a newspaper, and before this arranged-for meeting took place, he went to the office of the Star Printing Company to see the owner, but the office was closed, and he saw no one. But it seems he saw this newspaper when the parties met in the hotel. When plaintiff and Leibold met at the hotel Leibold informed plaintiff that he had seen the owner and had asked him about the price, had told the owner he had seen the place, had not told him defendant had taken him there; and that he had told the owner if he would sell for \$4,000, he, Leibold, might talk about it. The price stated in the advertisement was \$4,500, but the owner told Leibold he would take \$4,200 if Leibold took the property quick. After this, Leibold told the owner that Leibold had a friend whom he had agreed to meet, and thereupon he went to see the plaintiff at the hotel in accordance with the appointment made the day before. After the interview at the hotel, Leibold and plaintiff called on defendant, who told the plaintiff that Leibold had been to see plaintiff about that tract of land which had been spoken of between plaintiff and defendant, and the owner answered that Leibold didn't say

anything about that, and that if he had, he would have asked him more for his land, to which plaintiff responded that he couldn't help that; that he was his customer; that he did take him out and had showed him the land. The deal was not closed until Leibold again looked over the property. And Leibold says plaintiff did not inform him he was agent, nor indicate he had defendant's property for sale, and that Leibold was under impression he didn't have it.

It is true Leibold states by way of conclusion that he did not enter into the contract which he finally made with the owner by reason of anything that plaintiff said or did, but for the purpose of determining whether there was a jury question on the efficient cause of the sale, we cannot be bound by such a conclusion if the facts stated by the witness are such that a jury might reasonably draw the opposite conclusion.

If there were not a quite general custom to sustain motions to direct verdict in their entirety, when sustained at all, we feel sure the trial court would not be before us in the position of holding a jury might not find from the evidence the plaintiff was employed by defendant to find a purchaser, that he found one, that plaintiff sold to the purchaser found, and that plaintiff is in no position to complain that the sale was not made on the terms that he fixed when he employed the defendant. We think there was sufficient evidence upon which a jury could find for plaintiff upon these points, though we are unable to see that *Fenton v. Miller*, 153 Iowa 747, *Jones v. Ford*, 154 Iowa 549, *Lieuwen v. Kline*, 142 Iowa 14, and *Gilbert v. McCullough*, 146 Iowa 333, which appellant cites, afford his claims any aid. We think, also, that most of the objections made against this being a jury question are met and the contentions

of the appellee overruled in *Rounds v. Alee*, 116 Iowa 345; *Kelly v. Stone*, 94 Iowa 316; *Hubachek v. Hazzard*, (Minn.) 86 N. W. 426; *Welch v. Young*, (Iowa) 79 N. W. 59 (not officially reported); *Blodgett v. Sioux City & St. P. R. Co.*, 63 Iowa 606; *Ryan v. Page*, 134 Iowa 60; *Hurd & Wilkinson v. Neilson*, 100 Iowa 555; *Moore v. Cresap*, 109 Iowa 749.

We find, too, there was no evidence of a double agency or of acting in the interest of the buyer in such bad faith as that plaintiff should be on that account denied a commission. And beyond all question, too, there was competent evidence from which a jury could determine what was the ordinary and usual commission for selling real property in that vicinity during that time.

II. If a reversal is avoidable, it must  
 2. **BROKERS :**  
     **commission :** be because the motion was rightly sustained  
     **attempt by** on other grounds. It is further presented  
     **broker to pre-** by the motion to direct verdict that, if there  
     **vent sale :** ever was a contract between the parties,  
     **failure of proof :** plaintiff revoked and rescinded it before any sale was consummated; further, that there is no competent evidence to show what "the services which he claims to have performed were reasonably worth." It will appear presently why these two grounds may not be treated separately.

It appears that, when the plaintiff and Leibold reached the defendant, a controversy arose about commissions, and Leibold said it was usual for the seller to pay, and that whatever offer was made must be net to him. Leibold offered \$4,000, and defendant said he couldn't part with the property for that. At some stage of the interview, the defendant offered the plaintiff a commission of \$25, and suggested that Leibold should pay \$10 of that. It was at this juncture Leibold remarked that he would pay no commissions. They disagreed about it, and had trouble to such an extent that Leibold told defendant he believed he would back out,



that if there was going to be trouble between him and the plaintiff, he, Leibold, didn't want to be mixed up in it. The plaintiff testifies that, when Leibold said he would pay no commission and that the man who sold had to pay it, Leibold said to plaintiff, "Come on Johnson, let's go," and that after plaintiff told defendant the latter would have to pay the regular commission, defendant said to Leibold that Leibold could have it for \$4,150, and Leibold bought it at that price. There was testimony from which a jury could believe defendant said to plaintiff that, if he was not satisfied with \$10, he would cut him off entirely and close the deal himself, and that plaintiff responded, "All right; close the deal; but if you do, I bet you a Stetson hat you are entitled to pay me the regular commission;" and that defendant said to Leibold, when the trouble was on, "You and me have nothing to do with him; if Johnson tries to persuade you not to buy, you have to pay no attention to him;" and that defendant offered Leibold to draw up a contract that would cut Johnson out.

The jury could believe that after the parties seemed unable to agree and plaintiff and Leibold left, the plaintiff told Leibold that they would get out of this deal,—to come with him and he would show him another property; that he tried to persuade Leibold to see other places instead of the one owned by plaintiff and at that time not bought by Leibold; that he said to Leibold he, plaintiff, thought Leibold could do better than buy defendant's place; that he offered to bet a hat with defendant that defendant couldn't sell Leibold the place; that while Leibold will "not make it so strong as to say that at that time he ran down defendant's property to him," he did, on the day after this disagreement, tell Leibold not to buy defendant's place and he, plaintiff, would show Leibold some other place; that, after they left that day plaintiff tried to persuade Leibold not to buy the property, saying he had other

property which he would show Leibold and which was a better bargain; that plaintiff told Leibold not to buy the property, giving as his reason because he could not agree on the commission; that he never again asked Leibold to buy this property and tried to persuade him not to buy it and showed him no property after this, because if Leibold bought at all he would buy that of defendant. The only denial which plaintiff makes is by testifying that he did not tell Leibold he, plaintiff, didn't want Leibold to buy this property. He did testify, also, that he told Leibold to buy it; that, while it might look high the first year, after he was there a year Leibold would find it the best place he ever had, because the land couldn't be beat; that if he bought it at \$4,150, he was buying the best piece of land in Linn County, because it was black sandy loam. But, as this was said before the abandonment and disparagement to which Leibold testifies, it, of course, is not in conflict with the testimony of Leibold as to what plaintiff said and did in the way of disparagement and abandonment. True, Leibold says that, after he, Leibold, had bought the place, plaintiff told him he had got a bargain and that it was a good place. But Leibold adds that even then plaintiff sometimes praised it and sometimes talked the other way. This, again, makes no jury question on disparagement and abandonment.

We have no occasion to determine whether the conduct of plaintiff would defeat recovery of a stipulated commission fixed by contract. We need not determine whether he has forfeited recovering the reasonable value of the time he spent and the efforts he made before he said and did what he said and did after there was a disagreement about commissions. The controlling thing for our determination is whether plaintiff has any evidence on which the jury could base an allowance to him for what was done by him in the circumstances disclosed

3. EVIDENCE:  
opinion evi-  
dence: value:  
improper in-  
clusion of  
facts.

by the record. He has no testimony as to what is the reasonable value of his services in a case where, between their rendition and the sale concerning which they were rendered, one abandons his efforts and does what he can to prevent a sale, and, notwithstanding, a sale was thereafter made. The only testimony is what was the usual and ordinary commission "charged in Cedar Rapids, Iowa, during the year 1911 and thereabouts." This advised the jury what his services would have been worth if it had been the usual case of being the effective agency through which a purchase was brought about. This does not in the least show what the services of the plaintiff were worth in the peculiar case under consideration. It leaves the matter in the condition of a calculation where one factor in its result is not obtainable. It is the equivalent of testimony that three things together are worth a certain amount where one of the things taken into consideration is either unknown or not to be allowed for, and where there is no testimony what the two remaining, standing alone, would be reasonably worth. In such circumstances the testimony on value is no evidence whatever. See *In re Trusteeship of Clark*, 174 Iowa 449, at 458.

While the court erred in sustaining some of the grounds of the motion to direct, it did not err in directing verdict for defendant. Hence, we must affirm.—*Affirmed.*

GAYNOR, C. J., LADD and EVANS, JJ., CONCUR.

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A. J. LENHART, Appellee, v. F. A. BEAN, Appellant.

**PRINCIPAL AND AGENT:** The Relation—Subagent Employed by  
1 **Agent—Liability of Principal—Evidence.** Evidence, consisting of conduct and conversations, reviewed, and, while indefinite, held to present a jury question whether a subagent employed by an agent was in fact the agent of the principal.

**PRINCIPAL AND AGENT: The Relation—Authority of Agent to**  
 2 **Employ Subagents—Evidence.** On the question whether an agent had the authority to employ a subagent on behalf of the principal, evidence that the property taken by the principal in a deal negotiated by the subagent was conveyed by the principal agent in trust for the principal, is material, as tending to show that the authority of the agent was general, and not restricted.

**TRIAL: Instructions—Form, Requisites and Sufficiency—Broker's**  
 3 **Commissions.** Instructions on the subject of ratification by a principal of the act of his agent in employing subagents on behalf of the principal, reviewed, and held not to authorize the subagent to recover if the principal, subsequent to the doing of the work by the subagent, made a naked, unsupported promise to pay the subagent for his services.

**EVIDENCE: Hearsay—Repeating Conversation.** Plaintiff, who  
 4 testifies that he told defendant of the promise which defendant's agent made to him (plaintiff), may later be permitted to testify that said agent did make said promise to him, without prejudicially violating the rule as to hearsay evidence.

*Appeal from Guthrie District Court.*—J. H. APPLEGATE,  
 Judge.

MONDAY, FEBRUARY 19, 1917.

REHEARING DENIED SATURDAY, SEPTEMBER 29, 1917.

ACTION at law for the recovery of a commission for the sale of real estate. There was a verdict for the plaintiff, and the defendant appeals.—*Affirmed.*

*Einar Hoidale and Sullivan & Sullivan*, for appellant.

*Milligan & Moore*, for appellee.

EVANS, J.—1. The plaintiff averred  
 1. **PRINCIPAL AND AGENT: the relation: sub-agent employed by agent: liability of principal: evidence.** that he had procured for the defendant a purchaser for 480 acres of Canada land owned by the defendant, under an agreement that he was to receive a commission of \$1 per acre. The contract of agency with the plaintiff was made by one C. E. Larson, of the Larson

Investment Company, an alleged agent of the defendant. The defense was a general denial. It appears from the evidence that the plaintiff was a real estate agent, located at Guthrie Center, Iowa. The defendant was a resident of Minneapolis, and was the owner of a large amount of Canada land, which he had put upon the market through the agency of Larson. Larson employed the plaintiff to procure purchasers at a commission of one dollar per acre. Plaintiff's difficulty in the case was to prove authority in Larson to employ an agent for Bean and upon the responsibility of Bean. Was the plaintiff the agent of Bean, or was he the agent only of Larson? Granting the general authority of Larson to employ agents to assist him in selling Bean's land, it does not follow that such agents would be the agents of Bean, in the absence of proof to that effect. It is entirely competent for a landowner to select his own agent for the sale of land without becoming personally responsible to other agents whom the first agent may employ to assist him in carrying out his own undertaking.

There is no direct evidence in this case of the particular terms of the contract of agency between Larson and Bean. The proof introduced by plaintiff to show that his employment by Larson was authorized by Bean consists of certain conduct of the parties, and of certain conversations had with Bean after the commission had been earned. No testimony was offered on behalf of defendant, and the case was therefore submitted on the testimony of the plaintiff alone. At the close of the evidence, the defendant moved for a directed verdict on the ground of the insufficiency of the evidence; and after verdict, presented the same ground in support of a motion for a new trial. This is the principal question presented on appeal. From the very nature of the case, the evidence is indefinite and in some respects unsatisfactory. The purchaser found by the

plaintiff was one Pearce. The contract with him involved a trade whereby Pearce turned in an encumbered farm of 160 acres, situated in Guthrie County. This trade was made in the latter part of the year 1913. Because the consideration for the Canada land was represented in large part by the Pearce farm received in exchange, the plaintiff agreed to wait for his commission until the Pearce farm should be sold. Title to the Pearce farm was taken in the name of Larson. No sale was accomplished of the Pearce land until after a year or more. Such sale had been had, however, before the bringing of this suit. The plaintiff had been active in efforts to make a sale of the Pearce farm, but was not instrumental in the sale finally made. The principal evidence relied upon by the plaintiff in proof of the defendant's recognition of his agency consists of certain conversations had with the defendant at Des Moines in the year 1914, after the commission had been earned, the same being in the nature of admissions and a ratification on the part of the defendant. The most significant conversation was had in November or early December. The substance of such conversation, as testified to by the plaintiff, was that he had discussed with the defendant the subject of the sale of the Pearce land; that he told Bean that Larson had agreed to pay him a dollar an acre as commission for the sale thereof, in addition to the \$480 that he was to receive for the sale of the Canada land; that Bean objected to the payment of a commission for the sale of the Pearce land, on the ground that this was a part of the consideration of the Canada land, and that it would amount to a double commission, whereas only one commission was contemplated; that he never authorized Larson to offer a commission for the sale of the Pearce land; that he raised no question as to the payment of the \$480 commission which is the subject of this suit, and that he thereby impliedly ad-

mitted Larson's authority to promise it; that he thereupon said that, if plaintiff would sell the Pearce land at \$96 per acre, he would pay a commission of \$20 in addition to the \$480. This conversation was recited a number of times in the course of plaintiff's examination, direct, cross, and re-direct, and some variation is found in the various repetitions which would subject it fairly to a searching analysis before the jury. It further appears that, immediately upon the return of the defendant to his home, he wrote the plaintiff a letter purporting to preserve such conversation. This letter was contradictory to the plaintiff's testimony in some material respects. The letter is in evidence, and is as follows:

"I now write you with reference to the conversation we had at the Randolph Hotel, and as I agreed, I will state in this letter the substance of the conversation we had. You said you had a claim against Larson on account of commission on the Canada land traded to Pearce. Now I agreed with you that, if you would sell the Guthrie County farm, taken in trade from Pearce at \$90 per acre, I would pay you a commission of \$500, and that, if you made the sale and I paid you this commission you would assign to me your claim against Larson on account of trading the Canada land to Pearce. Yours very truly, F. A. Bean."

The plaintiff received this letter and made no reply to it. This is a fact also which tends to weaken the testimony of the plaintiff concerning the conversation, and the defendant was entitled to make the most of it before the jury. The claim of the plaintiff is that the letter was a clear departure from the conversation had, and that it was manifestly intended to avoid the effect of such conversation. It is contended for the defendant that the letter is conclusive against the plaintiff. We think not. It is a mere recital of a past conversation. Its statements are not even supported by the testimony of the defendant. We think it was a fair

question for the jury as to the weight to be given to it.

Early in the year 1914, a conversation had been had at Des Moines between Larson and Bean and Moore, as attorney for the plaintiff, concerning a commission in another case. The conversation had at this time, as testified to by Moore, might fairly be said to imply an admission of liability by Bean for that commission, either exclusively or jointly with Larson. Both of them then and there approved the commission, and it was paid by Larson. We think that the circumstance that the title to the Pearce land was taken in the name of Larson was one of some significance. There is sufficient testimony to show that Bean was the beneficial owner of the Pearce farm, and that the title was held by Larson in trust for him. Not that the evidence was conclusive in this regard, but it was sufficient to warrant the finding by the jury to that effect. This circumstance tended to show that the relations between Bean and Larson were close and confidential, and that the authority of Larson was of a more general nature than a merely restricted agency.

Unsatisfactory as the evidence is in some respects, it must be borne in mind that it is not ordinarily open to third parties to prove by direct evidence the exact extent of an agency as between the principal and agent, and that ordinarily the only proof available to third parties is that of the course of conduct of the alleged principal and agent. As bearing somewhat hereon, see *Fritz v. Chicago Grain & Elevator Co.*, 136 Iowa 699. We reach the conclusion that the trial court properly ruled that the evidence was sufficient to go to the jury.

2. The appellant assigns special error in the giving of Instruction No. 6, which is as follows:

2. PRINCIPAL AND AGENT: the relation: authority of agent to employ sub-agents: evidence.

3. TRIAL: instructions: form, requisites and sufficiency: broker's commissions.



"If you find from the evidence and under the law as given you by the court in these instructions, that said C. E. Larson was in fact the agent of the defendant, Bean, for the sale or exchange of Canada lands, then said Larson, under the law, would be authorized to employ subagents to assist him in making such sale or exchange. This fact, however, of itself, would not be sufficient to entitle the plaintiff, even though said Larson was the agent of the defendant, and even though plaintiff was employed by said Larson to furnish said Larson customers for the sale or exchange of Canada land, to recover against defendant a commission for so furnishing such customers. Before the plaintiff would be entitled to recover against the defendant any commission on account of having furnished a customer under a contract with said Larson, the burden is upon him to establish by the preponderance of the evidence not only that said Larson was the agent of the defendant, Bean, and that said Larson employed plaintiff to furnish customers for said Canada lands owned by the defendant Bean, and that he did in fact furnish customers to whom Canada lands belonging to defendant were traded or exchanged for Guthrie County lands owned by William Pearce, but he must further show that the contract or agreement between himself and said Larson was in substance and to the effect that the defendant, Bean, and not Larson, should pay such commission to plaintiff, *or that, after the transaction had been completed, the defendant was advised of such transaction, and that he thereby ratified or agreed to pay such commission.* It is further incumbent upon plaintiff to show by the preponderance of the evidence, or from all of the facts and circumstances disclosed by the proof, that the said Larson not only was agent for the sale of Canada lands belonging to the defendant, but that he also was authorized by the defendant to employ subagents for the defendant himself, and to whom the defendant would be liable for commissions

earned under contracts made with such subagents. To the end that you may understand the statements made by the court with reference to an agent having authority to employ a subagent to assist in making sale or exchange of lands, this would not necessarily, without more, carry with it implied authority to bind the principal to pay commission to such subagent. The law is that, where a party is employed as an agent to sell or exchange real estate, that he may employ a subagent to assist him in making such sale, but there would be no implied authority to render the principal liable for commission to such subagent; and without any showing to the contrary, the subagent would be required to look to the agent for his commission, and before the subagent can recover against a principal for commissions claimed to have been earned in making sale or exchange of lands, it is incumbent upon such subagent to show, by the facts and circumstances disclosed by the proof, that such agent had authority, not only to employ a subagent such as is implied by law, but that he was authorized by the principal himself to bind the principal to pay the subagent the commission for the services rendered by him in making sale or exchange of lands, *or else that, after having made such sale or exchange, the principal agreed to pay such subagent the commission for his services.*"

The particular objection is to the last clause of the instruction, which we have italicized. We have italicized also a similar clause included earlier in the same instruction. The particular complaint is that the effect of this clause was to permit the plaintiff to recover as upon a promise to pay. It is urged that this would be a new promise and a promise without consideration, and that the action was not founded upon such promise, and that the only promise shown by the evidence was a conditional one, and that the condition was not performed. We think the ar-

gument enlarges upon the instruction. It is conceded by appellant that in all other respects the instruction correctly states the law. Reading the clause complained of in connection with the entire instruction, it amounts only to a repetition of the previous clause which we have italicized, and bears only on the question of ratification. If the jury should find it to be true that the defendant, after being advised of the arrangement between plaintiff and Larson, promised to pay the same, it would be good as a ratification of what had been previously done by his agent, and not as an independent new promise. We think the defendant has no ground of complaint at this point. The same objection is urged by appellant to a similar clause in Instruction No. 7. For the same reason, this point also must be overruled.

3. The appellant specifies two rulings upon the introduction of evidence and makes complaint thereof. The first relates to the following question and answer in the testimony of the plaintiff, Lenhart:

4. EVIDENCE:  
hearsay: re-  
peating con-  
versation.

"Q. You may state what was said, if anything was said, about your selling the Pearce farm. A. Mr. Larson said, if I would sell the Pearce farm for \$96 per acre, he would give me \$1 per acre on the Pearce farm in addition to the \$480 on the Canada land deal."

The objection to this was that it was incompetent, irrelevant, immaterial and hearsay, and that no foundation had been laid for it. At the time this testimony was offered, the witness had already testified concerning his conversation with the defendant, Bean, and that he had told Bean that Larson had made this very promise to him. Under these circumstances, the testimony was proper. Appellant specifies one other question which was put to the plaintiff as a witness, and to which an objection was made.

We need not set out the question, for the simple reason that it does not appear from the record that it was ever answered.

No other specific objections to the testimony are presented for our consideration. We find no error in the record, and the judgment is therefore—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

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IDA MAY LUDDEN, Appellee, v. LILLIE BUTTERS et al.,  
Appellants.

**TRUSTS: Resulting Trusts—Conveyance to Non-Owner.** Where  
1 property is acquired by one person, but is conveyed by the grantor to a third person, without any arrangement or understanding with reference thereto, a trust results in favor of the one actually owning the property.

**PRINCIPLE APPLIED:** A father instituted bastardy proceedings for the seduction of his minor daughter. At the trial, the court fixed the amount to be paid by defendant for the support of the unborn child at \$600. The mother (outside of court) insisted that \$600 was inadequate. After much discussion concerning the support of the child, the proceeding was settled by the defendant's deeding to the mother 160 acres of land, and assigning to her a note for \$125. The defendant wanted to deed the property to the daughter, but the mother insisted that the daughter was too young, and that she (the mother) "would be the one to support the child." The daughter had nothing to do with the settlement. The mother did care for and support the daughter and child for some two years. The daughter then married. The property so conveyed was sold by the mother and converted to her own use.

*Held*, the mother must account to the daughter for the proceeds.

**PARTIES: Plaintiffs—Husband and Wife—Injury to Minor.** Principle  
2 recognized that the mother of a minor may not (the father being alive, with his family, and under no disability) maintain an action for an injury to her minor child, i. e., the seduction of the minor.

**ESTOPPEL:** Equitable Estoppel—Absence of Prejudice. Absence  
3 of prejudice excludes estoppel.

*Appeal from Buchanan District Court.*—CHARLES W. MUL-  
LAN, Judge.

WEDNESDAY, JUNE 20, 1917.

REHEARING DENIED SATURDAY, SEPTEMBER 29, 1917.

SUIT to have certain property decreed to have been transferred to defendant in trust for plaintiff, and that same be turned over to her. Decree was entered against defendant, from which she appeals.—*Affirmed.*

*Cook & Cook*, for appellants.

*Hasner & Hasner* and *G. W. Dawson*, for appellee.

LADD, J.—I. The plaintiff is daughter  
1. TRUSTS: re- of defendant and L. M. Stout, from whom  
sulting trusts: conveyance to  
non-owner. defendant has been divorced. In February,  
1910, plaintiff's parents learned that she had become pregnant by one Henry Holman. Bastardy proceedings were immediately instituted by Stout, and, as Holman made no defense, the court fixed the amount to be paid to the plaintiff herein for the support of the child at \$600; but, upon announcement of the decision, the defendant, who was present, declared that "she would not stand for that," and the court is said to have remarked to Holman: "If you could get the \$600 in court inside of 3 days, I will put you at \$600." After some parley, defendant insisted that she would not "stand for no \$600," and all parties retired to a lawyer's office across the street. Holman testified that she there "said the way she would settle with me would be to take all I had in property. I did not settle with her, but I deeded to her 160 acres of land." He also transferred a note for \$125 given for the rent of the land.

"Q. That deed and that note was given for the purpose of settling up the charge against you of bastardy? A. Yes. \* \* \* Q. You wanted to settle it, didn't you? A. She said she would put me as far as the law would let me go; so I thought I would settle it any way to get out of it. \* \* \* Q. You said you were willing to deed the farm to her, didn't you? A. No, sir, I didn't want to deed to her, but she said I had to deed it to her. Q. Her husband assented to that? A. I wanted to deed it to Ida. Q. You did say in the office that you were willing to deed to Mrs. Stout? A. Nothing— Q. You said you would? A. That is all the way I could settle, and it is the way I settled. I wouldn't say I was willing. I wasn't deeding to the one I wanted to deed to, but I had to. I deeded it to Mrs. Stout. I gave her an order for the note, because I had to, to settle it, not because I was willing."

Stout corroborated Holman as to what his wife had said in the court room, and testified that she said—

"She would have to have more; that she would have to have the 160 acres of land and also the note. Mr. Holman said he would turn over the land; he was willing to turn over that land to support Ida—that is, my daughter—and her child. Mr. Holman proposed first to give it to my daughter, and Mrs. Stout said 'No;' that she was under age—that would not do. She said if he would give it to her, it would be all right; she would be the one to support the child and her too. She would take care of her and her child."

The plaintiff testified that she was then 17 years of age; that she had nothing to do with the settlement; that it was made by her father and defendant. The child was born in June, 1910, and plaintiff and the child were cared for by defendant until April, 1912, when plaintiff married, and the child was taken by her, 3 or 4 months later. The defend-

ant realized something over \$1,700 out of the Oklahoma land, and has appropriated it to her own use.

II. The plaintiff contends that the property out of which this amount was realized was conveyed to defendant in trust for her daughter, to enable her to care for the child, and that, therefore, in the performance of her obligation as trustee of a resulting trust, defendant must turn over the proceeds of the land to plaintiff as *cestui que trust*. On the other hand, defendant insists that the conveyance and transfer of the note to her was in settlement of Holman's criminal and civil liability for the seduction of defendant's daughter. As defendant's husband was alive and living with her, she had no claim or cause of action against Holman for such alleged seduction. Section 3471, Code, 1897. The daughter, however, might maintain an action therefor (Section 3470, Code); and in the bastardy proceedings, the court might charge defendant "with the maintenance of the child in such manner as the court shall direct." Section 5635, Code. This may be by exacting periodical payments to the mother of the bastard (*State v. Ginger*, 80 Iowa 574), or payment to her of a lump sum, or in such other manner as the court, in view of the situation of the parties, may determine. Here, the court had concluded to require Holman to pay a lump sum to the mother of the unborn child, when defendant intervened, and insisted that the amount was insufficient, and demanded all the accused had. For what and whom? Not for defendant, for she had no claim against him. Not in settlement of any claim her husband may have urged for loss of his daughter's services, under Section 3471 of the Code; for he had made none. Nor does the evidence justify the conclusion that the conveyance was executed in compounding an alleged felony, or by way of extortion. True, she told Holman she would put him "as far as the law would let him go;" but

it is undisputed that all parties had gone to court for the purpose of having their difficulties adjusted in court. Holman testified that "she said she would settle in court, and we went down to Marion. \* \* \* I said that, if nothing else would do but settle in court, I would go down and settle in court."

The bastardy proceeding was pending then, and to that both must have referred. Her only objection to the allowance by the court appears to have been that it was not enough, for she declared she "would not stand for no \$600," and immediately demanded all he had, i. e., a deed to the land, and delivery of the note. For what? No claim other than that involved in the bastardy proceedings was asserted, and the only inference to be drawn from what happened is that the conveyance and delivery of the note were demanded and made in settlement of the bastardy proceedings. As the court was not advised of what had been done, judgment was entered in accordance with the announcement heretofore referred to. When Holman suggested that the conveyance be made to the daughter, the only objection raised by defendant was that the daughter was under age, and that defendant would have to care for her as well as the child. But there was no agreement at the time with respect to their care, and no renunciation by plaintiff of her right to the property received in settlement. The land and note, then, though transferred to defendant, became the property of plaintiff, to enable her to care for and support her unborn child. That where property to which one person acquired ownership from another is conveyed by the latter to a third person, without any arrangement or understanding with reference thereto, a resulting trust arises, and such third person holds title for the benefit of the party acquiring such ownership, is elementary law, in support of which the citation of authorities is unnecessary; and we are of opinion that title to the note and Oklahoma



land was taken by defendant as trustee for plaintiff, and that she is bound to account for the proceeds derived from the collection of the note and the sale of the land.

III. The plaintiff and her husband borrowed of defendant \$200 on October 17, 1914, and, executed their note therefor.

This money was some of the proceeds of the Oklahoma land, and defendant pleads this transaction by way of estoppel. Manifestly, defendant could not have been prejudiced by being induced to pay money belonging to plaintiff over to her as a loan. At most, the circumstance tended to sustain defendant's claim of ownership. In the absence of prejudice, there could be no estoppel.

IV. In June, 1913, defendant sued her then husband, L. M. Stout, for a divorce, and in November following, the parties entered into a stipulation, under the terms of which Stout was to retain 160 acres of land in his name, and pay her \$500, and she was to retain the Oklahoma land, and, upon the entry of decree of divorce, their property rights were determined as stipulated. She pleaded that plaintiff knew of the negotiations with reference to the property rights, and that the Oklahoma land was being set off to defendant as belonging to her in the division of property, and made no objection thereto. But plaintiff testified that she was away at the time, and had no knowledge concerning the stipulation or of the suit for divorce, until the day the decree was entered, and about that time, heard the way the property was divided. The defendant testified, in a general way, that the matter of settlement of the property interests was discussed, so that plaintiff knew of the matters under discussion, and knew that defendant was to have the Oklahoma land and \$500; and that the latter had told her how the parties to the divorce suit had settled.

"Q. Did your daughter discuss with you the divorce and the property affairs after it was made? A. There

was nothing said to me, objected to nothing until after I was married. I thought everything was all right and settled—settled just as they wanted me to.”

For all that appears, she might have told her daughter after all had been done; and in any event, we do not think the evidence sufficient to overcome plaintiff's denial of knowledge, even though the latter's husband may have advised the settlement of the property rights of her parents. The trial court credited defendant for all above \$1,200 as compensation for the care she had bestowed upon plaintiff and her child, and its decree awarding recovery for that amount is—*Affirmed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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R. B. MARTIN, Appellant, v. BENNETT LOAN & TRUST COMPANY et al., Appellees.

**PROCESS:** Original Notice—Requisites—Insufficient Statement of Relief Demanded. An original notice of suit which recites that plaintiff will ask the foreclosure of his mortgage and a personal judgment against the mortgagor only, confers no jurisdiction on the court to decree that a mortgage held by a defaulting defendant, even though in form an absolute deed, is junior to the mortgage held by plaintiff.

*Appeal from Woodbury District Court.*—W. G. SEARS, Judge.

TUESDAY, MARCH 13, 1917.

REHEARING DENIED, SATURDAY, SEPTEMBER 29, 1917.

ACTION to foreclose a mortgage. Defense, *res adjudicata*. Decree for the defendants in the district court. Plaintiff appeals.—*Reversed and remanded*.

*Alfred Pizey*, for appellant.

*C. N. Jepson* and *J. F. Stecker*, for appellees.

Process : origi-  
nal notice :  
requisites :  
insufficient  
statement of  
relief de-  
manded.

GAYNOR, C. J.—On February 20, 1908, Mary A. and H. G. Chapman executed and delivered to the plaintiff, appellant, a warranty deed to the premises in controversy, to secure an indebtedness owing by them to appellant. This deed was duly filed for record, and recorded on February 21, 1908. Subsequent to the recording of appellant's deed, and on June 19, 1908, the defendant, Bennett Loan & Trust Company, obtained a mortgage from the Chapmans covering the same premises, to secure an indebtedness owing by the Chapmans to it. Some time in February, 1914, Bennett Loan & Trust Company commenced foreclosure proceedings against the Chapmans on their mortgage, making the Chapmans and this plaintiff defendants. Notice was duly served on each, and each made default. The cause proceeded then to trial, and judgment was entered against the Chapmans for the amount due from them to the Bennett Loan & Trust Company, and the mortgage given by them to the Loan & Trust Company foreclosed, the decree reciting that all the defendants, including this plaintiff, had been duly and legally served with sufficient original notice, as provided by law, and in time for the term, and adjudging all the defendants to be in default. The decree provided further that, on and after the day of sale, the defendants, and each of them, including this plaintiff, and all persons claiming by, through, or under them, be forever barred and foreclosed from all interests and equity in and to said mortgaged premises, excepting such rights of redemption as are specially provided by law, and that, if said real estate be sold and not redeemed as provided by law, a writ of possession issue to the sheriff of the county, commanding him to put the purchaser at said sale in possession. Subsequently, the premises were sold to J. M. White, under special execution issued upon said judgment, and on or about the 14th day of April, 1915, a sheriff's deed

was issued to him for the said premises.

The original notice in the suit served on this plaintiff recited: That, on or before the 20th day of February, 1914, a petition would be on file asking a personal judgment against the Chapmans on certain promissory notes, and that plaintiff would ask, as against all defendants, including plaintiff in this suit, the foreclosure of defendants' real estate mortgage given to secure the payment of notes, describing them, and the property covered by the mortgage, and further reciting that no personal judgment would be asked against the defendants except the Chapmans.

The petition filed in pursuance of the notice recited the giving of the notes and mortgage by the Chapmans, and prayed for judgment against the Chapmans for the amount due on the notes and the foreclosure of the mortgage, and then recited that the defendant R. B. Martin, plaintiff in this suit, and other defendants, have or claim to have some claim or lien upon or interest in said premises; but plaintiff alleges and avers the fact to be that whatever lien or interest the said defendants have in the premises is junior and inferior to the plaintiff's mortgage, and prays that the lien of said defendants, and each of them, be held to be junior and inferior to plaintiff's mortgage, and that the equity of redemption of said defendants and each of them be forever barred and foreclosed, and that a special execution issue for the sale of the premises. As before said, a decree was entered in accordance with this prayer against plaintiff herein.

On December 23, 1914, the plaintiff commenced this suit, asking judgment against the Chapmans for the amount due him, and a foreclosure of his deed of February 20, 1908, and praying that the lien of the Bennett Loan & Trust Company, under its mortgage, and the claim of J. M. White, under the foreclosure of such mortgage, be declared and decreed junior and inferior to the lien of plaintiff's mortgage

deed. In his petition, the plaintiff recites all the facts heretofore set out. To this the defendants, Bennett Loan & Trust Company and J. M. White, demurred, for the reason that the facts therein stated as to these demurring defendants do not entitle the plaintiff to the relief demanded; that it affirmatively appears from said petition that, as to the cause of action against these demurring defendants, there has been a former adjudication, and the same is *res adjudicata*. This demurrer was sustained. The plaintiff having elected to stand on his petition, decree was entered in favor of these demurring defendants, and from this, plaintiff appeals.

The only question presented here is the sufficiency of the notice to give the court jurisdiction to enter the decree declaring the lien of the Bennett Loan & Trust Company mortgage prior and superior to the lien of the plaintiff's mortgage. The facts recited in the petition and admitted by the demurrer show that the plaintiff's mortgage deed is prior to defendants' mortgage in point of time, both in its execution and delivery and in its record. To sustain the defendants' contention, then, it must appear that the decree of the court in the foreclosure proceedings instituted by the Bennett Loan & Trust Company was within the power of the court to grant, and that the granting of the relief in that foreclosure proceeding bars the plaintiff of all right in the property under his mortgage deed, no redemption having been made by the plaintiff.

It is fundamental that no one can be deprived of life, liberty or property, or be divested of a vested right, without due process of law; that due process of law involves the idea that due and legal notice of the fact that his rights are called in question has been given. Notice to a party that his rights are called in question, before a legally constituted tribunal, is essential to give that tribunal authority to make any adjudication affecting those rights. It is

fundamental that the original notice required by the statute to be served upon a defendant is for the purpose of informing him that he is required to appear in court and defend against some adverse claim asserted against his right; that some claim will be made and established against his right if he fails to appear and defend it. He is bound to appear and defend only as to the rights which are asked to be established against him, and of which he has notice.

Plaintiff's mortgage was, both upon the record and in fact, prior and superior to the lien of the Bennett mortgage. No claim was made in the notice that the Trust Company would seek to impair or displace this right of Martin's to have it so remain. The notice in that suit was to the effect only that the Bennett Loan & Trust Company would foreclose their mortgage; that they would ask no personal judgment against anyone but the Chapmans. The Bennett Company had a right to judgment as to the Chapmans and to foreclose its mortgage, and no defense made by this plaintiff would have been availing against this assertion of that right. There is nothing in the notice to suggest that they would claim more. No right of Martin's was involved in that suit, so far as the notice disclosed. The notice recited, in so far as it affected Martin, "Plaintiff will also ask as against all defendants, the foreclosure of a real estate mortgage executed and delivered by the Chapmans to the plaintiff to secure the payment of certain notes," describing the mortgage and the real estate covered by it, and then said, "No personal judgment is asked against any of the defendants except the Chapmans." Having no defense to this asserted right, Martin was at liberty to go about his business without further care. The notice in fact said to him:

"We claim nothing against you or your mortgage. We simply desire to foreclose our own mortgage as against the Chapmans."

There was nothing in the notice served on this plaintiff to suggest that the priority of appellant's right would be called in question. As said in *Blain v. Dean*, 160 Iowa 717:

"It is not necessary that the notice shall be stated in specific detail such as might be required in a pleading, but it must be specific enough to permit the defendant to understand the 'cause or causes' upon which plaintiff expects to ask the judgment of the court. Above all things, it is not to be so constructed as to deceive an ordinarily cautious defendant and secure the entry to his prejudice of a judgment or order, of the purpose to ask which the notice gives him no hint or warning. It is to be what its name purports—a notice, and not a trap. He has the right to assume that the notice has been drawn and framed in good faith, and, in case the purpose stated therein be one he does not care to contest or resist, he need not appear in the proceedings, but may rest in confidence on the assumption that no adjudication will be sought or had against him other than such as is foreshadowed in such notice. The jurisdiction which the court acquires is to do the thing or hear the cause disclosed by the notice, and, if the other party takes advantage of the defendant's default to obtain other and additional adjudications beyond the fair scope of such notice, then the adjudication to that extent has been without jurisdiction, and is void. In other words, the office of the notice is not only to give jurisdiction, but also to limit it."

A junior mortgagor has a right to foreclose his mortgage and to sell the property pledged to the satisfaction of his debt, but he has no right by such foreclosure to displace prior, valid, subsisting liens held by other parties against the same property in such foreclosure proceedings. If he has a purpose in mind to do this, notice of his intention to so do must be served upon the party whose rights are to be thus displaced. His right to foreclose his mort-

gage is an absolute right, against which the prior encumbrancer cannot contend. His right to displace the prior encumbrancer is not necessarily an incident to his right to foreclose. If he seeks this relief against the prior encumbrancer, not only the law, but common fairness, requires that he inform this encumbrancer of his intended purpose. Notice that he will foreclose his mortgage is not notice that he will ask this added right. The notice gave this plaintiff no information that plaintiff would seek to displace this prior encumbrancer. The plaintiff was not, therefore, bound to appear, and, having defaulted, the court had no jurisdiction to grant relief in that proceeding against this plaintiff, beyond that which the notice called upon him to defend. As bearing upon this question, see, also, *Browne v. Kiel*, 117 Iowa 316; *Jordan v. Woodin*, 93 Iowa 453; *Blain v. Dean*, 160 Iowa 708.

It is claimed, however, that, so far as the record discloses, the plaintiff held under a warranty deed executed by the Chapmans to him, and it does not appear that the Bennett Company had any notice, at the time it foreclosed its mortgage, that plaintiff was claiming to hold the land under said deed as security for an indebtedness; that the Bennett Company, in commencing its foreclosure proceedings, had a right to believe from the record that plaintiff was holding the fee title from the Chapmans. It will be noted that the deed antedates the execution of the mortgage relied upon by the Bennett Company. The Bennett Company's mortgage came to them from the Chapmans, after the execution and recording of the deed to the plaintiff. There is no allegation in the notice, nor in the petition filed, that the plaintiff's deed was fraudulent or void, or that it did not pass title from the Chapmans to the plaintiff, whether that title be absolute or as security for a debt. In the foreclosure proceedings, the Bennett Company treated the plaintiff's deed as a mortgage. They must have



assumed this because they recognize the fact that plaintiff's title rested upon an unquestioned instrument antedating any claim held by the Bennett Company. If, as contended, defendant was justified in assuming that the Chapmans had conveyed the absolute fee to the plaintiff, and that the plaintiff was made a party simply as fee holder, how can it be assumed by the Bennett Company that they acquired any title from the Chapmans under their mortgage to land the title to which had been absolutely conveyed to the plaintiff before the execution of the mortgage? We must assume, therefore, there being no showing to the contrary, that plaintiff's deed was in fact a mortgage, and was so recognized by the Bennett Company in the foreclosure proceedings.

With this in the record, the Loan & Trust Company, without notice to Martin that it would seek to have its junior lien declared a prior lien over Martin's mortgage, procured from the court a decree making Martin's lien junior and inferior to the lien of the Loan & Trust Company, and barring and foreclosing Martin from any interest in the land under his conveyance from the Chapmans. Clearly, in granting this relief the court went beyond the jurisdiction it acquired by the notice, so far as this plaintiff was concerned. True, the court had jurisdiction of the subject matter and of the parties, but that jurisdiction extended only to the right in the court to grant, as against this plaintiff, relief to the extent of the rights involved, which the notice given him called upon him to protect. Without notice to the present plaintiff that the right of superiority in the property would be called in question in the foreclosure proceedings instituted by the Bennett Company, the court was without jurisdiction to grant the relief which it did grant as against this plaintiff.

It is fundamental that courts, in granting relief, cannot go outside of the issues tendered and grant relief not

involved in the suit or prayed for in the action, and on default it is equally true that no relief can be granted against the party served with notice, except as against those rights which the notice called upon him to defend, or which, as a reasonably prudent man, he had reasonable grounds to believe would be called in question in the proceedings instituted. As bearing upon this general proposition, see *Heins v. Wicke*, 102 Iowa 403, and the authorities therein cited.

We think the court was without jurisdiction, as against this plaintiff, to grant the relief prayed for in the Bennett foreclosure proceedings, and the court should have so held, and, so holding, should have overruled defendants' demurrer in this suit. The relief granted was outside the jurisdiction invoked, beyond the jurisdiction of the court to grant, and the decree to this extent was void, and not voidable only.

The cause is therefore reversed and remanded for proceedings in accordance with this opinion.—*Reversed and remanded.*

LADD, EVANS, and PRESTON, JJ., concur.

SALINGER, J., took no part.

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HENRY E. MAXWELL, Receiver, Appellee, v. MISSOURI VALLEY  
ICE & COLD STORAGE COMPANY, Appellant.

**RECEIVERS: Management—Right to Repudiate Pre-Existing Con-**  
1 tracts. A receiver has the right, within a reasonable time after his appointment, to repudiate the pre-existing executory contracts of the person or corporation for whose property he has been appointed receiver.

**CONTRACTS: Performance — Recovery — Non-Contracted Items.**  
2 One may not recover for items or things which he neither furnished nor contracted to furnish. So held where a receiver

was permitted to recover for electric power furnished, but denied a recovery for a non-contracted fixed charge for keeping the plant in readiness for additional power.

*Appeal from Harrison District Court.*—A. B. THORNELL,  
Judge.

SATURDAY, SEPTEMBER 29, 1917.

Opinion states the facts.—*Modified and affirmed.*

*J. S. Dewell*, for appellant.

*C. W. Kellogg*, for appellee.

GAYNOR, C. J.—On the 2d day of June, 1913, the plaintiff was appointed receiver of a corporation known as Iowa Nebraska Public Service Company, a Delaware corporation. His appointment was made by the United States district court of Nebraska, in a suit pending therein to foreclose a mortgage or trust deed covering the property of said corporation in Nebraska and in Harrison County of this state. A copy of the bill in said foreclosure suit and the order appointing plaintiff as receiver was duly filed in the office of the clerk of the district court of the United States for the Southern District of Iowa, on June 7, 1913. Plaintiff duly qualified, and gave bond as required by the order appointing him, and entered upon the discharge of his duties. In the order appointing him receiver, it was provided that he should take charge of all the property of said corporation described in and covered by the trust deed, and manage and operate its business and apply the income and receipts under the order and decree of the court, and do any and all acts which might be necessary to preserve the property and the income of said company.

Among the property so coming into the hands of the

receiver was a certain electric light and power plant in the city of Missouri Valley, in Harrison County, Iowa, formerly owned and operated by said corporation. Under the power granted him by his appointment, he took possession of this plant at Missouri Valley and operated the same, and furnished to this defendant electric current from said plant for the purpose of operating defendant's plant, to wit, an artificial ice and cold storage plant. This suit is to recover for power so furnished by the receiver to the defendant company during the months of September, October, November and December. The plaintiff claims \$445.51, after allowing all credits.

From the pleadings filed, it appears that the plaintiff claims in his petition and amendment that, about June, 1913, he, as receiver, entered into an oral contract with the defendant to furnish electric current for power according to a specific schedule which he sets out. In an amendment, he claims that the prices and values which he charged and for which he seeks to recover are the reasonable prices and values for such services, and that, after allowing all credits on account of such current furnished, there was due him as receiver, \$445.51.

The defendant in his answer claims that the services rendered were rendered under a contract previously entered into between the defendant and the corporation for which plaintiff was receiver; that the plaintiff simply continued the business under said contract, as a representative and successor of the Iowa Nebraska Public Service Company, and by way of counterclaim, says that the plaintiff failed to comply with the terms of that contract, and by reason thereof, the defendant has been damaged in a sum far in excess of the amount claimed. Defendant denies that there was any new contract between the receiver and the plaintiff.

The real question presented involves the right of the

defendant to hold plaintiff, as receiver, to the performance of the original contract between the defendant and the Iowa Nebraska Public Service Company existing at the time plaintiff was appointed receiver, and to mulct him in damages for a breach thereof. It appears that, on September 29, 1913, or thereabouts, the Iowa Nebraska Public Service Company was adjudged a bankrupt. The original contract between the Iowa Nebraska Public Service Company and the defendant, on which defendant relies, provides, among other things, that the service corporation should furnish the defendant, at and for scheduled rates, electric current of 220 volts, in sufficient amounts at all times to continuously operate all of defendant's electric motors at any time during the continuance of the contract, and to at all times continuously furnish such electric current in full quantity desired by the defendant, and should be responsible to the defendant for all loss or damage directly resulting from a failure to furnish such current. Defendants claim that the receiver failed to perform the conditions of said contract and to furnish the current as called for by this contract, and that defendant was, therefore, unable to operate its business, and accordingly suffered damage.

It may be conceded, for the purposes of this case, that the receiver did not comply with the requirements of this contract. It may be conceded that the defendant could not rescind or annul or destroy the efficacy of this contract so far as the service company is concerned. The question here is, Was the receiver bound to perform this contract by reason of his appointment as receiver? This was an executory contract. Of course, a failure to perform it on the part of the service company would be a breach for which that company might be liable. A claim based thereon was a matter for adjustment in the bankruptcy proceedings. The question

here is not whether the receiver can repudiate the contract or destroy the validity or binding force of the contract between the defendant and the service company, but whether or not this receiver, as such, is liable to the defendant for his failure to perform. If he had adopted the contract, there would be some basis for holding him liable for its breach. Upon his appointment as receiver, he was not bound to adopt this contract. The property was placed in his custody by the court to be managed under the direction of the court for the benefit of the *cestui que trust* in the deed. He was not the successor or representative of the service company in any sense. The property was taken by the court, through its receiver, from the service company, placed in the hands of the receiver with direction to manage and control it, under the direction of the court, in the interests of the trustees. Many of the failures which result in drastic actions of this character, involving parties in bankruptcy and requiring a sequestration of their property by the court for the benefit of their creditors, are due to improvident contracts and unbusinesslike methods of the original owner. Courts take possession for the protection and conservation of the property. We say, therefore, that the appointment of the plaintiff as receiver did not bind him to the performance of the contracts of the original owner made before the appointment of the receiver. He may, with the consent of the court, adopt these contracts if, in his judgment, they are for the best interests of the estate which he is called upon to manage, or he may repudiate them, if not for the best interests of the trust. So, unless it is shown by this record that the receiver adopted the contract, the defendant has no standing upon his counterclaim. After appointment, the receiver has at least a reasonable time in which to determine whether he will adopt or reject existing executory contracts. The order appointing this receiver authorized him to operate this plant; to manage it in such manner as,

in his judgment, would produce the most satisfactory results consistent with the discharge of the business duties imposed upon him; and to do any and all acts necessary to preserve the property, franchise and income of the defunct company for the benefit of the *cestui que trust*; to sue, collect and receive the earnings and profits and other income therefrom, and to apply the income and receipts under the order and direction of the court; and to do all acts necessary for the protection and preservation of the property and income.

It clearly appears in this record that, when the existence of this contract relied upon by the defendant was brought to the notice of the receiver, plaintiff, he notified the manager of the defendant company that he repudiated and would not be bound by it; that the manager asked time for further consideration, which was given; that he told the manager at the time that he would furnish power, if needed, at scheduled rates, but not under the written contract; that thereafter, the manager told him that they would take the current; that thereafter it was furnished, but not under the contract. This was notice to the company that, as receiver, he repudiated and refused to be bound by the contract, and refused to render service under the contract. The defendant company was, therefore, bound to know thereafter that service would not be rendered by the receiver under the contract. The receiver testifies, and this is not disputed:

"When I came over to Missouri Valley, either the last of June or the first of July, I was informed that there was a contract between the defendant company and the service company, touching the furnishing of electric current to the defendant company. I asked to see the contract and they produced it. I went over the contract with the manager. I spoke to him about the ice company not paying its June bill. He said, 'Well, the contract provides that, if the ice

company sustains loss by reason of a failure to furnish current, the ice company was to be compensated for it,' and that they had sustained a considerable loss during the previous month because of the interruptions of service, which more than offset the bill we had against the ice company. I told him when I had examined that contract that I was not bound by it and would not recognize it; that I was not controlled by any agreement; and that, if they wanted any current, they would have to pay according to the printed schedule that we have for those power rates. I told him further that I would not be responsible in any way for any damages caused by interruptions of service or any breakdown; and that, if they were not willing to take the current on these terms, I would simply discontinue service. Trapp asked me for 3 or 4 days in which to consider it. I was back in 3 or 4 days, and they paid the June bill, and Mr. Trapp indicated to me that they had decided to take the current. Mr. Trapp complained to me during the summer about interruption of service. I told him that I would get those things fixed up just as quick as we could. That was the very best we could do. The plant was in very bad condition when I got charge of it, and I saw the income was not sufficient to take care of it."

Without setting out the testimony further, we have to say, as a basis for our ultimate conclusion, that, upon discovering the existence of this contract, the receiver, within a reasonable time, notified the manager of the defendant company that he would not be bound by it. This was a distinct repudiation by the receiver of the obligations of the contract so far as he was concerned as receiver. The contract, therefore, cannot be made the basis of a claim for damages against him, resting as it does solely upon the claim that he did not perform this contract. It would seem like a simple proposition that one cannot be held in damages



for a failure to perform a contract which in law he is not bound to perform. The general rule laid down is that a receiver is not liable upon the covenants and contracts of the person or corporation for whose property he is appointed receiver, unless he adopts the contracts as his own. The general rule is that no executory contract is binding upon the receiver until adopted by him. It is, however, his duty to refuse to be bound by any contract which would prove burdensome or imperil the fund intrusted to his care as receiver. In *Scott v. Rainier P. & R. Co.*, 13 Wash. 108 (42 Pac. 531), it was held that a receiver of a corporation may refuse to carry out a contract entered into before his appointment, without being liable for damages for its breach; as otherwise, liabilities of the corporation upon executory contracts would become preferred claims. It is said in that case:

"By the insolvency of the company and the appointment of a receiver, \* \* \* it was made impossible for the corporation to carry out its part of the contract, and this being so, it must answer in damages for its violation; but a liability flowing therefrom should have no better standing than any other claim for money. \* \* \* It will be seen that, if the receiver has not the right to terminate executory contracts when their continuance would not be for the interests of the creditors, every such contract would, in effect, become a preferred claim and entitled to full performance at the expense of claims growing out of executed contracts which, in good conscience, should in all cases have the same consideration, and in some, by reason of their greater age, even more. \* \* \* But whatever may be the logic of the matter, the rule contended for \* \* \* is so well settled that it is not now open to question. The general proposition is well stated in 20 Am. & Eng. Encyc. of Law, on page 375, in the following language: 'The re-

ceiver is not bound to respect or continue a contract entered into before his appointment. To do so on any grounds other than necessity for the operation of the road would be to divert the earnings from the purposes for which the receivership was created. \* \* \* Claims for loss incurred by the refusal of the receiver to fulfill such contracts remain in the same status as other debts of the company incurred before the receiver's appointment."

See also *Commercial Bank, etc. v. Gates*, (Mich.) 80 N. W. 13; *Brown v. Warner*, (Tex.) 11 L. R. A. 394. In this case it is said:

"Let us suppose, then, that the proprietor of a cotton gin has contracted to gin the cotton of his neighbor at a certain rate, and that, before he has performed his contract, the property is placed in the hands of a receiver, who is directed to operate it. Can it be said that he is liable in damages should he refuse to comply with the contract? Certainly not. He is appointed, not to carry out the proprietor's contracts, but to manage and preserve the property."

In that case, it is further said:

"If appellee were unable to recover damages of the company for its breach of the contract by reason of its insolvency, it is a misfortune he has suffered, doubtless, in company with numerous other simple contract creditors. For the failure to perform the contract, his cause of action was against the company, and it was not of that character which could be brought against the receivers without leave of the court."

The holding of that case is that the party to the breached contract might have a cause of action against the original contract party, but had no cause of action against the receiver for the breach of the contract, unless the receiver had ratified and adopted it as his own. Then, we take it, such

ratification or adoption might well be subject to the approval of the court appointing the receiver.

The better practice is that, before adopting an executory contract and binding the estate in his hands by such adoption, the receiver should submit the matter to the court for its approval. Improvident contracts are often the very basis of the conditions which make the appointment of a receiver necessary for the protection of the assets in the interest of creditors. *Casey v. Northern Pac. R. Co.*, (Wash.) 48 Pac. 53; *Spencer v. World's Columbian Exposition*, (Ill.) 45 N. E. 250. In this case it is said:

"The general principle \* \* \* that a receiver has, subject to the order of the court, the right to elect whether he will perform the contract or not, and is entitled to a reasonable time, after taking possession, in which to make such election, is not denied. It is so laid down by many authorities."

This case affirms the general doctrine. See also *United States Trust Co. of New York v. Wabash Western R. Co.*, 150 U. S. 287 (37 L. Ed. 1085). The general rule is there recognized and adopted that a receiver is not bound to accept the executory contracts, or otherwise step into the shoes of the one for whose property he is appointed receiver, if, in his opinion, it would be unprofitable or undesirable to do so, and he is entitled to a reasonable time to elect whether to adopt or repudiate such contract. *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1; *Fountain v. Stickney*, 145 Iowa 167. For a full discussion of the subjects here under consideration, see High on Receivers (4th Ed.), Sections 273-a, 273-b, 273-c, and 273-d.

We hold, therefore, that the court was right in refusing to recognize defendant's counterclaim, and in refusing to hold the receiver responsible to the defendant for a breach thereof.

This brings us to a consideration of another proposition. There is no dispute in this case that the scheduled rates for services actually rendered were adopted by the court in estimating the amount of plaintiff's recovery, and we think the court was right in this. It is shown that the scheduled rates are the reasonable rates for such services rendered. The plaintiff claims, however, in addition, a certain sum as a fixed charge. This we are inclined to think the plaintiff is not entitled to. The fixed charge is based upon the assumption that the receiver agreed to and did keep on hand a current of sufficient volume or power to operate at all times, when needed by the defendant, at least 40-horse power. This the plaintiff neither contracted to do nor did. The charge of \$40 is for keeping the power in readiness for service, whether needed or not, and not for current actually supplied. It does not seem that the plaintiff should be permitted to recover this fixed charge unless it affirmatively appeared that he contracted to and did keep this amount of power supplied, whether used or not. The record affirmatively shows that plaintiff did not contract to do this, and that he did not keep or supply this full power, and is not entitled to this fixed charge of \$40 a month. The amount of plaintiff's claim, therefore, should be reduced for these 4 months by \$160, leaving the amount actually due plaintiff, which he has shown himself entitled to recover, \$285.51, with 6 per cent interest from January 1, 1914; and for this amount plaintiff is entitled to judgment, and no more.

Thus modified, the case is affirmed.—*Modified and affirmed.*

LADD, EVANS and SALINGER, JJ., concur.

JOHN F. MOHN, Executor, Appellant, v. LOTTIE J. MOHN et al., Appellees.

**FRAUD: Fraudulent Representations—Education, Experience, Etc.,**  
**1 as Bearing Thereon.** Evidence reviewed, on the issue whether defendant's education, experience, mental strength and business capacity were such as to render her easily susceptible to fraudulent imposition, and held to present a jury question.

**FRAUD: Fraudulent Representations—Jury Question.** Evidence re-  
**2 viewed,** on the issue whether certain false representations were made, and held to present a jury question.

**EVIDENCE: Presumptions—Conflicting Presumptions—Jury Ques-**  
**3 tions.** A war of conflicting presumptions of equal force necessarily presents a jury question.

**PRINCIPLE APPLIED:** Defendant gave her note for \$1,050 in payment of three \$350 installments of indebtedness owing by her deceased husband on January 1, 1905-6-7. In defense to an action on the note, defendant pleaded that the representations which were made to her, to the effect that her deceased husband owed said installments on said date, were false. To prove such falsity, defendant relied on the claim that, when a person executes a note, or files or makes a claim against an estate, a presumption arises that the note, in one case, and the claim in the other case, represented *all* that was owing at that time. Defendant showed that, after she gave the note in suit, the payee thereof filed against the estate of her husband a claim solely for \$100, as balance due on the 1905 installment.

Held that, if a presumption did prevail as contended for by defendant, it was at war with the following legal presumptions, to wit: (a) That every negotiable instrument is presumed to be upon a valuable consideration; (b) that a promissory note in the possession of the payee is presumed to be unpaid; and that at best the evidence on the matter in issue was in equipoise.

**FRAUD: Acts Constituting Fraud—Knowledge of Falsity—Con-**  
**4 structive Knowledge.** Actual knowledge that a representation was false is not deducible, as a matter of law, from the fact that the maker of the representation had *constructive* knowledge only that it was false.

**BILLS AND NOTES: Consideration—Surrender of Old Notes—Re-**  
**5 duction in Interest—Extensions.** Surrender of old notes, reduc-

tion of interest, an extension of time of payment, howsoever short, and even forbearance to make a claim, furnish adequate consideration for a new note by a wife for notes owed by her deceased husband.

*Appeal from Linn District Court.*—MILO P. SMITH, Judge.

SATURDAY, SEPTEMBER 29, 1917.

SUIT on promissory note executed by the defendant, Lottie J. Mohn; defense that plaintiff obtained same by fraud, and that there is no consideration for it. Both plaintiff and defendants moved for a directed verdict. The motion of defendants was sustained, and plaintiff appeals.—*Reversed.*

*Randall, Courtney & Harding and Jamison, Smyth & Hann, for appellant.*

*Remley & Remley and E. A. Johnson, for appellees.*

1. FRAUD: fraudulent representations: education, experience, etc., as bearing thereon.

SALINGER, J.—I. In his lifetime, Philip G. Mohn, the son of Conrad and Elizabeth Mohn, was the husband of the defendant, Lottie J. Mohn. After the death of Conrad,

some conflict arose between Philip and his mother as to the construction of the last will of the father. The dispute was adjusted in such way as that Philip became obligated to pay the mother annually the sum of \$350. Both mother and son are now dead. After the death of the son, but in the lifetime of the mother, plaintiff, another son, obtained from defendant a promissory note for \$1,050, payable to the mother. This son is now the administrator of the mother's estate, and brings this suit to collect said note.

It is defended that, in taking the note, plaintiff was the agent of the payee, and that it should not be paid, because:

(1) The husband of defendant died suddenly on October 19, 1906, and left her with three small children, and another was born in June, 1907; (2) that, on the day of her

husband's burial, his brother took advantage of defendant's sorrowful and stricken condition, and caused her to agree to have him appointed administrator of her husband's estate, and thereupon immediately took possession of all the real estate, falsely alleging that he had a right to do this as administrator; (3) that as administrator he took possession of all exempt property; (4) that he assumed control of all her property and business transactions, and on all occasions told her what to do; (5) that he falsely alleged that the relatives of defendant would get her property from her unless he protected her from them; (6) that, at the time she signed the note in suit, plaintiff took advantage of his influence over her and directed her to sign, assuring her falsely that her distributive share of the land would be liable, otherwise; (7) that, for the purpose of deceiving and defrauding her, he represented to her, falsely, that the annual payments of \$350, due January 1, 1905, 1906 and 1907, respectively, were wholly unpaid, and that her distributive share of the real estate was liable for same, and such estate would have to be sold to pay such annual payments unless she signed said note; (8) that in truth her deceased husband had fully paid all annual payments due up to the time of his death, including said three annual payments, and in truth her distributive share and the land of her deceased husband were in no way liable for the payment of said annuity; (9) that all this was well known to Elizabeth, for whom plaintiff was acting, and so known to her when plaintiff made said representations; (10) that all said representations made by plaintiff at and before the time when said note was signed were false, and so known to be at the time when he made them, acting in behalf of Elizabeth; (11) that defendant never transacted any business, was inexperienced, and relied on plaintiff to advise her what to do; that she trusted him and relied upon his advice

in all things pertaining to the estate of her late husband and her property; that she relied on said representations, and, because she believed them to be true, signed the note; and (12) that her distributive share was not liable for the debts of her husband,—she was in no manner liable therefor,—and that, because of the premises, she received no consideration or benefit whatever for executing said note.

The motion for a directed verdict made by defendant, which the trial court sustained, asserted that it was shown by the uncontradicted evidence that said note was procured by false and fraudulent representations, and by fraud; that there is no evidence that any consideration was given therefor; that the uncontradicted evidence shows that the greater part of the alleged indebtedness for which the note was given had been fully paid before same was given, and before the making of the false and fraudulent representations which procured the note; that the fact that there had been such payment was, at the time the note was obtained, well known to the agent of the payee; that, the action being bottomed on a promissory note procured by fraud, such fraud vitiates the entire contract, and, as plaintiff is not entitled to recover the whole amount of the note, he is entitled to recover no part thereof; and that, on the whole record, if a verdict should be returned for plaintiff, it would not be sustained by sufficient evidence, and it would be the duty of the court to set it aside. The appellant says it was error to sustain this motion. It is self-evident that the trial judge held that the material allegations of the answer in the essential points urged in the motion to direct were so conclusively proven as that there was no question for the jury on whether what the defendant charged was sustained by the evidence. We then have for review whether what defendant claims is established as matter of law.

II. One vital defense is, in effect, that the plaintiff induced defendant Lottie to sign the note in suit by falsely



representing to her: (1) That plaintiff's mother held two notes against the late husband of defendant, and that the husband owed the mother \$350 additional for the use of the mother's land; (2) that these three items remained unpaid; (3) that the plaintiff took advantage of the defendant's sorrow over the sudden demise of her husband, of her impaired physical condition, and of her lack of business experience and capacity and of her isolation, to induce her to sign the note in suit. The claim is one of deliberate fraud or nothing, and we are told by the brief of appellee that the evidence shows that the plaintiff practiced fraud under such circumstances as that he could not help but know that the statements he made were untrue, and that "there is no question of honest mistake or innocence in the case."

As to isolation and lack of business advisors, while defendant testifies that she was in such situation, she greatly modifies this, and the weight of all the evidence on this head was fairly for a jury. As to her physical condition, one significant fact is that, though then in a very advanced state of pregnancy, she was engaged in dropping potatoes in the field almost up to the very moment at which she signed the note in suit.

This is not an attempt to avoid a note upon the ground that it was obtained from an incompetent. The only claim for the condition defendant was in is that it made the representations charged, or helped to make them, effective. We are fully persuaded that a jury would be sustained in finding that defendant had at least the average education, experience, mental strength and business capacity. The jury could find that defendant stated that, in a talk she had with payee, it was said that a renewal note could be made at five per cent., and that defendant did the figuring, which consisted of figuring out the aggregate principal of the items that made up the new note and the accrued interest upon these items. She has clear, concise and accurate com-

prehension of what property her husband left, and just what items of it were sold, and she knows that the personal property left is insufficient to pay the note she signed. She says she sold most of her own personal property after the death of her husband, but, at the time she signed the note in suit, she still had an 80, and still has it. She says they had hired help during the last five years of her husband's life; that he always left it to her to keep their time as he paid them off; that she kept the time and the payments, and looked after that, and had practically all the handling of that feature of "our" business; and that they took a paper giving the market reports, and she generally looked at that paper. She handled the poultry and knew how much she got for it, and the amount that it was sold for was always reported to her. She knew at the time how much the eggs amounted to, but she didn't keep track of it because they were mostly traded for groceries, etc., at the stores. For a year she kept books for her husband, setting down the amount of things that she had bought and that he had bought and the things sold, including the amount of produce sold, and the wages of the hired people. During that year she knew just what her husband was doing; he told her all of his affairs so that she could set them down. It was the year after they were married during which she "kept a regular bookkeeping system," but after that first year, she simply kept a daybook, a journal account. She was interested to some extent in her husband's speculations in cattle, and in his farm operations. She says she knows when an 80 she still owns was bought; that, while she hadn't been over the land, she had been along the road, knew what the price was, though she didn't know how much cash was paid; that she probably signed a mortgage to William Peffer for the balance, and she doesn't know whether or not he later transferred it; that the piece of ground her questioner calls the 80 acres was rented by Garrett, who generally

paid by check; that, whenever these checks were due, he generally brought them to their house, and the administrator required that she sign her name on the back and turn the checks over to him, claiming that she had no right to the checks, and that they belonged to him; and she did it. She has deductive power enough to say she knows that plaintiff had no note for 1906, because her husband didn't usually settle until after January 1st.

She seems to appreciate the exact value of words in testifying. Being asked whether or not she had knowledge of the business transactions of her husband specifically, as, for instance, how much he gave for this or that property, or whether she was consulted about that or he attended to that all himself, she answered: "I was not consulted, but some things I knew of, heard about." In another place she says that sometimes, but not always, she knew what her husband paid for the stock he bought; that he sometimes talked it over with her when he came home in the evening. Again, she says the husband sometimes consulted her when he sold the stock. Once more, she does not know "exactly" how many cattle her husband fed from year to year, and she only knew "by reading the sale bill" how many head of cattle her husband had when he died. She does not know the "exact" number of horses, but it is probably about 20. She was able to correct her testimony by saying that, where she had stated that her husband told her he owed nothing unless it was for the year 1906, she meant 1905.

An attempt was made to bring out that the relations between her father and her husband were such as to have made it natural to suggest to her that her father should not act as administrator of her husband's estate. In that connection, and for that purpose, she was asked how long it had been since her father and her husband and she had spoken when they met on the road. She answered, "I don't remember of ever meeting my father on the road." Being

then asked, "You were on speaking terms with your father at this time, and your husband hadn't been for a considerable time," she answered, "We always spoke when we met." It being then suggested by counsel that she had said she didn't remember that they met, she answered, "There are places to meet besides on the road." She said that her husband, her brothers and her father had had no quarrels in her presence. She was then asked: "You knew they had had such quarrels, though?" She answered, "They may have." Being then asked, "You knew they had had, didn't you?" she answered that she never heard any of it, and, this being followed up by the question, "But you had heard of it?" she answered, "A little."

It seems that defendant's father sued the estate of her husband; filed a claim against it. She was asked whether she recalled that her father presented a claim against the estate of her husband on note, and she answered, "Through the administrator I knew it." She apprehended and was able to state that her father dismissed that claim, and that he said to her that she might have the note upon which the claim was based, as a share of his own (the father's) estate.

When she went to the office of an attorney with the plaintiff, the plaintiff said they had come to have an administrator appointed, and when the lawyer produced blanks, plaintiff said, "You will have me put in as administrator, won't you—have me appointed, will you not?" She answered, "No;" whereupon plaintiff said, "Whom will you have,—your father?" She testifies that she didn't say whether she would have her father or whom; that thereupon the lawyer said he thought it would be better,—that she would better have plaintiff appointed, and the lawyer thought plaintiff would do the right thing by her. According to her own testimony, she still hesitated, because she didn't know what they wanted of her up there, and hadn't

known they were taking her there for that purpose.

We repeat that the weight to be given to her situation, physical condition, experience, business capacity and her ability to resist pressure, were fairly for the jury.

III. On the circumstances attendant upon signing the note, and on whether any and what representations charged were made, both sides say much that is not very reasonable or probable. But dealing with that was for the jury. On the substantive question, believe one, and some of the material representations alleged were made: believe the other, plaintiff never said a word to induce the writing of the note; all that was done was volunteer action on part of defendant; she did the making of the note and the signing because of a prearrangement with Elizabeth, and as a means of reducing the interest; she read the old notes as well as the new; herself made the adjustment effectuated by giving the new note. Assuming, for the sake of argument, that the representations testified to by defendant would avoid the note, it certainly was open to the jury to find that no such representations were made, and it was not for the court to decide that such representations were made.

2. FRAUD:  
fraudulent  
representations:  
jury ques-  
tion.

3-a.

Another reason why this is so is that there was sufficient question of credibility so that, for that reason, the question of whether representations charged were made should have been submitted to the jury. On examination as to whether defendant had made certain statements to the attorneys of the estate, she proved very evasive, but under pressure, said finally what a jury could well find amounted to admitting she had made false statements, and when asked if she had not elsewhere testified to the effect that no representations were remembered by her, and that she

signed simply because she was told to, which was according to her habit, she answered, "I don't know." She began with saying that she did not remember writing the note in suit; that it looks like an imitation of her writing, and if she did write it, she wrote merely because what she wrote was dictated to her. On cross-examination, she said that she not only signed the note, but wrote the note entirely herself. She discloses fairly close general knowledge of and participation in the business affairs of her late husband, and also says that after marriage she took no part in business matters.

### 3-b

We think it a close question whether there is any evidence of reliance, but in view of a retrial, prefer not to pass upon that point.

IV. There is no direct testimony worthy of the name for the claim that representations made, if any, were false and known to be false. As to this, defendant testifies first what is quite without evidentiary value, namely, that, in her opinion, there was no note of her husband outstanding for the rent of 1906, because the husband didn't usually settle until after January 1st; second, that she does not know whether or not there were notes for 1904, 1905 and 1906; that, while plaintiff said there were, she made no search among her husband's papers for notes or receipts; third, that she knew nothing of the affairs of the estate, including paid claims, never figured how much was due for rent at any time, and never talked about it until the day she made the note. She remembers that she and her husband talked one evening, and she told the husband he owed a little on the year 1906, but not very much.

The theory of the appellee is that this proof is supplied by a so-called presumption that the execution of a promissory note or a mortgage to secure indebtedness, or the like, is evidence "that all matters between the par-

3. EVIDENCE:  
presumptions:  
conflicting  
presumptions:  
jury ques-  
tions.

ties up to that date had been settled." See *Eaves v. Henderson*, 17 Wend. (N. Y.) 190; *Gould v. Chase*, 16 Johns. (N. Y.) 226; *Smith v. Bissell*, 2 G. Greene 379; *Grimmell v. Warner*, 21 Iowa 11; at 13; *Allen v. Bryson*, 67 Iowa 591, at 597; *Hopley v. Wakefield*, 54 Iowa 711, at 713. This claim is based upon the fact that, on the 29th of April, 1909, the payee of the note in suit filed a claim in the estate of defendant's husband for rent for the season of 1905; made affidavit that the claim was genuine, just, correct and wholly unpaid; that the sum of \$100.68 is justly due; that the court approved the claim; and that, on the 24th of November, 1909, the plaintiff, as administrator, paid said payee said sum, for which she receipted as being payment for the balance due for rent for 1905.

The first position of appellee upon this is that the law presumes that the payee filed all claims she then had against the estate; that, therefore, all such claims were paid and satisfied, and any representation that there were unpaid debts due from the late husband to the payee of the note were, therefore, false. Assuming this to be so, it still does not follow that the court was warranted in directing the jury to find for the defendant on that issue, because there was a conflict of presumptions. There is also a presumption that has at least as much force as the one commented upon, and which is created by our statute,—that every negotiable instrument is deemed *prima facie* to be upon valuable consideration, and that everyone whose signature appears thereto is a party thereto for value. So, there is a presumption that, if the payee has a promissory note in his possession, same remains unpaid. Of course, an existing antecedent indebtedness may be sufficient consideration for a new note. Now, we have held in *Schaefer v. Anchor M. F. Ins. Co.*, 133 Iowa 205, at 209, that presumptions of this class may be so conclusively negated as that the court may hold, as matter of law, that such presump-

tion has been met. But that is not this case. The most that can be said is that the presumption arising from the fact that the note is in writing and signed, and from the fact that the payee retained the possession of the old notes, and that, therefore, they were unpaid when the new note was given, is met by another presumption that, where a claim is filed, all matters antedating its filing have been satisfied between the parties. Put it at its best for the appellee, and the testimony on whether there was a living indebtedness to go into the new note is in equipoise, and, as the defendant had the burden of proving that the things put into the note had been paid off, the court was not warranted in directing the jury that, as matter of law, these had been paid off.

4-a.

4. FRAUD: acts constituting fraud: knowledge of falsity: constructive knowledge.

But grant, for the sake of argument, that the filing of this claim would establish, unless met, that the estate of Philip was not indebted for rent for the year 1906. Can we go beyond that, and hold that, because there is such presumption, and because all men are presumed to know the law, plaintiff was guilty of actual fraud, in that he knew there was being included in the note taken by him an item which had been paid? We think it may fairly be held, both on reason and what we decided in *Markey v. Chicago, Milwaukee & St. P. R. Co.*, 171 Iowa 255, at 262-4, that this is not so. That case concedes that, in the sense of fixing rights or imposing obligations, constructive notice and the rule which charges all men with having knowledge of the law are equal to actual knowledge; but it is fairly to be deduced from the case that neither constructive notice nor said presumption will supply *scienter*; that there cannot be guilt by construction, it being held, for instance, that one may not be guilty of negligence for failing to move with diligence on what he might learn on search of records,



and that to establish *scienter*, which means proof of a mental condition, requires affirmative proof that such mental condition existed. It follows that *scienter* was not established, as matter of law, even if the jury might have found it.

V. Only part of the remaining question has been disposed of, and that is the effect of fraud upon the claim of want of consideration. As we hold that the question of fraud was at least one for a jury, the doctrine that, where fraud taints part of the consideration, the valid consideration will not save the enforceability, has no application. We now reach whether want of consideration was so conclusively established as that the direction for defendant was justified on that ground. As has been seen, if there be a presumption that the husband owed nothing, and, therefore, the note given in consideration of his claimed indebtedness was without consideration, there are other presumptions that negative the first presumption, which made whether he owed a jury question.

5. BILLS AND  
NOTES: con-  
sideration:  
surrender of  
old notes:  
reduction in  
interest: ex-  
tensions.

If the husband was indebted to the payee, a consideration for the new note is made out if the jury could find that the two old notes executed by the husband were surrendered to the defendant in consideration of her making the new note, and that she retains them. It is true there is a conflict on whether they were ever surrendered to her, but it is a conflict, and it was for the jury and not for the court to resolve it. If the jury found that the husband was indebted, a sufficient consideration, at least as to those who represented the husband, is furnished by the fact that there was a reduction of interest, the old indebtedness drawing six while the renewal note drew five per cent. Upon this, too, there is conflict. At least one witness, Oscar Mohn, testifies positively that such change

in interest was discussed and agreed upon. This question, too, was for the jury.

There is a contention that there is no evidence that there was any extension of time, because the date at which the note sued on became due is left blank. We think it appears fairly, from the record as a whole, or at least sufficiently so to make that a jury question, that taking a new note at the time it was taken, in view of what the old notes are said to have been given for, worked an extension; that, if the note had been paid on the very day it was given, it would still have been paid at a time later than the old notes required. This furnished a consideration.

The last contention for the appellee is that, as the personal property of Philip was insufficient to pay the claims against his estate, and as the distributive share of the defendant was not liable for debts, and as, therefore, no property belonging to her could be taken for payment of debts against the estate of her husband, therefore the note she signed was, as to her, without consideration. She and her child were beneficially interested in the estate of Philip. The mere forbearance to make a claim against that estate, or surrendering the notes against her dead husband for her own note, seems to us to be sufficient to support the new note. Moreover, it appears nowhere that, whatever was the relation of the personal property to the debts, there was not land left which, if sold to pay the notes of Elizabeth and her claim for the rent of 1906, would not have diminished, or have led to the selling of, lands left by the husband. We think *Cole v. Charles City Nat. Bank*, 114 Iowa 632, at 634, and *Hartman v. Chicago G. W. R. Co.*, 132 Iowa 582, at 584, fairly support the claim that the case of the defendant, as a whole, was one for a jury; and that *Thompson v. Maugh*, 3 G. Greene 342, *Atherton & Ricker v. Marcy*, 59 Iowa 650, at 653, *Young v. Shepard*,

(Mich.) 83 N. W. 403, and *Union and Planters' Bank v. Jefferson*, (Wis.) 77 N. W. 889, give very considerable support to the claim of the appellant that the note in suit was sufficiently supported by a consideration. It follows that there must be a reversal because a verdict was directed for the defendant.

VI. The appellant presents that a verdict should have been directed in his favor, and it is responded that, while such motion was made at the close of the testimony for the defendant, the plaintiff thereafter put in testimony, did not renew his motion, and, therefore, according to our oft repeated decisions has waived any error in overruling the motion to direct for plaintiff. Some of the cases which make this rule of practice also hold that it does not preclude from raising the sufficiency of evidence to sustain the verdict. But the effect of that holding needs no consideration. For it appears that while, at the close of all the testimony, there was not a formal motion to direct verdict, the plaintiff did move the court to withdraw the defense of fraud, misrepresentation and undue influence. This was overruled, and that ruling is properly presented on this appeal. We have pointed out that there is a conflict on whether the representations alleged were made; have left the question of whether there was reliance open. As we hold that it is a jury question whether the husband of defendant owed anything, we have thus left open whether, if representations are found to have been made, they were falsely made. While we hold that there is no direct testimony of falsity, and that neither falsity nor *scienter* are made out as matter of law, we are not prepared to say, in view of a retrial, that, as matter of law, the proof of falsity and *scienter* has failed. It follows that plaintiff is not entitled to a directed verdict upon the record now presented to us,

or, at any rate, may not be entitled thereto upon the record that may be made on retrial.

For the reasons pointed out, the judgment of the district court must be and is—*Reversed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

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RUTH NASSEN, Appellee, v. THOMAS ANFENSON et al., Appellants.

**INFANTS: Disability in General—Guardians—Right of Minor to**  
1 **Choose—Estoppel.** A minor of sound mind reaches his or her majority at the age of 14 years *for the purpose of selecting a guardian of property.* (Section 3195, Code, 1897.) It follows that a minor over 14 years of age who selects his or her property guardian may be estopped to deny such guardianship.

EVANS, J., concurs.

GAYNOR, C. J., and LADD, J., withhold judgment on the discussion under this point.

WEAVER, PRESTON and STEVENS, JJ., did not sit in case.

**GUARDIAN AND WARD: Custody of Ward's Estate—Failure to**  
2 **Qualify—Ratification—Estoppel.** One who, on reaching majority, knows that funds belonging to him have, in good faith, been paid to a supposed guardian (appointed on motion of the claimant while a minor), and for more than a year recognizes the rightfulness of the payment to said supposed guardian, collects a part of the funds from such guardian, and in no wise repudiates such payment until he discovers that said supposed guardian has never qualified and is insolvent, is estopped to deny that such guardian is his guardian. Such conduct constitutes such supposed guardian an *agent by ratification*.

*Appeal from Hamilton District Court.—R. M. WRIGHT, Judge.*

TUESDAY, JUNE 26, 1917.

REHEARING DENIED SATURDAY, SEPTEMBER 29, 1917.

ACTION in equity to foreclose a mortgage securing a note given by the defendants to the guardian of the plaintiff. The plaintiff prevailed, and defendants appeal.—*Reversed.*

*D. C. Chase*, for appellants.

*O. J. Henderson*, for appellee.

SALINGER, J.—I. This much stands admitted, or is clearly proven: About May 11, 1904, defendant Thomas Anfenso made to one Iverson, as guardian of the property of plaintiff, then a minor, his note for the principal sum of \$529.17, with interest at 6% per annum, due February 13, 1915; to secure the payment of the note, both defendants made to Iverson, as guardian, a mortgage on premises described. Iverson died on October 25, 1911. At this time, the plaintiff was still a minor, but she was over 14 years of age when, on December 18, 1911, she, at the suggestion of the defendant Thomas Anfenso, who is her stepfather, made application that Himmel be appointed guardian to succeed Iverson. The administrator of Iverson notified that it was necessary to have a guardian appointed to receive this note and mortgage, and he says as a witness that "they" wanted Himmel. At this time, Himmel was a banker in reputable standing. On May 21, 1912, Himmel was appointed guardian, and his bond fixed at \$2,400. The clerk of the proper court testifies:

"Q. I ask you if you can state from your examination of the records that no bond or oath or qualification has ever been filed by J. E. Himmel as such guardian. A. No, sir."

The witness adds that no letters of guardianship were ever issued to Himmel. The administrator of Iverson turned the note and mortgage over to Himmel, and Himmel,

1. INFANTS :  
disability in  
general :  
guardians :  
right of  
minor to  
choose : es-  
toppel.

on May 21, 1912, receipted therefor as guardian. Both plaintiff and defendant Thomas Anfenson understood at this time that Himmel was acting as her guardian. He had in his hands moneys belonging to plaintiff other than what was paid him on the note given by defendants. She never made inquiry whether Himmel had qualified, and assumed that he had. It is conceded that Anfenson paid the note to Himmel and that Himmel acknowledged payment as guardian, conceded that neither before nor then did plaintiff or defendant know that Himmel had failed to qualify and give bond, and that Anfenson made full payment to Himmel about six days before plaintiff became of age, in good-faith belief that he was plaintiff's duly appointed guardian, and conceded that plaintiff erroneously assumed that he was such duly qualified guardian until, long after payment of the said note to Himmel, he went into bankruptcy, when it developed for the first time that he had utterly failed to qualify, and was wholly insolvent.

Defendant asked plaintiff, about three weeks before she became of age, and, therefore, about two weeks before he made payment to Himmel, whether she wanted that money when she became of age, and she said, "Yes." The note was not due until April, 1915, but he raised some grain and paid the note to Himmel before it was due, some six days before plaintiff became of age, and understood at that time that he was plaintiff's guardian. As will appear, Himmel paid plaintiff part of what was paid him on the note. She never told defendant of the payment Himmel had made to her; never asked defendant about the money after he paid it to Himmel, and said nothing about her note or any money until Himmel went into bankruptcy, more than a year after defendant made payment. There appears this in the testimony:

"Q. Well, what did you think Himmel would pay you \$300 for, if he hadn't collected anything of your step-

father? A. Well, the agreement was made when he was appointed guardian that Mr. Anfenson was to pay it, and I supposed he had, and not asking him, I didn't know."

II. Though Himmel did not qualify, yet it was plaintiff whom the statute authorized to take and who took the step without which Himmel could not be her guardian, and in the absence of which he would not have acted as her guardian. She alone had power to select him. She had power to deal with any situation created by and to obviate results that might flow from his failure to take steps to qualify him; because, if he did not qualify, there was no guardian chosen, and she could choose another. Defendant had no such power. When she held Himmel out to be her guardian, she did not know he had not qualified. But neither did defendant know of the failure to qualify, when he paid Himmel. She did what defendant did not do. She held Himmel out to be her guardian; she permitted her note and mortgage to remain with him. Thus she laid the foundation upon which Himmel could work a fraud upon anyone who in good faith believed that Himmel was authorized to act as guardian and to take payment upon the note and mortgage which he had in his possession. More, the record fairly shows that, shortly before her minority ended, plaintiff had reason to believe that defendant would pay this note to Himmel, and made no objection. The position of plaintiff is that, though more than 14 years old, she was still a minor in such sense that no act or omission on her part could estop her to deny that Himmel was her guardian, and that here is a naked case of payment made to one who had no authority to receive it. This position is sound if she had been less than 14 years old. The question is whether Section 3195, Code, 1897, worked a limited manumission which subjects her to being estopped to deny that a guardian chosen by her is not legally her guardian.

What is it that creates the disabilities and grants the immunities of minority? The legislature. Who can take away wholly all disability or immunity? The legislature. If it can take away all, it can take away part. Majority and minority and municipal corporations are alike the creatures of statute. And in *School District of Fairview v. School District of Burlington*, 139 Iowa 249, we said of the last that they are such creatures; that their existence, powers, rights and privileges are all creatures of legislative will; and that the power that made them can unmake, and the power that gave them can withhold or take away.

What has the legislature done? Section 3195 of the Code of 1897 is:

"A minor over fourteen years of age, of sound mind, may select the guardian, subject to approval by the district court, or a judge thereof, of the county in which his parents reside, if living with them, if not, of the county of his residence."

It is suggested that this but recognizes that one over 14 is old enough to make it important that there shall be no friction because a personal guardian is not pleasing to the ward. But that could not have been the object of the statute. It deals wholly with a guardian over property. Section 3194, Code, 1897, which deals with guardianship of property, is its antecedent. The parents are the guardians of the person, and no other is to be appointed as long as there are parents. Yet Section 3195 permits the choosing of a guardian while the parents are living. All of which emphasizes that the selection which it authorizes is of a guardian to manage property.

Why is it not plainly the purpose of the statute to recognize that, when 14 is reached, youth no longer negatives intelligence to choose a proper guardian of property,—to declare that, when and after that age is attained, there exists



an ability to do business as to this particular thing which was not possessed before? It was intended that none save persons of sufficient intelligence to make it properly should be permitted to select, because the statute, in terms, excludes those who are not of sound mind. Taking into consideration statutes *in pari materia*, we find other instances wherein the legislature recognizes that, though a minor, one may be qualified to do some things, properly. Though a minor, one may maintain actions for nuisance, waste and trespass done in the time of his ancestor, as well as in his own time. Section 4308, Code, 1897. When younger than 14, service of notice must be made on someone other than him. After he has reached 14, service on him is sufficient. Section 3533, Code, 1897. He is bound by notice of appeal served on him. *Brundage v. Cheneworth*, 101 Iowa 256. True, the selection of a guardian made by him must have the approval of the court, but, manifestly, one may be liable for acts done by him though the act is to be done only upon an approval. An administrator may not, without an approval, bind the estate, at least as to some things. But the very fact that he does them without such approval will make him liable individually. At this point we must try to avoid reasoning in a circle. We must not say that selection is authorized because ability is recognized; that approval of selection and qualifying is necessary to give powers to the one selected, as to the world at large; that the selector can insure an approved selection and qualification by the one selected, because he can make a new selection until there is an approval and qualification, but that, if he fails to get the approval or the qualification, which he has power to insure because he is recognized as having the necessary intelligence, this proves that the power given him was not a recognition of his having such intelligence.

It may be said that it is unreasonable and arbitrary to authorize one at 14 years of age to select a guardian to

manage his property. Many will so say as to the statute which ends minority in males at 21, in females at 18, and which allows all minors to attain full majority by marriage. As to the last, it removes all disability, while Section 3195 removes but part. The same argument can be more strongly urged against authorizing service of original notice and of notice of appeal to be made on one who has attained 14 years. To a certainty, one of that age may be as well qualified to select a guardian to manage his property as he is to determine whether to defend against a suit or an appeal which may take all of his property from him. Even more strongly may the statute be arraigned which permits a minor of any age to maintain actions for nuisance, waste and trespass done before or in his time. We might well content ourselves by saying that, if it were not clear that authority to do these things had been granted by the legislature, we would consider that upon the question *whether* manumission with reference to guardianship was granted, or these other acts authorized. But, as said in *School District of Fairview v. School District of Burlington*, 139 Iowa 249, while it is true that legislative power may be unwisely exercised, and that a statute generally wise may operate oppressively in individual instances, such matters are for legislative consideration. If the legislature *has* removed a disability, taken away a privilege or an immunity, or granted a right or a power, we can do nothing, though the action be arbitrary or unreasonable. That the legislature has so ordered is the all-sufficing answer, though it were conceded that it acted unwisely and improvidently. All these things matter only if there be reasonable doubt on whether it has acted as claimed. We might well stop here; but it is not to be said, either, that the statute exhibits any unreasonableness. What if the time limit fixed is arbitrary? In the very nature of things it must be. Boys

become entitled to all the privileges of an adult when they reach 21. Some are fully able to take the responsibility of a major when they are 19. Some never become thus able. But we would not undertake to say that, therefore, majority for the male was not established at 21, nor that it was an unreasonable time. It can be said that, if it be wise to stop minority in a male at 21, it is unwise to do the same thing for a female at 18. Certainly, many instances can be thought of wherein it has proved unwise to have minority removed by a marriage before the statute age discontinuing minority has been reached. But all will concede that such objections must be addressed to the legislature, and that there is nothing so unreasonable as that a court could hold that majority was not reached at 18, and that marriage did not work an attainment of majority.

These and other statutes on the same subject can be said to be unreasonable only if it be against reason to couple a grant of power or removal of a disability with corresponding duty, obligation and responsibility. On that reasoning, the minor who is authorized to maintain an action for nuisance, waste and trespass is not bound to pay the costs of suit, if the one he institutes be defeated. Before he is 14, no valid service of notice can be had upon him. He may be effectively served after he has reached that age. Is he as little bound by the notice which may, as by the one that might not, be served upon him? After he is 14, substituted service may be had upon him, binding others. On what theory? Manifestly, by entertaining the conclusive presumption that he has intelligence enough to apprehend the effect of the service, and that he will advise the member of the family impleaded of having been served. In this illustrated case, there is more than a recognition of ability to act for himself. He is made the agent of another, and that other is bound and may suffer,

if the agent do not do the duty which the law presumes he will perform.

If we are to go into the question of reasonableness, the legislature had to fix an arbitrary time, and must be credited with having had all the possibilities in view when it made this time limit. If it can be said that it seems unreasonable to give a 14-year old girl powers which would make her responsible if her negligence in either selecting or having qualified a guardian injured another, it must also be said that, without this statute, a girl just one day short of being 18, or a boy just one day short of being 21, could deliberately defraud another by a pretense that one receiving payment was a duly qualified guardian, and yet escape all liability. And truly illuminative is the provision of Section 3190, Code, 1897, that a minor may not disaffirm his contracts where, on account of his having engaged in business as an adult, the other party had good reason to believe him capable of contracting. The legislature, being obliged to fix an arbitrary time, must have had all the periods and possibilities we have spoken of in view. In view of all this, it is not unreasonable to provide that minority was removed after a person of sound mind attained the age of 14, to the extent of making such person responsible if something done or not done by him in the selecting of a guardian subjected another not in fault to an injury. And it should be borne in mind that, if this statute does not create a limited manumission, it is because we must hold that the statute had no purpose. Without it, this plaintiff could not be estopped or have any responsibility concerning the appointment of a guardian until she became 18 or married. If that is still so, notwithstanding the enactment of this statute, then there was no occasion for the enactment.

We think the plea of minority does not avail to pre-

vent plaintiff from being estopped to deny that Himmel was her guardian.

2. GUARDIAN AND  
WARD: cus-  
tody of ward's  
estate: failure  
to qualify:  
ratification:  
estoppel.

III. Grant, for the sake of argument, that nothing done or omitted before she reached 18 can bind her. We have next to consider what she did after she was 18. She then did what clearly amounts to taking part of what had been paid to Himmel, knowing he had been paid the note, and extending credit to him for the balance. For it appears that she made repeated efforts to get money from Himmel, called on him for that purpose several times; she found him absent, but finally did meet him in April, 1914, more than a year after the note had been paid to Himmel, and then attempted to collect what had been paid. At this time, she still supposed he had been her guardian. In her own words, he paid her \$300, put her off for the rest, and in a couple of weeks he went into bankruptcy. She understood that the \$300 paid her was part of what Anfenson paid on his note. Himmel admitted he had collected the note, paid the \$300, and said he couldn't pay all of it then; that she should wait a couple of weeks and he would pay her the balance when he straightened it up in court. He refused to pay her the balance on the pretext that he could not do so until the next term of court, when he would make an accounting and settlement with her in full. There can be no question of her attitude with reference to considering Himmel a debtor. She complained because he had not paid her, and spoke of it as a failure to receive the balance of her estate, and it was only at the very last that she thought of suing her stepfather.

She deferred all activities towards collection until collection had become hopeless. It was only after Himmel went into bankruptcy that she took steps to ascertain whether he had a bond, and consulted lawyers to that end. It was then that she first proposed to collect the balance of

him and his bondsmen, if she could.

One theory advanced by appellee is that defendant has suffered no prejudice, and therefore no estoppel arises. It is not at all clear that prejudice is lacking. If more pressure had been brought to bear by her, Himmel might have paid all, rather than part. Had she, as soon as she could after becoming of age, advised defendant of the situation, he might have forced, or attempted to force, Himmel to pay over the balance. She preferred to make Himmel her debtor. But, in a sense, the presence of prejudice is quite beside the question, which is, how plaintiff may deny that Himmel was her agent to receive full payment on the note; how she can avoid the agency by ratifying only so much of what her agent did as is to her profit.

In this suit, she concedes that the part that Himmel paid over to her is a credit to defendant, and he was given such credit. Assume that she never gave Himmel original authority to collect this note, yet ratification is equal to original authority. We see no escape from holding that there was an agency by ratification. If defendant is now entitled to a credit for part of what Himmel received, it must be because Himmel was empowered to receive all. Where one receives \$600 for another, and that other is advised of the fact, he may not take \$300 of the sum paid in, agree to defer payment of the balance, treat the \$300 paid over as received upon authority, and deny that there was authority to receive all because part was not paid over. We cannot escape it will not avail to say that an agent who was authorized to receive \$600 paid her but half of that sum. In essence, the trial court permitted a ratification which adopted only so much as was beneficial to plaintiff. We are of opinion that Himmel was the agent of this plaintiff and never the agent of the defendant, and that any loss suffered because the agent was guilty of a breach

of duty must fall on the plaintiff and not upon the defendant.

3-a.

It is urged that, though Himmel had the note in his possession, defendant cannot be said to have paid the note to one apparently the rightful holder or owner thereof. The argument is that this results from the fact that the note bore no endorsement of payment other than interest, and that the mortgage was never formally released. We do not agree to such deduction from these premises.

It follows that the decree of the district court must be—*Reversed*.

GAYNOR, C. J., and LADD, J., concur in the result, but do not wish to be bound by Paragraph II of the opinion. EVANS J., concurs.

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HARRY L. OGG, Appellant, v. E. H. ROBB, Appellee.

**LIMITATION OF ACTIONS: Computation of Period—Torts—Knowledge of Wrong But Ignorance of Extent of Damage, Effect of.** A wrongful or negligent act which invades some legal right of another gives rise to a cause of action from the date when the injured party has knowledge of such act, and not when the full extent of the damages develops, even though the wrongdoer falsely and fraudulently assures the injured person, at the time of the doing of the act, that the injury is temporary and of no consequence.

**PRINCIPLE APPLIED:** Plaintiff alleged that defendant negligently experimented on plaintiff's arm with an X-ray machine; that the flesh became discolored by reason thereof; that defendant falsely assured plaintiff that the discoloration was temporary and of no consequence, well knowing at the time that he had produced effects and conditions that would finally develop into malignant cancer; that defendant treated the discoloration, and the same disappeared, but a scar remained; that, twelve years later, said injury did develop into a malign-

nant cancer; that, until the cancer did so develop, plaintiff was ignorant of the fraudulent concealment of defendant. *Held*, petition was demurrable because the cause of action accrued when the discoloration and injury became known to plaintiff, and not at the time the cancer developed.

*Appeal from Jasper District Court.*—K. E. WILLCOCKSON, Judge.

FRIDAY, APRIL 6, 1917.

REHEARING DENIED SATURDAY, SEPTEMBER 29, 1917.

As appellant states his claim, this is an action at law brought by plaintiff to recover damages for injuries caused by defendant's negligence and malpractice as a physician and surgeon, and by his fraud and fraudulent deception therein in connection with electric rays, radio-exposures, and use of an X-ray machine and medical services therewith. Plaintiff sued for \$50,000. Defendant interposed a demurrer to the petition, which was sustained, and, plaintiff electing to stand upon his petition, judgment was rendered against him for costs, and he appeals.—*Affirmed*.

*O. P. Myers* and *W. G. Clements*, for appellant.

No appearance for appellee.

LIMITATION OF  
ACTIONS: com-  
putation of  
period: torts:  
knowledge of  
wrong but  
ignorance of  
extent of dam-  
age, effect of.

PRESTON, J.—It is alleged that plaintiff was born September 2, 1884, and became of age in 1905. He was injured about June, 1901; he was treated and burned by defendant as hereinafter stated in July of that year; some time in 1908, defendant moved to Wisconsin, and became a nonresident of Iowa; some time in the year 1912, the tissues where plaintiff had been burned broke down, and became a malignant cancerous growth, necessitating the amputation of his arm; and it is alleged that this condition was first discovered in 1912.



This action was brought September 20, 1915.

Complaint is made by appellant that the court erred in sustaining defendant's motion to strike parts of the petition wherein it is alleged that defendant used the X-ray machine without the knowledge of plaintiff's parents. The parents are not suing in this action, and, in the view we take of the case, the ruling on the motion to strike is not material, because the stricken testimony would not have made a case on demurrer or prevented the running of the statute of limitations had the motion not been sustained. The real question in the case, as conceded by appellant, is whether his claim is barred by the statute of limitations. We have not been favored with an argument for appellee. We prefer argument, because, in its absence, the court is compelled to make an independent investigation.

It is alleged in the petition, substantially, that, in 1901, when plaintiff was under seventeen years of age, he accidentally broke his right wrist; that it had been set by other doctors, but, about June, 1901, defendant used his X-ray machine in one application upon plaintiff's wrist, to determine whether the bones were properly set, and found that they were; that, at this time, and for some years prior thereto, defendant had been a regular practicing physician and surgeon; that thereafter, and during the month of July, 1901, upon the request of defendant, and for the benefit of defendant, plaintiff went into defendant's office, without the knowledge or consent of plaintiff's parents, and defendant experimented upon plaintiff with defendant's X-ray machine, to secure pictures of plaintiff's hand and wrist; that he continued for ten days in said experiments, and used the X-ray machine on plaintiff's hand and wrist many times, and made long and close exposures; that, as a result thereof, the skin on his hand and wrist became discolored; that defendant then informed plaintiff and his parents that the use of the X-ray machine caused such

discoloration, and defendant then falsely and fraudulently informed plaintiff and his parents that this discoloration was of no particular consequence, and would be temporary in its effects, and defendant fraudulently concealed from plaintiff and his parents the true effect of radio exposure produced by the X-ray machine; that defendant then treated said discoloration for a time, and it apparently disappeared, leaving a scar, but the usual use of the hand; that plaintiff and his parents fully relied upon the statement and advice of defendant as to the temporary effect of said X-rays, and nothing further was done in regard thereto until 1912; that the use of said machine by defendant produced a cancerous condition, which was latent and dormant until 1912, and plaintiff had no knowledge of said condition until then; that at said time, the tissues of the right hand where the X-rays had been applied broke down, and became an epithelioma, or malignant cancerous growth, causing plaintiff great pain, suffering and mental anguish, greatly injuring his general health, and necessitating the amputation of his right forearm, in order to save his life; that, at great expense, during and since 1912, he has advised with the most skillful physicians and surgeons and experts, and made every effort to overcome the effects of said X-ray upon him as used by defendant, but that the outcome is not fully determined; that the loss of his right arm has greatly incapacitated him from earning his livelihood; that plaintiff was guilty of no contributory negligence; that in using said machine defendant was negligent, and thereby caused said injury; that defendant well knew that, by such use, he had produced effects and conditions that would finally develop into a malignant cancerous growth, which fact he knowingly and fraudulently concealed from plaintiff; that said action and representations of defendant were a fraud upon plaintiff, which fraud was

not known to plaintiff until 1912; that said fraud consisted in inducing plaintiff, then a minor, to submit his right hand to the X-ray and X-ray machine, plaintiff being wholly ignorant of the effects and use thereof, and further, in representing to plaintiff and his parents that the discoloration produced by such use was only temporary, and further, in knowingly and fraudulently concealing from plaintiff and his parents the real nature and effect of the negligent use of said machine, all of which fraud was not known to plaintiff until the year 1912.

The demurrer was in this form:

"That the petition shows upon its face that the plaintiff's alleged cause of action is barred by the statute of limitations, in that: (a) The said cause of action did not accrue within three years prior to one year after the plaintiff attained his majority, and no sufficient facts are stated to postpone the running of the statute of limitations. (b) That the gist of plaintiff's action is negligence, and his cause of action, if any, accrued at the time the injury was done, whether the extent was then known or not. (c) That, under the law, the right to maintain an action for negligence is distinguished from the measure of damages resulting from such negligence; and, although the entire damages resulting from the alleged negligence of the defendant was not known to the plaintiff until his time of recovery was barred, yet the time in which the action may be brought was not prolonged thereby. (d) That said statute does not run from the time of the consequent injury to the plaintiff. (e) That plaintiff's cause of action is not founded on fraud, and the allegations of the petition do not defeat the bar of the statute."

Appellant has not argued the question as to whether, if a cause of action accrued at the original injury, suit could have been brought by plaintiff by his guardian or next friend, or whether he would have time after attaining

his majority to bring suit, nor is the question of the effect of defendant's removal from the state in 1908 argued, doubtless on the theory that, if a cause of action accrued to plaintiff in 1901, it would be barred in any event. As bearing on the first proposition, see *Murphy v. Chicago, M. & St. P. R. Co.*, 80 Iowa 26; *Roelefsen v. City of Pella*, 121 Iowa 153.

Appellant says in argument that there is only one main controlling question to present to this court in this cause; that the demurrer raises only one question, and that is the question of the statute of limitations; and he insists that, on account of actual fraudulent concealment by defendant, this cause or right of action did not accrue until the year 1915, the time of bringing this action, and hence the action is not barred; that the main legal proposition is that, where a party against whom a cause of action existed in favor of another, by fraud or actual fraudulent concealment prevented such other from obtaining knowledge thereof, the statute of limitations would commence to run only from the time the right of action was discovered, or might, by the use of diligence, have been discovered. The only authorities cited are in support of this proposition. Appellant cites *District Township of Boomer v. French*, 40 Iowa 601; *Wilder v. Secor*, 72 Iowa 161; *Carrier v. Chicago, R. I. & P. R. Co.*, 79 Iowa 80; *Cook v. Chicago, R. I. & P. R. Co.*, 81 Iowa 551, 564; *Bradford v. McCormick*, 71 Iowa 129; *Findley v. Stewart*, 46 Iowa 655, 657; *Cress v. Ivens*, 155 Iowa 17, 20; *Aultman v. Adams*, 35 Mo. App. 503; *Mullen v. Callanan*, 167 Iowa 367, 379.

The gist of plaintiff's cause of action is based upon the alleged negligence of defendant in 1901, and the claim that defendant fraudulently concealed some of the effects of the injury caused by the X-ray machine. It is alleged that defendant knew and fraudulently concealed from plaintiff that the burning in 1901 would result in cancer. Neces-

sarily, the statement by defendant that the injury in the first place was only temporary would be his opinion, unless cancer results in all cases from such burning, and the pleading of such fact would, to a certain extent, be pleading a conclusion. It is not specifically alleged that burnings of this character result in cancers in all cases, though one part comes very close to it.

It is not claimed by appellant, as we understand it, that his cause of action is based on fraud, under Section 3448 of the Code. Under that section, it is provided that the cause of action shall not be deemed to have accrued until the fraud shall have been discovered by the aggrieved party; and Code Section 3447, Paragraph 6, limits to five years the period within which an action may be brought in such cases.

It has been held that the fraud contemplated in Section 3448 is only such as was heretofore solely cognizable in chancery, and that, where the fraud is not of that character, but the plaintiff's remedy is concurrent, the exception there made does not apply. *Gebhard v. Sattler*, 40 Iowa 152; *Brown v. Brown*, 44 Iowa 349; *Phoenix Ins. Co. v. Dankwardt*, 47 Iowa 432; *Relf v. Eberly*, 23 Iowa 467; *McGinnis v. Hunt*, 47 Iowa 668; *Carrier v. Chicago, R. I. & P. R. Co.*, 79 Iowa 80; *Daugherty v. Daugherty*, 116 Iowa 245; *West v. Fry*, 134 Iowa 675; *Baird v. Omaha & C. B. R. & B. Co.*, 111 Iowa 627. The last two cases distinguish between fraud and mistake. In *Lougee v. Reed*, 133 Iowa 48, it was held that Section 3448 has no application to an action against a clerk of court for omitting to index a judgment, because such is governed by Section 3447, providing that actions against officers for neglect of official duty must be brought within three years. As bearing upon this, see *Ott v. Hood*, (Wis.) 44 L. R. A. (N. S.) 524; *Cornell v. Edsen*, (Wash.) 51 L. R. A. (N. S.) 279.

Appellant's contention, as we understand it, is that his alleged cause of action itself was concealed by the alleged fraud of the defendant in stating that the original injury was but temporary. Without taking the time to review plaintiff's citations, the import of them is that the cause of action was itself concealed, as in *Mullen v. Callanan*, supra, where, at page 379, it was said:

"But, conceding that it might have been brought either at law or in equity, or that a court of law alone had jurisdiction, still the action is not barred, because the cause thereof was deliberately concealed from plaintiff."

So in the *Cress* case, where there was no knowledge by plaintiff that there were to be commissions in a land trade, and defendants falsely told plaintiffs that there were to be no commissions. We said, in *Cole v. Charles City Nat. Bank*, 114 Iowa 632, at 635, referring to *Cook v. Chicago, R. I. & P. R. Co.*, 81 Iowa 551, one of plaintiff's citations:

"It is there stated that the statute does not begin to run, where a cause of action is fraudulently concealed, until the facts are discovered by plaintiff."

In *McKay v. McCarthy*, 146 Iowa 546, 551, we said of that case:

"It is not alleged that the cause of action was concealed by defendant, and for this reason \* \* \* *District Township of Boomer v. French*, 40 Iowa 601, and *Carrier v. Railway*, 79 Iowa 80, are not in point."

The last two citations are among those cited by appellant in this case. In the instant case, was the plaintiff's cause of action concealed by the statement of the defendant that the original burning was but temporary and was of no particular consequence, and by the fraudulent concealment of the true effect produced by the use of the X-ray machine? Plaintiff alleges that he was burned in 1901, and, as he alleges, by the negligence of the defendant. This fact was known to plaintiff and his parents. All damages

which subsequently developed are traceable to and based upon that act. By the original act, plaintiff was injured, and, as the petition alleges, by the negligence of the defendant. He would have been entitled to some damages at that time; and, if it be true that cancer necessarily and in all cases is the result of such burning, or if cancer is the probable result, such fact could be shown as bearing upon the question of damages in an action for the original injury. If cancer is not the necessary or probable result of such a burning, then, as before stated, defendant's statement would be more or less of an opinion, and in that case, the fact that later, and in 1912, a cancerous condition did develop, and plaintiff's damages might thereby be increased, would not constitute a new cause of action. It would seem, then, that plaintiff's cause of action accrued at the time of the original injury. In *Gustin v. County of Jefferson*, 15 Iowa 158, it was held that the statute of limitations as to actions for damages resulting from injuries to the person commences to run from the time the injury is done, and not from the time the party injured becomes fully advised of the extent thereof. See also *Steel v. Bryant*, 49 Iowa 116; *Garrett v. Bicklin*, 78 Iowa 115, 122. In the *Steel* case, it was said:

"The time when the action accrued on the bond is the time when it accrues for the negligent act. It is true that the negligent act had been committed before that time, but there was no immediate injury or damage, nor does the law imply there was any. The injury and damage were consequential, depending on the happening of certain things in the future."

In *Miller v. Lesser*, 71 Iowa 147, it was held that an action upon an unwritten contract against one who had removed to Iowa and had lived here for five years after the cause of action had accrued was barred by the statute of limitations,—notwithstanding the fact that the defendant

had lived here under an assumed name, and plaintiff was not able, by the exercise of diligence, to discover his place of residence,—on the ground that the case was not brought within any of the exceptions to the statute of limitations. See, also, *St. Paul Title & Trust Co. v. Stensgaard*, (Cal.) 39 L. R. A. (N. S.) 741, and note. In the note to *Aachen & M. F. Ins. Co. v. Morton*, (C. C. A.) 15 L. R. A. (N. S.) 156, at page 161, are a number of cases bearing upon the question as to when the statute of limitations begins to run in cases involving breaches of professional duty or malpractice by physicians and surgeons. One of these is *Fronce v. Nichols*, 22 Ohio C. C. 539, where the damage complained of was occasioned by the malpractice of a physician, and it was held that it is the breach of duty that gives rise to the action and causes it to accrue, and not knowledge of the fact evidenced by resulting injury. Also *Miller v. Ryerson*, 22 Ont. Rep. 369, where it was held that, under a statute providing that physicians should not be liable to any action for malpractice unless commenced within one year from the date of the termination of the professional services, an action against the physician for the alleged malpractice was barred within one year from the time the services were rendered, and that the statute of limitations began to run from that time, and not from the time the effects of the treatment developed. Also *Fadden v. Satterlee*, 43 Fed. 568, holding that the statute as to actions for personal injuries begins to run at the time injury is received, although its results may not be then fully developed. In *Wilcox v. Executors of Plummer*, 4 Pet. 172 (7 L. Ed. 821), cited in *Fortune v. English*, (Ill.) 12 L. R. A. (N. S.), at 1005, an action against an attorney for negligence, it was said:

“When the attorney was chargeable with negligence or unskilfulness, his contract was violated, and the action



might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action."

And in *Gould v. Palmer*, 96 Ga. 798 (22 S. E. 583), it was held that it was not a special damage or injury resulting from the unskilfulness of an attorney, but the breach of duty imposed by the contract of employment which gives a right of action for damages sustained; and the statute of limitations in such a case, therefore, runs from the date of the breach of the duty, and not from the time when the extent of the resulting injury is ascertained. A number of other cases to the same effect are cited in the same note. In 25 Cyc. 1135 (18), we find this doctrine:

"The test to determine when the statute of limitations begins to run against an action sounding in tort is whether the act causing the damage does or does not of itself constitute a legal injury, that is, an injury giving rise to a cause of action because it is an invasion of some right of plaintiff. If the act is of itself not unlawful in this sense, and plaintiff sues to recover damages subsequently accruing from and consequent upon the act, the cause of action accrues, and the statute begins to run when and only when the damages are sustained. \* \* \* But if the act of which the injury is the natural sequence is of itself a legal injury to plaintiff, a completed wrong, the cause of action accrues and the statute begins to run from the time the act is committed, be the actual damage however slight, and the statute will operate to bar a recovery not only for the present damages, but for damages developing subsequently, and not ascertainable at the time of the wrong done; for in such a case the subsequent increase in the damages result-

ing gives no new cause of action. Nor does plaintiff's ignorance of the tort or injury, at least if there is no fraudulent concealment by defendant, postpone the running of the statute until the tort or injury is discovered. Where the doing of an act is attended immediately by resulting actual damage, the statute begins to run at once."

It is our conclusion that the plaintiff's alleged cause of action was barred by the statute of limitations, and that the court was right in sustaining defendant's demurrer to the petition. The judgment is, therefore,—*Affirmed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

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E. B. RADER, Appellant, v. GEORGE ELLIOTT, Appellee.

**CONTRACTS: Legality of Object and Consideration—Unlawful**

- 1 **Practice of Profession—Recovery for Services—Physicians and Surgeons.** *Recovery may not be had for services which constitute a crime.* More concretely, when the practice of a vocation or profession is punishable by fine or imprisonment unless certain specified statutory conditions are first complied with, one who assumes to practice, without strictly complying with all such conditions, may not recover for his services, even though he possesses high qualifications and acts in perfect good faith.

**PRINCIPLE APPLIED:** Plaintiff brought action to recover for services in vaccinating defendant's hogs. Plaintiff had publicly advertised himself as a veterinary surgeon, and defendant employed him in the belief that he was such, and the services were rendered by defendant *as a purported veterinary surgeon*. Plaintiff diagnosed the ailment of the hogs to be something other than cholera, and administered medicine. He later diagnosed and concluded that the ailment was cholera. He then vaccinated. At this time, plaintiff had taken an examination before the State Board of Veterinary Medical Examiners, as required by law, and had been orally assured by members of the board that a license to practice would be issued to him, and it was so issued about a month *subsequent* to the vaccination of the hogs. Under Section 2538-1, Code Supple-

ment, 1913, it is an indictable misdemeanor to practice veterinary medicine, etc., without a license from said state examiners.

*Held*, plaintiff might not recover for said services, even though he possessed high qualifications and had personally acted in good faith.

**CONTRACTS: Legality of Object and Consideration—Partial**

- 2 **Illegality—Effect—Physicians and Surgeons.** He who performs services in such a manner as to go beyond that which is legal, and to embrace that which is criminal, may not expect the court to sever the criminal acts from the non-criminal acts and grant him a recovery. The poison of criminality inseparably permeates the whole.

**PRINCIPLE APPLIED:** Plaintiff brought action to recover for services rendered in vaccinating defendant's hogs with hog cholera serum. He had publicly *advertised* himself as a veterinarian, was *employed* as a veterinarian, *diagnosed* the ailment of the hogs as a veterinarian, and *treated* the hogs as a veterinarian. He possessed no certificate from the State Board of Veterinary Medical Examiners authorizing him to practice veterinary medicine, etc. This lack of a certificate rendered him indictable under Section 2538-1, Code Supplement, 1913.

When the services were rendered, Section 2538-w5, Code Supplement, 1913, authorized anyone to administer hog cholera serum, provided he had taken a special course of instruction and had been granted a permit, as required by law. Plaintiff, prior to rendering the services, had taken such course of instruction and had received said permit. Had he not assumed to act as a *veterinarian*, his right to recover would have been unquestioned.

*Held*, recovery was not authorized, because the court could not separate the criminal acts from the lawful acts.

*Appeal from Johnson District Court.—R. P. HOWELL,*  
**Judge.**

**TUESDAY, JUNE 26, 1917.**

**REHEARING DENIED, SATURDAY, SEPTEMBER 29, 1917.**

ACTION at law to recover \$318 for services rendered to the defendant by plaintiff in the vaccination of hogs. It was alleged that such was the agreed value of the services. The defendant admitted the services, but denied the value thereof. He further averred that, at the time of his employment of the plaintiff, such plaintiff professed to be a veterinary surgeon, duly authorized to practice as such, and that the defendant employed him as such; that all the services performed by plaintiff for defendant were in pursuance of such employment as a supposed veterinary; that in truth the plaintiff had not at that time received from the state board of examiners any certificate authorizing him to practice as such veterinary; that the plaintiff did so practice in violation of the law; that his contract of employment with the defendant was in violation of the law on his part, the defendant believing him to be duly authorized.

The trial court submitted to the jury the question of fact whether the services rendered by the plaintiff for which compensation is claimed were so rendered by him as a purported veterinary, and instructed that, if the affirmative were found on such question of fact, the verdict should be for the defendant. The verdict was for the defendant. From the judgment entered thereon, the plaintiff has appealed.—*Affirmed*.

*Milton Remley*, for appellant.

*Dutcher, Davis & Hambrecht*, for appellee.

EVANS, J.—Some time prior to July 13, 1914, the plaintiff located at Oxford, Iowa, and publicly advertised himself as a veterinary surgeon. The defendant, a farmer, relying upon the advertisement, called the plaintiff as a veterinary to examine his hogs, some of which were sick. The plaintiff came on July

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13th, and examined the hogs and diagnosed their ailments and administered medicine. He diagnosed the ailment at that time as something other than cholera, but the treatment was not successful. On July 22d, he made a further diagnosis, and declared the ailment to be cholera. At plaintiff's request, he proceeded to treat the hogs for cholera by means of vaccination with virus and serum. He told the plaintiff that the expense would be at the rate of \$15 per bottle of serum used. About 21 bottles were used. The treatment was only partially successful, the mortality being very great. At the time this service was rendered, the plaintiff had no lawful right to practice as a veterinary in the state of Iowa. Section 2538-i, Code Supplement, 1913, specifies the preliminary conditions which must be complied with before any person is authorized to practice as a veterinary within this state. These conditions require an examination of the applicant by the state board of examiners, the payment of a \$15 fee, the issuance of a certificate or license signed by the members of the board, the recording of such license in the county where the applicant proposes to practice, and the payment of the recording fee. By the provisions of Section 2538-l, Code Supplement, 1913, it is made a misdemeanor for any person to practice as a veterinary before such conditions have been complied with.

For the plaintiff, it is put forward that, prior to July 13th, he had taken the examination before the board of medical examiners; that he had been orally informed by some of the examiners that he would receive a license; that the license was subsequently issued, on September 1, 1914. Whether it was ever recorded does not appear. By reason of the foregoing, it is urged that plaintiff acted in good faith, and that the issuance of a license on September 1st, pursuant to an examination had prior to July 12th, was evidence of his qualification as of the date of such examination. However, it must be said that the good faith of

the plaintiff cannot be accepted as a substitute for the express requirements of the statute. Nor will it suffice the plaintiff to show that he had in fact the qualifications of a veterinary. In a legal sense, he was not a veterinary, nor was he authorized to practice as a veterinary nor to advertise himself as such until he had received his license and recorded the same. It necessarily follows as a legal consequence that he was not entitled to recover for services rendered as a veterinary. This legal proposition is conceded by the plaintiff, and we need not cite authorities thereto.

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However, it is further urged for the plaintiff that the services for which he sues were not rendered by him as a veterinary; that the administration of virus and serum for the treatment of cholera is a special service recognized by the statute, and may be performed by any person who shall obtain an appropriate permit from the state biological laboratory. The provisions of the statute thus relied on are found in Section 2538-w5, Code Supplement, 1913. This section provides generally that no person shall use such materials who shall not have first taken a course of "special instruction in reference to such use," to the satisfaction of the director of the laboratory, who shall thereupon issue a permit to such person. The plaintiff had taken such course and had received from the director of the laboratory a permit. He contends, therefore, that he was authorized under such permit to vaccinate the defendant's hogs, regardless of the question of his authority to practice as a veterinary. If the act of the plaintiff in administering the virus and serum could stand severed and independent of his attempted practice as a veterinary, there would be much force in his position. Unlawful acts frequently, if not usually, include as a part of the scheme of conduct acts which, standing alone, would be

lawful. This joining of the unlawful with the lawful does not forbid the consideration of such lawful acts as a part of the greater whole. The carrying out of an unlawful conspiracy usually involves the doing of many acts which of themselves would be lawful and harmless. As parts of a conspiracy, even lawful acts become unlawful. Granting, in the case at bar, that a person not a veterinary could lawfully administer the virus and serum treatment upon cholera hogs under permit from the director of the laboratory, it does not necessarily follow that the act of plaintiff in doing so under the circumstances here appearing was lawful. It is also true that even a veterinary may not administer this treatment without a permit from the director of the laboratory. Such permit will also be dependent upon previous special instruction on the subject. Such special instruction being had and permit issued, a veterinary may include such treatment in his veterinary work. Manifestly, such a veterinary must be deemed, by reason of his learning and experience, to be especially suitable for administering such treatment. This is so particularly because proper diagnosis is a necessary condition to successful treatment. A permit from the director of the laboratory to use the virus and serum does not confer authority upon such permit holder to assume to diagnose the ailments of animals. This work is within the domain of the veterinary. No patron would wish to administer the virus and serum treatment without first being assured of a proper diagnosis of the ailment by a competent veterinary. Before selecting any person to administer the treatment, he would want first to know from competent diagnosis that the treatment was necessary. Naturally, therefore, he might prefer to select a veterinary who was competent both to diagnose and to administer treatment. We think it clear that a veterinary who assumed to diagnose an ailment as cholera, and who then assumed to administer the virus and serum

treatment therefor, should be deemed to be practicing as a veterinary both in the diagnosis and in the treatment. This is the precise attitude assumed by the plaintiff. He assumed to act as a veterinary in the diagnosis of the ailment, and he proceeded to treat the same under the same assumption. From the evidence in this record, it cannot be assumed that the defendant would have employed him at all, either for diagnosis or for treatment, if he had known that he was not authorized to practice as a veterinary. The provisions of the statute which were violated by the plaintiff were intended for the protection of the defendant and others similarly situated, and in the making of his defense he has only availed himself of the protection thus intended.

On the evidence in this record, there is little room for claiming that the acts of the plaintiff in administering the treatment are severable from his acts of diagnosis and practice as a veterinary. There was an essential unity between diagnosis and treatment, both of which were changed in the course of his efforts to serve the defendant. Nevertheless, the trial court submitted the question to the jury as a question of fact whether the plaintiff purported to act as a veterinary surgeon in administering the treatment in question. The finding of the jury could not well have been otherwise. The record fully sustains the verdict. The judgment below is therefore—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

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JASPER RANNE, Appellee, v. FRANK HODGES et al., Appellants.

**WILLS: Testamentary Capacity—Unsoundness of Mind—Evidence—**  
1 Sufficiency. Evidence reviewed, and held ample to carry to the jury the question of testator's sanity.



**WILLS: Testamentary Capacity—Evidence—Unequal Distribution.**

2 Inequalities of distribution between testator's children and stepchildren, along with any proper explanation thereof, are proper subjects for the consideration of the jury in determining the actual condition of the testator's mind.

**EVIDENCE: Opinion Evidence—Non-Experts—Insanity—Nature**

3 of Facts Detailed—Wills. Justification for the opinion of a non-expert that a testator was of unsound mind is found in a detailing by the witness of facts and circumstances (a) which are in *some* fair degree extraordinary and unusual, and (b) which *tend* to indicate an unsound mind. Unusual circumstances and conduct in the life of a testator reviewed, and held to furnish ample basis for the opinion by a non-expert that testator was of unsound mind.

**WILLS: Testamentary Capacity—Evidence—Ignoring Children,**

4 —Strangers As Beneficiaries. Principle recognized that a jury may well conclude that it is not rational for a testator to ignore his own children in the disposition of his property, and to bestow his property on stepchildren, and quite largely on an aged second wife who had no need for such an unusual amount of property and had accumulated no part of it.

**WILLS: Testamentary Capacity—Old Age. Principle recognized**

5 that old age is not, of itself, evidence of mental incapacity.

**EVIDENCE: Opinion Evidence—Hypothetical Questions—Form**

6 and Accuracy. Hypothetical questions need not be framed with technical accuracy. It follows that misstatements in the recital of facts do not render erroneous the reception of the opinion, especially when the question is lengthy and there is no objection specifically pointing out such misstatement.

*Appeal from Mills District Court.*—A. B. THORNELL, Judge.

· WEDNESDAY, MAY 16, 1917.

REHEARING DENIED, SATURDAY, SEPTEMBER 29, 1917.

THE will and two codicils were presented for probate. Objections were interposed by decedent's son. Probate was denied, and proponents appeal.—*Affirmed.*

*John Y. Stone, C. E. Dean, A. E. Cook and Cochran & Barrett, for appellants.*

*Genung & Genung* and *Saunders & Stuart*, for appellee.

LADD, J.—I. Henry Ranne was born March 8, 1819. He died November 23, 1914. His first wife had departed this life some time in 1896, and he was married again July 19, 1898. He was then over 79 years of age and she 54, again confirming a saying on high authority "that the mating instinct does not necessarily wane with advancing years." *Perkins v. Perkins*, 116 Iowa 253. The second wife died September 3, 1914, leaving four children by a former husband surviving, the proponents in this case. He outlived her but a few months, leaving six children, one of whom, Jasper Ranne, is contestant, and another of whom, Catherine Whiteside, joined proponents by petition of intervention. On October 3, 1906, a paper purporting to be the will of decedent was signed by him in the presence of witnesses, giving to his widow one third of his estate, to a daughter, Ellen Boyd, \$300, and the residue, share and share alike, to his other children, William, Henry and Jasper Ranne, Mrs. Whiteside and Alice Weaver. On May 11, 1909, a paper purporting to be a codicil was made, directing that, in lieu of the specific legacy to Mrs. Boyd, she share the residue of the estate equally with the other children. A paper purporting to be a second codicil was signed November 19, 1909, changing the will and first codicil so as to give his three daughters \$5,000 each, his son William, \$3,000, his son Henry, \$2,000, his son Jasper, \$1,000, and \$2,000 to be divided among the children of Jasper, \$1,000 to each of the children of Catherine Whiteside, \$2,000 to his wife's daughter Nora, and the homestead and residue of the estate to his wife. The estate at his death amounted to \$61,000 and some accrued interest. Under the last codicil, then, \$27,000 of this would pass to decedent's children, and \$34,000 to his stepchildren, of which \$10,000 would pass to Nora Bourgeaux and \$8,000 to each of the other

three. The circumstance that one of his children, Mrs. Whiteside, joined proponents, is explained by the circumstance that she and her four children would take \$9,000 were the will to be admitted to probate, and little if any more if it were found to be invalid. The will, and also the last codicil, provided that any beneficiary contesting either should be cut off and take nothing thereunder, and this may account for there being but one contestant. His objections, duly filed, were that, when making the will and codicils, and for many years prior thereto, decedent was of unsound mind, and that these were the product of undue influence. No evidence bearing on the latter objection was adduced, and that issue was withdrawn from the jury.

The proponents contend that the evi-

1. WILLS: testamentary capacity: unsoundness of mind: evidence: sufficiency.

dence was insufficient to warrant the submission of the remaining issue to the jury.

The will was made when testator was nearly

88 years of age. The only change from dis-

tribution without a will consisted in reducing a daughter's share of the estate to \$300 and giving the wife one third of the property, instead of leaving her to elect between that and the homestead for life. The inequality as to the daughter was eliminated in the first codicil. The second codicil practically abandoned the will and first codicil, and in effect the second codicil was a new will. Besides discriminating between his own children, he therein gave the larger part of his estate to his wife, who was then 65 years of age, and his stepdaughter.

The inequalities, if any, of the will and

2. WILLS: testamentary capacity: evidence: unequal distribution.

codicils, together with any explanations appearing, were appropriate for the jury's

consideration, in connection with other evi-

dence, as bearing on the condition of the decedent's mind. *Manatt v. Scott*, 106 Iowa 203; *Mileham v. Montagne*, 148 Iowa 476; *Sevening v. Smith*, 153 Iowa 639;

*Trotter v. Trotter*, 117 Iowa 417. After the marriage in 1898, decedent, with his wife and her daughter, continued on the farm until the spring of 1906, when they moved to Glenwood, where they lived the remainder of his life. He had sold his farm the year previous at a price of about \$10 per acre less than it was worth, according to some witnesses, and had paid \$4,500 for his new home. All of his property except the home had been reduced to money, and this was loaned on certificates of deposit at four per cent per annum, the amount being distributed among four different banks. He appears to have collected the interest for a year or two, and thereafter this service was rendered by his stepdaughter.

II. Contestant relied on three classes of testimony: (1) that of non-experts, who related incidents and based their opinions thereon; (2) that of physicians having personal knowledge of decedent; and (3) that of a physician who based his opinion on a hypothetical question. Six or seven witnesses related incidents and expressed the opinion that in 1906 he was of unsound mind. The incidents, in addition to ordinary forgetfulness due to old age, were: That he directed a neighbor to bring over hogs he said he had bought of him, when in fact there had been no deal; that he sold a cow to a neighbor, and when he came for it, denied the sale; inability to recognize acquaintances he had known 20 to 45 years; saying that his own son had been stealing his corn; pushing back and forth on posts to ascertain whether solid, day after day; seeing brick castles in the air, and asking witnesses if they could not see them; proposals to erect a brewery; asserting that his cattle were lost and were stolen, when he had none; claiming he had lost a horse, when he had none to lose; buying a team without looking them over for blemishes or examining their mouths or inquiring as to their age; paying for work, and immediately thereafter offering to pay again; interrupting workmen repeat-

edly while employed, by offering to pay them; directing work to be done, and after it was done, denying having given the directions; inability to appreciate relationship of grandchild; that he wandered about aimlessly, and wife had to turn him back to house; asserting that rails had been stolen, when he had none; beginning conversation and before response, turning away; talking of going west and taking homestead; saying he had not enough hogs to follow cattle, when he had neither; saying that others let cattle through gate, when there were no cattle to go through; and the like. Decedent had been a farmer all his life, and the unusual circumstances related were of a kind likely in case of a farmer, and were of more or less significance, as the witnesses and jury might have viewed them. Several witnesses related incidents, but expressed no opinion. Of course, the weight to be given to the opinions of the several witnesses depends largely on the incidents recited, and the length and intimacy of their acquaintance. See Schouler on Wills, Sections 133 and 142; *Gates v. Cole*, 137 Iowa 613.

III. Objections were interposed to the expression by several non-expert witnesses of an opinion as to the condition of decedent's mind, on the ground that the facts shown were insufficient as a basis thereof. These must have been somewhat inconsistent in their nature with the idea of mental soundness, as that his acts or conversation were unnatural or unusual or such as would not ordinarily be expected from a person of his character. In other words, there must have been such as tended to support the witness's conclusion. The facts, as is often the case, might have been developed more fully in several instances, but it was only necessary that they be such as tended to indicate an unsound mind. Having in-

3. EVIDENCE:  
opinion evi-  
dence: non-  
experts: in-  
sanity: nature  
of facts de-  
tailed: wills.

licated some facts which tended to support the opinion to be given, the witness was properly allowed to express such opinion, and its value, as well as the effect of explanatory circumstances, was for the determination of the jury. We are of opinion that facts out of the ordinary and somewhat unusual in their character were recited by each non-expert witness, and that, therefore, the court rightly allowed such witnesses to express opinions based thereon. *Stutsman v. Sharpless*, 125 Iowa 335; *Erwin v. Fillenwarth*, 160 Iowa 210; *Spiers v. Hendershott*, 142 Iowa 446.

IV. Several physicians were called on behalf of contestant, and, of these, Dr. Campbell had treated decedent and members of his family, especially his first wife. She had become insane, and was confined to a room so arranged as to protect her and at the same time keep her comfortable. She had continued in that condition about a year. Decedent cared for her, and the physician testified that, though he had been a firm, robust and outspoken man, he underwent changes after 1890; that he "was always a very robust and outspoken man and very firm, but in the latter years that firmness had left, and he seemed to—well, have a different—I don't know how I can express it. I know that he seemed to be a changed man. He didn't seem the same in his home as he formerly was when he was younger. I didn't see any marked symptoms of any insanity or anything of that kind, but he wasn't the same man that he was."

The deposition of Dr. Corbin was taken that, though now a resident of Oklahoma, he had resided at Malvern and treated decedent as an osteopathic physician during the winter of 1904 and 1905. These treatments were given from 4 to 5 times a week, in 3 courses of 4 to 6 weeks each. He testified that at the time he was "suffering with a toxic condition due to persistent constipation, \* \* \* his vitality was low, memory bad, circulation poor, due to an organic heart trouble, with arteriosclerosis or hardening

of the arteries. After getting his bowels active, elimination greatly improved, the toxic symptoms were relieved, and his memory would become better. The disease was progressive. The tendencies in these cases is senile softening of the brain, with mental decay and apoplexy. In my mind, he was a person of unsound mind when I treated him."

Dr. Rush, also an osteopathic physician, accompanied Dr. Corbin and assisted at his examination. He testified that thereat decedent was indifferent about answering questions and did not seem to be interested; that he did not think decedent "had reached a point of being absolutely of unsound mind;" that he was suffering from obstinate constipation; that they "discovered some valvular lesion of the heart," but did not know what it was, but concluded there "was an insufficient valve in the heart;" that "there were symptoms of kidney disease—there was an increase in the structural framework of the kidneys." The witness would not say that he was of unsound mind, but would say that he was showing decided symptoms of mental degeneracy and mental senility.

In 1909, Jasper Ranne applied to the court for the appointment of a guardian of decedent. An affidavit of his physician appears to have been attached to a motion for continuance, or at least as showing his inability to attend trial, and thereupon the court designated four physicians to examine decedent. Of these, Dr. Scott had known him since 1885, though he had never treated him. He testified:

"I made that examination by the direction of the court. He was senile; senility is a condition where a person is worn out and exhausted mentally and physically. The cause of his senility was a marked case of arteriosclerosis, hardening of the arteries. That would produce a very weakened condition of the brain, owing to the imperfect supply of blood to the brain. I knew Mr. Ranne before he moved to Glenwood. I met him quite often and had an

opportunity to observe him. When I first knew Mr. Ranne, he had a very bright mind, I thought, earlier, when I first came to Malvern. Later on, just prior to his moving to Glenwood, he was very forgetful, and could not remember anything. That condition was to a very marked degree. He talked to me about being married, going to get married, and I talked with him after he was married. He told me about it three or four times. I did not ask him anything about it. I was not his family physician; I never treated him. We were quite friendly. I would not consider him of sound mind at that time. Arteriosclerosis is a progressive disease, and one that is not curable; the patient gets worse in almost every instance. I did not see him after he left Malvern, until I saw him in this examination. Q. Doctor, tell the jury from your observation of Mr. Ranne, just prior to his moving to Glenwood as you have testified,—what do you say would be his probable condition about during 1896, 1897, 1898 and 1899? A. Gradually growing worse, I should say. In my opinion there would be no time between the dates mentioned when his mind would be sound. At the time I examined him in April, 1910, he was in bed, and in response to questions, he didn't seem to realize what I asked him; he didn't answer, and I think either his wife or myself told him that Dr. Scott was there from Malvern and asked him if he would like to talk with him, and he didn't remember me at all; he didn't remember who I was; I couldn't get anything out of him at all,—that is about the facts, as far as I could see; he did not seem to know anything. I should pronounce him wholly senile at that time."

Dr. Cole, another of those appointed, testified that, on April 18, 1910, when examined, decedent "had quite marked hardening of the arteries;" that he was unable to recognize Dr. Plimpton, his family physician; that he said, in response



to a question, that he did not live in Glenwood; that he was suffering from senile dementia; that the disease is progressive, and that he (witness) "could not think he was capable of transacting business affairs at that time," and that in his opinion he was suffering from senile dementia October 1, 1909.

The several physicians reported to the court that:

"We believe that the physical condition of Mr. Ranne is such that to bring him into court would be absolutely prohibitive. As to taking his deposition at his home, we beg to state that Mr. Ranne is very deaf and nearly blind, and senile in all respects, and that, if taken at all, should be done very carefully, and in the presence of a physician, and even then we do not consider that it could be done entirely without danger."

Dr. DeWitt, who joined in this report, testified:

"He was an old man, about 90 years of age. Heart weak, arteries atheromatous. He was unable to walk and needed an attendant. His eyesight and hearing were greatly impaired, and it was with difficulty we were able to converse with him. He exhibited considerable interest in passing events, and when we succeeded in making him understand our questions, answered them all intelligently. I am unable to repeat any of the conversation, but have a distinct recollection that my impression was that his mental state was remarkably good, considering his age. I considered his mind sound at that time. He was sane. He impressed me of being capable of understanding himself and his surroundings. He gave evidence of thoroughly understanding his financial affairs as well as his local surroundings."

Dr. Plimpton's testimony was to the same effect. It also appeared that he had been decedent's physician since the spring of 1906, and he testified that decedent's afflictions then were indigestion and constipation, and that there

was no considerable change until December, 1911, when he discovered a kidney disturbance; that from then on decedent was afflicted with Bright's disease, and died from senility and uremic poisoning. In this physician's opinion, decedent was of sound mind up to 1912. Notwithstanding his testimony that decedent had suffered only from indigestion and constipation up to 1911, he had made affidavit, November 26, 1909:

"That he is about 90 years of age; that his heart is weak and the walls of the arteries are hard on account of his age; that it is necessary for him to lead a quiet and gentle life at his home and around his house, entirely free from excitement or the jar of quick physical action; that either quick physical action or any severe jar or any mental excitement would be liable to cause a breaking of the walls of the arteries and produce instant death; that on account of his age there is no hope of any improvement in these respects, but the great probability is that he will progressively grow worse as to that; that it will be dangerous to his life for him to leave his home and come into court or to engage in any other thing likely to cause any change from his quiet habits of life; that any mental excitement or disturbance of the even progress of his life is likely to precipitate the same consequences and cause his death; that it will be dangerous to his life to put him on the witness stand and put him through the process of examination and cross-examination, on account of the mental excitement that would thereby be occasioned, whether it is in the court room or in his own home; that it is indispensable to his life that he should be quiet and free from physical action, except the mild exercise in walking and other gentle methods of action around his house and home. As his family physician, I desire to enter my protest as solemnly as I can against his being attempted to be used as a witness in any form, and against

his going away from his home and immediately surrounding grounds."

This affidavit was but seven days after the signing of the second codicil, and is illuminating as to the physical and mental condition of decedent at the time. We are not inclined to join counsel in their respective criticisms of these physicians, even though the last mentioned may not have been entirely consistent. They were no more able to ascertain definitely the condition of decedent's mind than were his acquaintances of many years, save possibly for a better understanding of symptoms. The fault found with Drs. Scott and Cole, in that they did not include in the report to the court decedent's mental condition, is particularly unjust. These men were not to inquire into the condition of his mind, but whether his physical health was such that he might safely attend court or testify. To demonstrate his mental incapacity may have been the design of requiring his attendance. Dr. Barstow testified in answer to a hypothetical question, and, as some matters were improperly included, his testimony can be said to add little or nothing to the evidence adduced by contestant. On the other hand, the attorney preparing the will and codicils, one of those who witnessed the execution of the will, one of those witnessing the first codicil, and both of those witnessing the second codicil, a banker, a stepdaughter, a friend of the latter's who had frequently visited the family from 1905 on, and several other non-experts, as well as the two physicians mentioned, expressed the opinion that he was of sound mind. We have set out or referred to this much of the evidence found in the large record before us, not for the purpose of determining whether decedent was of unsound mind when he signed the will and codicils, but to demonstrate that there was ample evidence to carry that issue to the jury.

4. WILLS: testa-  
mentary ca-  
pacity: evi-  
dence: Ignoring  
children:  
strangers as  
beneficiaries.

Counsel for proponents direct attention to several matters said to militate against the justice of this conclusion. The decedent was nearly 88 years of age when the alleged will was signed, and over 90 when the codicils were prepared. As argued, the circle of love and influence is likely to narrow as the years beyond the allotted time increase. As life becomes more solitary and exposed to neglect, the control of property is the most efficient and often the only means of compelling the attention due, and whatever the aged may do with reference thereto, when acting rationally, should be accorded the considerate protection of the courts. On the other hand, their situation is such as peculiarly to expose them to imposition and fraud, and courts also should be vigilant in shielding them and their property against the designing wiles and selfish encroachments of those closely associated with them. All exacted is that whatever they do shall be of their own volition and the product of a sound mind. No doubt a testator may and should dispose of his property as he chooses, but when in doing so he prefers the children of another, even though indirectly, to his own, this is so contrary to the ordinary course that a suspicion arises that something is wrong. Counsel may have persuaded themselves that willing the larger part of his property to the second wife, who was then 65 years of age and had not participated in accumulating it, was the natural thing to do, but jurors are likely to speculate as to whether, in so giving, the testator was rational; for if so he must have taken into consideration whether she would need and be likely to make use of more than the income, and whether the bequest of the property was not really through her to her children. If he did not so realize and yet made the will, the circumstance had some bearing on the issue being tried. Again, counsel talk about 17 years of faithful service by this wife; is there anything

to detract from the performance of the marital obligations due from a husband? If she looked after him, he cared for and supported her. Neither accumulated property. Neither relied on his own nor the children of the other for care or support, though her daughter resided with them, and after a year or two received interest on the certificates of deposit at the banks. So far as the record discloses, as between this husband and wife it was a case of *quid pro quo*. Would not a rational man have taken into account the probable brevity of the life of a woman of 65 years, and that all given her would go to her children and not to his own flesh and blood? It may be that he had helped his own children in the past. Certainly he had relied on contestant to assist him in caring for and renting his land up to the time of his marriage, and, as certainly, he dispensed with his services thereafter, and, for some reason undisclosed by the record, all connection with his own children was severed. Even if he had given to his children, that might not be regarded as justification for denying them the bulk of what remained, as against others having no claims on his bounty. The process through which a man advanced in years passes, after taking unto himself a spouse other than the mother of his children, in forgetting his obligations to those bound to him by the ties of blood, and who have helped to accumulate a fortune, and in bestowing his fortune in large part or wholly on strangers in blood who have been more of a burden than benefit, is past finding out, and jurors are unlikely to be found who will, in passing on the issue of mental unsoundness, entirely close their eyes to such a situation.

We agree with counsel for appellants

5. WILLS: testamentary capacity: old age.

that advanced or even extreme old age is not, alone, evidence of mental incapacity, and quote with approval from their brief the excerpt from Sherwood's famous address, delivered on the eightieth birthday of Speaker Cannon:

"It is a mistake to suppose that a man who has reached the age of 80 years has reached the acme of his intellectual development. Pope Leo XIII and John Adams were in the full possession of their intellectual powers at 90. John Wesley was at the height of his eloquence and at his best at 88. Michael Angelo painted, at 80, the greatest single picture that was ever painted since the world began. He made the sky and sunshine glorious with his brush at 83. General von Moltke was still wearing the uniform at 88, and at 70 he commanded the victorious German army that entered the gates of Paris. George Bancroft was writing deathless history after 80. Thomas Jefferson, Herbert Spencer, Talleyrand and Voltaire were giving out great ideas at 80. Tennyson wrote his greatest poem, "Crossing the Bar," at 83. Gladstone made his greatest campaign at 80, and was the master of Great Britain at 83. Humboldt, the naturalist, scientist,—the greatest that Germany ever produced,—issued his immortal *Kosmos* at 90."

As glorious as are the careers of the aged great of the world, they are exceptional in the matter of unusual achievement after having passed the allotted period of human life. The Scriptures bear witness that:

"The days of our years are three score years and ten; and if by reason of strength they be fourscore years, yet is their strength labour and sorrow; for it is soon cut off, and we fly away."

The ravages of disease play havoc with mankind, and impair mentally and physically at all ages. Age is not a test of mentality, though, everything else being equal, mental incapacity is more likely as the years go by. As contended, the rights of old age should be tenderly guarded, but this will be quite as effectually done by striking spurious instruments not evidencing the voluntary or intelligent act of the purported signer as by establishing and giving effect to those emanating from unhampered volition and unim-

paired intelligence. We have said this much in response to the appellants' discussion of what probably brought about the verdict. The charge of mental incapacity in such a case opens up a wide field of inquiry, and the situation and relationship of the parties is not only appropriate but is bound to be taken into consideration by the jury. We are of opinion that the evidence was such as to leave it open for the jury to find the issue as to decedent's mental condition either way, as the truth appeared to them to be.

V. A hypothetical question which had been reduced to writing, covering 16 printed pages, was submitted to Dr. Barstow, and he was asked his opinion as to the mental condition of decedent, and what it was in the month of October, 1906. Counsel for defendant were given an opportunity to examine this question, and they interposed general objections thereto, in substance saying that facts proved had not been fairly stated, and others omitted, and that those repeated were stated in a one-sided and biased manner. There was no objection to any specific statement contained in the question. Objections were overruled, and it is now contended that this was error, for that it was recited that, in June, 1903, when examined by two physicians (Corbin and Rush), decedent "at that time had senile dementia," and that, during the winter of 1904 and 1905, he was "suffering from senile dementia;" whereas there was no evidence thereof.

Hypothetical questions usually include several and sometimes a great number of facts, and it would be unfair to exact of the trial court an absolutely accurate comparison between those recited and the proof adduced. That is a matter to be attended by counsel. Certainly it is not too much to require that the party objecting shall know the ground on which he bases the objection, and enlighten the court concerning the particular defect in the question.

6. EVIDENCE:  
opinion evi-  
dence: hypo-  
thetical ques-  
tions: form  
and accuracy.

*State v. Ginger*, 80 Iowa 574; *Allison v. Parkinson*, 108 Iowa 154; *Seckerson v. Sinclair*, (N. D.) 140 N. W. 239; *Prosser v. Montana Cent. R. Co.*, 17 Mont. 372 (30 L. R. A. 814); *Rivard v. Rivard*, 109 Mich. 98 (63 Am. St. 566); *Howland v. Oakland C. St. R. Co.*, 110 Cal. 513 (42 Pac. 983). Ordinarily, as was said in *Meeker v. Meeker*, 74 Iowa 352, opposing counsel will not be slow, in re-examination of the witness, to correct the hypothesis upon which the question is based, if it be inaccurate, and, as said in *Hall v. Rankin*, 87 Iowa 261:

"Hypothetical questions need not be framed with technical accuracy; that an error as to one or more facts is not prejudicial, as the opposing party may, on cross-examination, show the error, if any there be."

The items referred to could readily have been eliminated by a question from counsel for proponents, and, as the court's attention was not directed thereto by specific objection nor in the cross-examination, we are of opinion that they are not in a situation to complain.

As we discover no error, the judgment of the district court is—*Affirmed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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J. W. RIGGS et al., Appellees, v. BOARD OF SUPERVISORS et al.,  
Appellants.

**COUNTIES: Board of Supervisors—Highway Petition—Tie Vote**

1 —Effect. A tie vote by a board of supervisors on the question of granting or rejecting a petition for the vacation and relocation of a highway (jurisdiction being then complete), determines nothing, but leaves the question still pending, with unabated jurisdiction and legal duty to the parties interested to determine the same, and necessitates a statutory continuance for further consideration. It follows that a dismissal of the



entire proceeding *because of such vote*, and a consequent refusal to determine the question, are illegal, and open the door to certiorari. (Section 413, Code, 1897.)

**CERTIORARI:** Judicial Proceedings—Highway Petition—Refusal  
2 to Determine. Certiorari will lie to review the act of a board of supervisors in *refusing* to pass upon a petition for the vacation and relocation of a highway, even though it be conceded that petitioners might, by petition, have instituted entirely new proceedings for the vacation and relocation.

**COSTS:** Taxation—Losing Party. He who leads a court or other  
3 public official body into illegal action must, on certiorari to correct the illegality, pay the costs necessitated by the writ. So held where those objecting to the vacation of a highway caused the board of supervisors to illegally refuse to pass upon the petition.

**EVIDENCE:** Relevancy, Competency and Materiality—Noncon-  
4 sent to Legal Action. It is wholly immaterial that one did or did not consent to that which the law commands. So held where objectors to the vacation of a highway sought to show that they did not consent to a continuance of the proceeding by the board of supervisors following a *tie* vote. (See Section 413, Code, 1897.)

*Appeal from Van Buren District Court.*—SENECA CORNELL,  
Judge.

SATURDAY, SEPTEMBER 29, 1917.

ACTION in certiorari to test the legality of the action of the board of supervisors in dismissing a petition filed by the plaintiffs asking the re-establishment of a highway. The opinion states the facts.—*Affirmed*.

*Sloan & Sloan, F. W. Sargent and George E. Buckles,*  
for appellants.

*Walker & McBeth,* for appellees.

GAYNOR, C. J.—On the 21st day of September, 1914, plaintiffs filed with the county auditor of Van Buren County a petition asking for a vacation of a certain highway and a relocation at another point. A commissioner was duly appointed by the auditor, as provided by law, who reported in favor of the vacation of said highway and a relocation of same, as asked in the petition. Within the proper time, the defendant Ellis LeFever filed a claim for damages. There was also filed, within the proper time, a remonstrance against the relocation, signed by a large number of citizens. All the necessary preliminary proceedings were had on said petition, and the matter came up for hearing before the board of supervisors on the 16th day of February, 1915. At that time there were only two members of the board present, Boyer and Miller, the third member being absent on account of sickness. Neither party made any objection to proceeding before the board as constituted. The petitioners for the road and the parties remonstrating introduced their testimony, and arguments were made by both parties, and the matter taken under consideration by the board. On the 15th day of March, the two members who heard said evidence disagreed in their judgment, and caused the following record to be made:

“The board of supervisors of Van Buren County met pursuant to adjournment. Members present, Boyer and Miller. On motion, a ballot was taken on the road petition of J. W. Riggs et al., to change near Selma, the result being one for and one against.”

At the June session, 1915, and on the 28th of that month, the matter came on for further hearing before the board, and the following proceedings were had and record made, or caused to be made, by the board:

“Keosauqua, Iowa, June 28th, fourth day June session. Board of supervisors of Van Buren County met pursuant to

adjournment. Members present, Kerr and Boyer. Meeting called to order by Kerr, chairman. On motion the board fixed July 1st for a rehearing of the Riggs road petition. The rehearing being by mutual agreement of both parties."

On July 1, 1915, the cause came on again for further hearing, and the defendant Ellis LeFever, and other objectors and remonstrators, filed the following motion to dismiss:

"Before the Board of Supervisors of Van Buren County,  
Iowa.

"In the Matter of the petition)  
of J. W. Riggs et al. For vacation & relocation of the highway leading east from)  
Selma. )

"Now come the objectors in the above entitled matter and object to a reconsideration or any consideration of the petition for the re-establishment and vacation of a part of the road in the above entitled matter for the following reasons: On the 21st day of Sept., 1914, a petition signed by J. W. Riggs and others was filed in the office of the county auditor of Van Buren County, asking that the highway leading out of Selma, east, running by the Hinkle place, thence on to Douds, be vacated and to a point relatively opposite the first railway bridge out of Selma and re-establish from said point back to Selma along the track of the railroad, operated by the C. R. I. & P. Ry. Co. Upon this petition a commissioner was appointed, who reported in favor of the petition, and upon his report, the county auditor appointed appraisers to appraise and assess damages. The county auditor appears to have followed the provision of the statute by giving notice to adjacent property owners, including the C. R. I. & P. Ry. Co., and in all other respects appears to have complied with the law of procedure in the establishment or vacation of highway.

Upon notice having been given, the auditor, as provided by law, fixed the time and place of hearing of the petition to be on the 16th day of February, 1915. A remonstrance signed by numerous persons in the vicinity of the road in Village Township was filed in due time with the county auditor, as well as objections and claims in the matter of damages. Pursuant to the order of the county auditor, the board of supervisors of said county met in adjourned session at the court house in Keosauqua, for the purpose of hearing and determining the matter of the petition and the objections thereto. The petitioners appeared by Walker & McBeth, Attorneys, and the objectors, including Ellis LeFever and the C. R. I. & P. Ry. Co., by Sloan & Sloan, their attorneys. A hearing was had, evidence introduced on the part of both petitioners and objectors, and arguments heard by counsel for both parties. But two members of the board were present at such hearing, to wit, H. G. Boyer, who acted as chairman pro tem, and Geo. W. Miller, these two members being the only members of the board who at any time had any part in the hearing of the case or in any other proceedings whatever. On the 15th day of March, 1915, the minutes contain the following: 'The board of supervisors of Van Buren County met pursuant to adjournment. Members present, H. G. Boyer, acting chairman, and George W. Miller. On motion, a ballot was taken on the road petition of J. W. Riggs et al., to change near Selma, the result being 1 for, and 1 against.' That the action is a full and final determination and an adjudication of this particular petition, and the board now has no power or authority to reconsider its action and no further jurisdiction respecting the merits of this particular petition.

"Objectors to Petition, including C. R. I. & P. Ry. Co., by Sloan & Sloan, their attorneys.

"Filed July 1st, 1915."

This motion was sustained, and plaintiff's road petition

dismissed without any further hearing thereon before the board. Thereupon, the plaintiff filed a petition for a writ of certiorari, alleging that the action of the board of supervisors, in sustaining said motion and in dismissing the proceedings and in refusing to hear said petition and matters, was and is erroneous, illegal, and without authority of law, and is grievous and detrimental to these petitioners, and deprives them of the right to be heard on this petition, and, further, that they have no plain, speedy, and adequate remedy at law. Over the objections of defendants, a writ of certiorari issued, and the cause was taken to the district court. Upon a hearing in the district court, judgment was entered for the petitioners, setting aside and annulling the action of the board in dismissing the petition, the court holding that the action of the board in so doing was illegal and erroneous. The cause was thereupon remanded to the board of supervisors, with direction to set the same for hearing at some future date, and to hear and determine the cause upon its merits; further directing that, if the parties could not agree on a date for hearing, the board should fix a date and cause ten days' notice to be served on the parties; further ordering the costs made on the hearing in the district court taxed against Ellis LeFever and the Chicago, Rock Island & Pacific Railway Company. Judgment was entered against them therefor. These defendants appeal.

The defendants assign error in the action of the court, in that the court erred in holding that the action of the board of supervisors, on July 1, 1915, in dismissing plaintiff's petition and refusing further to hear and determine the question of the relocation of the highway, was illegal and void. It is apparent from this record that all preliminary steps were had necessary to bring before the board for its determination the question presented in plaintiff's petition. The board had jurisdiction both of the subject

matter and of the parties, and on February 16th, the matter was squarely before it for determination. But two members of the board were present. Without objection, the parties proceeded to submit the cause to the board, with but two members present. The board consisted of three members. It required an affirmative vote of a majority of the members to express the board's attitude on the question involved, one way or the other. After the submission, the matter was taken under advisement. On the 15th day of March, a vote was taken, with the result that one vote was cast for and one against the relocation and establishment of the highway. There was, therefore, no finding of the board as such upon the controverted question. At the June session following, the matter came on again for further consideration by the board. Thereupon, the board, by affirmative vote of a majority of the members, fixed July 1st for a rehearing of the petition. On this date, the parties again appeared. The petition was thereupon dismissed by the board, on motion of the defendants, upon the theory that the action of the two members on the 15th day of March was the action of the board and was final, and, as defendants say, a full and final determination and an adjudication by the board of all rights of plaintiff under the petition, and the board had, therefore, no further power or jurisdiction over the matter.

The members of the board acted for the board, which, in contemplation of law, is a legal entity. It requires affirmative action on the part of a majority of the members to bind the board. In the instant case, two members constituted a majority of the board for the transaction of business. When two members are present, and there are only three in all, it requires affirmative or negative action in which both join, to bind the board or to make their action the action of the board. This is true of all matters which come before the board for its determination. There must

be, necessarily, a majority of the members for or against a proposition before it is either affirmed or rejected. Section 413 of the Code of 1897 reads:

"A majority of the board of supervisors shall constitute a quorum to transact business, but should a division take place on any question when only two members of the board are in attendance, the question shall be continued until there is a full board."

On the 16th day of February, on the 15th day of March, and at the June session, the board was represented by a majority of its members. There was, therefore, a quorum for the transaction of business. Though two members constituted a quorum for the transaction of business, yet the business to be transacted by the board could only be made effectual by an affirmative vote of a majority of the board. Where two members are present, no affirmative action is binding upon the board unless the two members concur and join in the same act. Whether they concur in their conclusions as to what should be done in a particular matter necessitates, of course, a submission of the matter to them for their determination. If they concur, two being present, their action binds the board and binds the parties. But if they do not concur, two being present, their action does not bind the board nor represent the action of the board, nor does it bind the parties. When, two being present, a division takes place on any question, the question upon which the division arises must be continued until such time as the board shall direct, because the statute so says. This is what the board did, acting by a majority of its members. The question of the relocation of the highway came before the board on the 16th day of February. But two members were present. Two members heard the evidence. There was a division between these members,—one for it and one against. The vote of neither can be taken as binding upon the board, because neither member constituted a majority

of the board. Therefore, under the statute, it became the duty of the board to continue the question until there was a full board. They continued it until the first day of July. Both parties were then present, but there was not a full board. There were still but two members present,—one member who was present at the first hearing and one member who was not. These two members, however, who were present, constituted a quorum for the transaction of business. It could not be determined at that time without a hearing whether or not there was a division in the members as the board was then constituted, upon the ultimate question to be submitted and determined.

If the parties were not content to have the cause heard before the board with only these two members sitting, the cause should have been continued until there was a full board; that is, until the three members were present. There was no authority in the board to dismiss the plaintiff's claim because there was not a full board. There was a quorum for the transaction of business. The matter could have been rightly continued until a full membership of the board was present. There had been no determination of plaintiff's rights by the board up to this point. In no sense could the action of the two members hereinbefore referred to, had upon a hearing at the February session, be a final adjudication of the plaintiff's right to have the road re-established. There was simply a division of judgment between the two, which necessitated a continuation of the case to some future time. The matter was still before the board for determination. The board still had jurisdiction of the subject matter and of the parties. The duty still rested on the board to hear and determine, by an affirmative vote of a majority of the board, whether plaintiff was entitled to have his claim recognized or rejected. At the February meeting, the board had jurisdiction. A majority of the members of the board was present. Therefore, the board had



jurisdiction of the subject matter and of the parties, and, a majority of its members being present, was in a position to hear and determine the question submitted. It is not the contention of the plaintiff that the board did not have jurisdiction to decide at the February meeting. It could have decided it one way or the other, if the two members had agreed. There would then have been a majority of the members of the board in favor of the proposition. Though having jurisdiction to decide, they did not decide, because of the disagreement. The matter was, therefore, not decided one way or the other by the members present at that time. It was to meet a condition like this that Section 413, above set out, was enacted. The board did just what the statute directs the board to do, in continuing the cause for further hearing. On the 1st of July, on the request of either party, the cause might have been further continued without the board's losing jurisdiction. This, however, was not a necessary action on the part of the board, for, inasmuch as there were two members present at the July meeting, one of whom did not sit at the former hearing and had expressed no opinion upon the merits of the controversy, the cause might have been heard by these two. If they agreed, there would be no occasion for further continuance. If they disagreed, then, of course, the same condition would exist as existed before, and the cause would then have to be continued for hearing before the full board.

We are satisfied that the board acted erroneously in dismissing the petition without further hearing, and exceeded its jurisdiction in refusing to determine the controversy one way or the other upon its merits.

- It is next contended that, conceding that the board acted erroneously, yet certiorari is not the proper remedy for reviewing its action. It is claimed that the plaintiff had a plain, speedy, and adequate remedy at law.
2. CERTIORARI:  
judicial proceedings: high-way petition: refusal to determine.

The remedy suggested is that the plaintiff might have started all over again. This would be neither plain, speedy, nor adequate. It cannot be contended that plaintiff should have appealed from the action of the board, because there is no provision made for appeals in actions of this kind. Sections 1513 and 1514 of the Code of 1897 provide for appeals only from assessment of damages. *Myers v. Simms*, 4 Iowa 500; *McCrary v. Griswold*, 7 Iowa 248. Unless certiorari can be maintained, the plaintiff is remediless. Section 4154 of the same Code provides that a writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board, or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy and adequate remedy. We think certiorari is available to the plaintiff in this case, under the provisions of the statute. *Jewett v. Ayres*, 167 Iowa 431; *State v. Webber*, (Minn.) 37 N. W. 949; *State ex rel. Heller v. Lawler*, (Wis.) 79 N. W. 777; *Chicago, B. & Q. R. Co. v. Castle*, 155 Iowa 124; *Iowa Loan & Trust Co. v. District Court*, 149 Iowa 66, 70; *Bremer County v. Walstead*, 130 Iowa 164, 169; *Home Savings & Trust Co. v. Polk District Court*, 121 Iowa 1.

It is next contended that the court erred in taxing the costs to appellants. It will be noted that it was on motion of these defendants and at their instance and request that the road petition was dismissed. It was at their instigation that the illegal action was taken by the board, which necessitated the suing out of the writ for its correction. Our statute provides that the costs shall be taxed in favor of the successful, and against the losing, party. They should, therefore, be taxed against the party who procured the illegal action to be done. *Tiedt v. Carstensen*, 64 Iowa 131; *Coffey v. Gamble*, 134 Iowa 754, 756; *Hickman v. Hunter*, 159 Iowa 201, 205.

3. Costs: taxation: losing party.

It is next contended that the court erred in denying to the defendants the right to show by evidence that they did not consent to the continuance of the cause and the setting of it for retrial on July 1st. Any agreement on the part of the defendant would neither add to nor take from the board the right to do that which the statute directed should be done in case of a division upon any question when only two members of the board are in attendance. It is apparent, therefore, that no prejudicial error was committed by the court in refusing testimony tending to show that defendants did not consent to the continuance of the cause and the setting of it for rehearing on July 1st.

Upon the whole record, we think there is no error of which defendants may complain, and the cause is—*Affirmed*.

LADD, EVANS and SALINGER, JJ., concur.

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M. D. SMITH, Guardian, Appellee, v. IVA CRETORS, Appellant.

**JUDGMENT:** *Conclusiveness—Parties Concluded—Joint Defendants.* A nonfraudulent decree, which specifically adjudges that plaintiff has absolute title and that neither of two joint defendants has any title, *which latter part of the decree was squarely within the issues tendered*, necessarily operates as an estoppel on both defendants to again litigate such issues *as between themselves*.

**PRINCIPLE APPLIED:** A minor held conveyances from an uncle upon which he might predicate full title to certain lands. The minor's mother also held conveyances, later in date, and from the same grantor, upon which she might predicate full title to the same lands. The mother claimed that the conveyances to the minor were testamentary, while those to herself were the result of a sale on adequate consideration. The mother sold and *conveyed* the land. The purchaser, before paying the full price, objected to the title. The mother and her purchaser arranged for an action to quiet title, at the

mother's expense. The purchaser brought the action jointly against the mother and son. Jurisdiction was fully obtained. A guardian ad litem was appointed and duly answered. In harmony with the answer, the minor filed a sworn disclaimer of any interest in the land. The conflicting conveyances and attending facts were fully before the court. There was no fraud. Decree was entered that the purchaser had absolute title and that *neither the mother nor the son had any title*. The mother had been appointed as the regular property guardian of the minor, and the minor, at a later date, sought to secure the removal of the mother as guardian, on the ground that he, the minor, owned said land, and that the mother had failed to account for the proceeds thereof.

*Held*, the minor was estopped by the decree from relitigating the issue between himself and his mother.

**JUDGMENT:** Conclusiveness—Matters Concluded—Concession of  
2 Record. Principle recognized that, where material concessions are made of record in an action to quiet title, the decree will be construed as involving a finding *in accordance with such concessions*.

PRINCIPLE APPLIED: See No. 1.

**JUDGMENT:** Equitable Relief—Perjury. Decrees in an action  
3 to quiet title will not be set aside, especially in a collateral proceeding, on the ground of perjury, or the equivalent thereof, committed in the trial of the action.

**JUDGMENT:** Equitable Relief—Fraud—Insufficiency. Fraud  
4 sufficient to set aside a decree which quiets title is not made out by showing (a) fraudulent statements of a party made in a proceeding separate and distinct from the proceedings to quiet title, or (b) statements which constitute nothing more than erroneous legal conclusions.

*Appeal from Union District Court.*—H. K. EVANS, Judge.

SATURDAY, SEPTEMBER 29, 1917.

SUIT in equity to determine whether or not the appellant, who is the mother of appellee Walter Quick, and was his guardian, should be decreed to pay over the proceeds of land sold by her, the claim being that the land sold belonged to the minor. The court so decreed, and Iva Cretors appeals.—*Reversed*.

*Brown & Ferguson*, for appellant.

*L. J. Camp*, for appellee. (No brief.)

SALINGER, J.—The issue tried out was formed by a contest over whether the appellant should be removed as guardian, and this proceeding was finally so dealt with as that the trial court passed upon the questions presented in a suit in equity. The complainant has evidence which, if there be no tenable avoidance, we may assume justifies the decree appealed from. But while this may be so, if there is no bar to considering and giving weight to such evidence, we have first to decide whether a plea of estoppel by adjudication has been sustained, and whether the trial court was warranted in acting in disregard of that plea, as it did do. We need not elaborate upon the proposition that, no matter how meritorious the claim of appellee may be, ordinarily he may present it but once.

The appellant presents a plea which, in due form, asserts that appellee is estopped to litigate whether or not appellant owned the land with the proceeds of which it was attempted to charge her. This plea is based upon the claim that, though nominally the defendant in a former action, she was the real party in interest and real plaintiff therein, though one Harness was the nominal one; that, in that suit, she and her ward, and minor son, were the defendants named; and that it was therein adjudicated that her said son, the real plaintiff in the present suit, had no title to, claim upon, or interest in, the land involved in both suits. It appears without conflict that both said parties defendant in the first suit made due appearance therein, and that the son was duly served with notice and duly defended by a guardian *ad litem*. The petition in the first suit, with some additions to be noted in another connection, was the usual one to quiet title; the decree was within

1. JUDGMENT:  
conclusiveness:  
parties con-  
cluded: joint  
defendants.

the issues tendered, and adjudges that plaintiff in the first suit has full title, and the defendants therein have no title nor interest. That decree stands, and is un-

2. JUDGMENT:  
conclusiveness:  
matters con-  
cluded: con-  
cession of  
record.

modified. The naked fact that, in an action to quiet title, there is a decree quieting title in plaintiff, operates as a decision that defendant has no title or claim. *Farrar v.*

*Clark*, 97 Ind. 447, at 449; *Board County Com. v. Welch*, (Kan.) 20 Pac. 483; 2 Black, Judgments (2d Ed.), Sec. 664; *Stevens v. Hughes*, 31 Pa. 381; *Indiana, B. & W. R. Co. v. Allen*, (Ind.) 15 N. E. 446; *Hays v. Carr*, 83 Ind. 275, at 288. Of course, that is the adjudication where, as here, it is expressly decreed that plaintiff has full title, and that defendant has no title or interest. *Davis v. Lennen*, (Ind.) 24 N. E. 885; *Ooter v. Baston*, 89 Ind. 185, at 186; 1 Freeman on Judgments (4th Ed.), Sec. 309.

The plea interposed is not the strict *res adjudicata*, but urges an estoppel to relitigate whatever is covered by any finding in the first suit which must have been the vital basis of the decree therein entered. On such plea the court may go beyond the face of the judgment, and the right to litigate successfully in the second suit may be foreclosed, because it is found upon such investigation that the decree pleaded could not have been entered without finding against the suitor that fact upon establishing which his success in the second suit depends. And both here, and, of course, as against an express finding that defendant has no title, it is immaterial that the loser in the first suit failed there to defend with all he had. These propositions are so well settled that citations in their support would be mere pedantry. Then, too, the minor filed in the first suit a sworn disclaimer, in which he declares in manifest effect that he has no claim or title, and ought not to have; that conveyances made to him are not effective; that later conveyances to his mother are, and ought to be; and that he is fully ad-

vised of the truth, and had no concealment practiced upon him. And appellant may well claim that the appellee was, by the decree in the first suit, excluded from all rights in this land, if for no other reason than because of the rule that, where one makes concessions of record material to the issue, the decree involves a finding in accordance with such concession. *Prouty v. Matheson*, 107 Iowa 259, at 263; *Burgess v. Stribling*, (Mich.) 108 N. W. 421; *In re Thoma*, 117 Iowa 275. But, as said, the appellant needs no aid from either of these well-established law rules, because by no possibility can they accomplish more for her than does the fact that the decree in the first suit expressly adjudged that her grantee had full title, and that her son had none.

The decree in the first suit was set aside and disregarded. We are not able to find that it was even attacked. There certainly is no attack in terms. There is and can be no claim that the disregarded judgment lacks jurisdiction. We are unable to find any allegation that same was obtained by the practice of any fraud upon parties or court. The allegations of the petition for removal, which was the vehicle for complaining of the appellant's dealing with this land, do not go beyond asserting that the interests of the mother in said land are adverse and hostile to the complaining minor, wherefore he prays that she be cited to show cause why she should not be removed as guardian; that, upon sufficient showing having been made, she be removed, and some suitable person appointed in her stead; and that said guardian be given authority to bring any necessary action or actions for the recovery of property belonging to the minor; and that the court make such other and further orders as may be deemed just in the premises, including a decree that the title to the proceeds of said land is in and should be transferred to the minor. Not a suggestion by way of replying to the plea of estoppel by adjudication through said first decree.

Passing that, if it may be passed, we come to the question whether the evidence warrants what was done. Possibly (and we suggest the possibility merely because we are at a loss to understand why the action was taken) the trial court gave controlling effect to the fact, if it be one, that mother and son were both defendants. This theory is suggested by the terms of the decree now in review, which declares that the first decree is not binding between mother and son. Passing whether the mother was not in fact a plaintiff,—if the decree rests on the position that the mother and son were not adversative parties and that, therefore, there was no adjudication as between them as to where the title lay,—the conclusion runs counter to *Devin v. City of Ottumwa*, 53 Iowa 461, 466, approved in *City of Sioux City v. Chicago & N. W. R. Co.*, 129 Iowa 694, at 702, and *City of El Reno v. Cleveland-Trinidad P. Co.*, (Okla.) 107 Pac. 163, where, as here, the parties were, on the record, parties on the same side.

If this was not the theory of the trial court, it must have proceeded on one or both of two other theories: either because it found (and it does so find) that the minor is the true owner of the property, and that no subsequent conveyance from his grantor was sufficient to defeat his rights; or that the mother, being under contract obligation to release a mortgage upon the land, had instead obtained said mortgage, transferred it, caused a sheriff's deed title to be erected upon it, and the grantee in the sheriff's deed to convey to her.

It but states a truism to repeat that it will not suffice to set aside the first decree that the trial judge in each of two suits disagree on the merits. If that suffices, a third judge may settle these merits for himself, and so make all that was done in the present suit waste paper. That the

3. JUDGMENT:  
equitable re-  
lief: perjury.



mother violated her obligation to satisfy the mortgage and wrongfully built up a title by sheriff's deed, is of no materiality. First, that should have been litigated in the suit which foreclosed that mortgage; second, if what was done concerning the mortgage constitutes a fraud upon the court that quieted title in a buyer from appellant, it was one of the class in which perjury on the trial is, and decrees may not be set aside, to a certainty not on collateral attack, by proving frauds of that class; third, if the sheriff's deed title be held void, that cannot sustain collateral attack upon a decree which quiets title upon conveyance wholly distinct from the basis of the sheriff's deed title. Then, too, the disclaimer to which we have referred was in evidence, and no attempt was made to impeach or avoid it.

It is clearly made out that no fraud was practiced upon the court. It had before it every fact arousing suspicion which was before the last court. Both courts had the minor's disclaimer. Both were advised of every step taken to obtain the decree in the first suit. Both courts were advised that appellant contracted with one Harness to convey the land in controversy to Harness by warranty deed; that, when she furnished abstract, Harness claimed there was a defect in the title, and an adverse color of title, whereupon it was agreed between them that Harness was to begin an action in his own name to quiet the title against all claimants, or supposed claimants; that she agreed to pay all costs, including a stated attorney fee to a stated attorney; that provision was made for paying part of the purchase price to her, if and when said action furnished a merchantable title; that the reason for bringing the action to quiet title in the name of Harness was that he is the only one that claims absolute fee simple title, and the only one who can rightfully bring the action on part of appellant; that it was agreed that, when her minor son, Walter, became

fourteen, which was to come about in a few months, she would, at the request of Walter, petition for letters of general guardianship over his person and property, in order that he might become a defendant in the action in due form of law; and that by said disclaimer the minor ratified the sale to Harness.

4. JUDGMENT: If there be any fraud such as would set aside a decree, at least on collateral attack, equitable relief: fraud: insufficiency. it must be because, in procuring the appointment of appellant to be guardian, she states in her application that she knows of no property that then belonged to the minor, or that he was likely to fall heir to until her death, it being claimed she well knew the fact to be then that her minor son was the owner of the tract in dispute and had obtained title thereto by virtue of a warranty deed executed to him by his uncle Jacob; that she paid off a mortgage on the land executed by Jacob, and instead of satisfying the same, transferred it to one Davenport, with the understanding that Davenport should foreclose and obtain title by sheriff's deed and thereafter convey to her, which arrangement was carried out; and this though she was under obligation by assumption to pay the said mortgage,—to which last matter consideration has already been given; further, that she stated, in a report later filed by her as guardian, that no money or property of any kind belonging to said minor had come into her hands since her appointment, when in truth she had received the proceeds of selling said land. It is apparent that this, and the statement that the minor had no property, is another form of stating the ultimate claim, i. e., that appellant practiced a fraud upon the court in securing her appointment as guardian, by falsely asserting, knowingly, that the land in question did not belong to the minor. To this there are two answers: These statements were not made in the cause in

which the decree relied upon was entered, and could not have influenced its entry. Second, if these statements are untrue, it results in no more than that a legal conclusion drawn on where title lies, is unsound. It is far from clear it is that. It appears that both appellant and her son held conveyances to this land from the same grantor, the uncle of the minor. The appellant claims that all conveyances to Walter were testamentary, were not delivered, were without consideration, and were not accepted before the grantor annulled what, at most, was an uncompleted gift. In his sworn disclaimer, the son admits all this, and that the uncle gave title to the mother and not to disclaimant. She had the deed from the uncle which was the last, and thinks she advised her buyer of it. But assume she was mistaken on where the law put the title,—that falls far short of establishing that she took her position on this head, knowing that in truth the title was in the minor. She denies that she knew that or believed it, and insists she still believes the title was in her. She denies all intent to wrong her son. It all comes to holding that a decree quieting title is not entitled to be sustained as other judgments are; that, as to such an one, successful attack will lie without plea and without the evidence required to set aside other judgments attacked with proper plea; that it may be disregarded or upheld, judge by judge, at will; and that public policy requires such decrees shall be lightly esteemed. That is not our view. The object of a suit to quiet title is not merely to settle particular claims. *Farrar v. Clark*, 97 Ind. 447, at 450. Its very object is to determine all conflicting claims and to remove all clouds from the title of the complainant. *Green v. Glynn*, 71 Ind. 336. The suit was intended to secure repose and to settle all conflicting claims in one comprehensive action. *Merced Mining Co. v. Fremont*, 7 Cal. 317. Its purpose is to put "all litigation at

rest" as to the titles involved. Sedgwick & Wait on Trial of Title to Land (2d Ed.), Section 532c; Pomeroy on Equity Jurisprudence, Section 248. The statutory remedy is broader and more comprehensive than that afforded by a bill of peace under the chancery practice. *Curtis v. Sutter*, 15 Cal. 259. And the object of the bill of peace was the exercise of an anticipatory precaution to establish and perpetuate a right claimed which otherwise might be controverted by different persons at different times and by different actions. The object is to suppress and restrain useless or oppressive litigation, and to prevent multiplicity of suits. 2 Story on Equitable Jurisprudence, Section 853. It is made use of where a person has a right which may be controverted by various persons at different times, whereupon the court will, to prevent a multiplicity of suits, direct an issue to determine the right, and ultimately issue an injunction. *Randolph's Adm'r. v. Kinney*, 3 Rand. (Va.) 394, 395. Wherefore, it follows that failure to put an injunctive clause into a decree quieting title is harmless error, because "the decree would have been a bar to subsequent litigation on the same subject matter if the injunctive clause had been omitted." *Reed v. Calderwood*, 32 Cal. 109, at 111. And see *Ritchie v. Dorland*, 6 Cal. 33, 37. It is an equitable remedy to determine in one suit what may be or threatens to be the subject of repeated litigation by various persons. *Woodward v. Seely*, (Ill.) 50 Am. Dec. 445, 449, note. The law is not hostile to the decree in such suit.

The views we have expressed, of course, make it unnecessary to consider the question of who in truth had title. For the reasons advanced herein, we are constrained to hold that the decree below must be—*Reversed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

E. A. WEIBEL, Appellee, v. BOSTON PIANO & MUSIC COMPANY et al., Appellants.

**PLEADING: Answer—Denials—Sufficiency.** A *general* allegation  
 1 by plaintiff that he has complied with all conditions which are precedent to his right to recover on a contract, is not put in issue by a *general* allegation by defendant of noncompliance by plaintiff. *Defendant must specifically state wherein plaintiff has failed to comply with said conditions.* (Section 3628, Code, 1897.)

**EVIDENCE: Relevancy, Competency and Materiality—Increase of**  
 2 **Sales—Prior Amount of Business.** On the issue whether a dealer's business had increased during a certain stated time, evidence is admissible as to the amount of business transacted during the same period immediately preceding the commencement of the time in issue.

**CONTRACTS: Construction—Implying Impracticable Conditions.**  
 3 A persuasive argument for rejecting a construction contended for is that it would render the other party to the contract practically remediless.

*Appeal from Johnson District Court.—R. P. HOWELL, Judge.*

WEDNESDAY, JUNE 20, 1917.

REHEARING DENIED SATURDAY, SEPTEMBER 29, 1917.

ACTION on the contract resulted in judgment as prayed.  
 The defendants appeal.—*Affirmed.*

C. H. Van Law and Otto & Otto, for appellant.

Remley & Abrams and J. E. Jordan, for appellee.

LADD, J.—I. The defendant is a corporation engaged in developing the business of retail merchants by systematic advertising, and incidentally in selling to said merchants at a profit goods such as pianos, watches, sewing ma-

1. **PLEADING:**  
**answer:**  
**denials: suf-**  
**ficiency.**

chines and the like, to be given as prizes. The plaintiff was engaged in the hardware business at Fairbanks, and on March 12, 1914, entered into a contract with defendant by signing an order, which was accepted, for one piano, one gold watch or sewing machine, and a large amount of advertising matter, due bills, pledge or patronage cards, one book entitled "How to Start a Contest," another on "The Art of Successfully Conducting a Piano Contest," and a third known as a "Model Ad Book." The plaintiff undertook to pay therefor \$358, as follows: One fourth within 30 days from date of shipment, and the balance in eight equal payments, two months apart, the first to be due in five months. Under the head of "Assurance of Trade" was this stipulation:

"As a further consideration, it is hereby mutually agreed that in the event twenty-five per cent. of the dealer's increase in trade, during a period of thirteen months from the date of this order, does not equal the sum of \$400, the said piano company will make up the difference between said sum and twenty-five per cent. of the actual increase in trade. It is expressly understood that this provision is effective only when the dealer makes satisfactory proof of the deficiency herein referred to, and complies in every respect with the terms of this order given to the said piano company, as well as promptly meeting his obligations with reference thereto."

The plaintiff alleged the making of the contract, including portion thereof as quoted, and that he had fully complied with all its conditions; that his business had not increased during the 13 months of the piano contest as warranted, but had actually decreased; and he prayed for judgment in the sum of \$400. The defendant, in the first division of the answer, admitted having entered into the contract, but denied each and every other allegation; in the second division, it alleged that no proof of deficiency in the increase

of trade had ever been furnished the defendant; and in the third division, pleaded generally the purposes of the contract, and that plaintiff undertook generally to pursue the methods outlined therein; that plaintiff failed to follow the instructions and suggestions contained in the book furnished, "How to Start a Contest;" also failed to obey instructions included in the book entitled "The Art of Successfully Conducting a Piano Contest;" and also failed to give heed to the suggestions in the book known as "Model Ad Book," and in many other respects and particulars failed to pursue the course outlined in the instructions supplied him; and defendant prayed that it be permitted to go hence with its costs.

The plaintiff moved to strike the third division from the answer, for that (1) the allegations therein did not constitute a defense; (2) the contract did not require plaintiff to follow the suggestions and instructions mentioned as a condition precedent to compliance with the assurance of trade clause; (3) the defense was sham in that it failed to specify what plaintiff ought to have done which he did not do, or any breach in the performance of the contract by plaintiff. This motion was sustained, and, as we think, rightly so. The plaintiff had pleaded the contract and full performance, as permitted by Section 3626 of the Code, 1897, and Code Section 3628 expressly declares that, in controverting such allegation of performance, "it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated." The only portion of the third division of the answer which could be claimed to be at all specific is that which avers failure to comply with the instructions and suggestions of the books named. But there was no intimation as to what these books contained, save as found in their titles. This being so, it needs hardly to be said that, inasmuch as the facts were not "specifically stated," in order to have put in

issue the alleged performance of the contract by plaintiff, the defendant should have specified the particular respect in which plaintiff had failed to comply with some condition or undertaking of the contract. *Knapp v. Brotherhood of American Yeoman*, 139 Iowa 136; *Stork v. Supreme Lodge of Knights of Pythias*, 113 Iowa 724; *Richards v. Hellen & Son*, 153 Iowa 66; *Krause v. Modern Woodmen*, 133 Iowa 199.

The bringing of suit on a contract necessarily is on the theory of performance on the part of plaintiff; and, instead of exacting allegations concerning each detail, a general assertion of complete performance is deemed to cover all separately, and the defendant in his answer is required to point out specifically the particular instances of delinquency on plaintiff's part, and aver the facts with reference thereto. This simplifies the issues, and avoids the incumbrance of the record with needless reference to portions of the contract not drawn into the controversy. The third division of the answer did not direct attention to the facts, but pleaded nonperformance in terms nearly as general as performance had been alleged in the petition. It should have pointed out specifically wherein plaintiff had not done as he had undertaken, and thereby particularized the issues, to the end that the parties might have known in advance the precise questions involved. The third division of the answer was rightly stricken.

II. As tending to prove that plaintiff's trade did not increase during the 13 months following the making of the contract, evidence was received, over objection, tending to prove the amount of his trade during this period and the amount thereof during the preceding 13 months. The objection is on the theory that any increase must be traced to and shown to have been con-

2. EVIDENCE:  
relevancy,  
competency  
and material-  
ity: increase  
of sales;  
prior amount  
of business.



sequent on the piano contest and advertising in pursuance of the contract. To so do would seem utterly impracticable, for a merchant could not be expected to ascertain what influenced each customer to buy, nor would all customers be able to detail precisely the influences lead-

3. CONTRACTS :  
construction :  
implying im-  
practicable  
conditions.

ing him to bestow his patronage on one merchant rather than another. Nor does the contract so specify. The portion of the con-

tract quoted does not define how the increase shall be ascertained. It only purports to specify on what condition \$400, or that amount less 25 per cent. of the increase, shall be paid to plaintiff. In not limiting said increase to that occasioned by the enterprise undertaken, the parties evidently recognized the impracticability of tracing any increase in business definitely to such a cause, and therefore referred to any increase of business which might come. This being so, it would seem that the previous trade of plaintiff would furnish a fair criterion in ascertaining whether it had increased and how much. Of course, previous trade might have been abnormal or unusual for some reason, and this might well be considered in determining whether there had been any actual increase, and if so, how much. But no such evidence was adduced, and defendant rested on its contention that the undertaking to pay the difference between \$400 and 25 per cent. of the increase in plaintiff's trade might be demanded only upon a practically impossible showing of such deficiencies by specific proof of the actual amount attributable to the methods prescribed and pursued in pursuance of the contract. We are not inclined to so construe the contract, and are of opinion that the evidence of the amount of plaintiff's trade during the 13 months under the contract and a like period previous thereto was admissible, and that, in the absence of any other showing, it was conclusive as to plaintiff's trade's having increased.

III. The court's ruling in permitting the plaintiff to

explain that he had compared his trade for 13 months under the contract with the 12 months previous, because of an explanation by the defendant's agent, was entirely without prejudice, for he immediately testified to his trade during the periods of 13 months each.

The judgment is—*Affirmed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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STELLA BALDRIDGE, Appellant, v. A. F. EVANS et al., Appellee.

**EXECUTORS AND ADMINISTRATORS: Executors De Son Tort—**

- 1 Accounting in Foreign State. One who has intermeddled in the affairs of a foreign estate and there done what an administrator might have done (there being no debts, and jurisdiction being acquired) may be compelled to account in this state to the heirs, even though the time for instituting administration has not expired, and even though it may be more difficult for the wrongdoer to account in this state than in the foreign state.

• **EXECUTORS AND ADMINISTRATORS: Administration in Gener-**

- 2 al—Omission—Effect. Principle recognized that administration is not necessarily required on *all* estates.

*Appeal from Davis District Court.*—SENECA CORNELL, Judge.

WEDNESDAY, OCTOBER 3, 1917.

THE question here is whether, where one has intermeddled in an estate left in Kansas, by taking possession of its property and dealing with it as an administrator might, he can, upon making appearance in an Iowa court, be compelled, the rights of creditors not interfering, to account to the heirs for their share in such estate. The trial court held that this might not be done; hence this appeal.—*Reversed and remanded*.

*Payne & Goodson*, for appellants.

*John F. Scarborough*, for appellee.

1. EXECUTORS AND ADMINISTRATORS: executors *de son tort*: accounting in foreign state.

SALINGER, J.—I. It is confessed by the demurrer of appellee that his wife and the mother of interveners and appellants died in Kansas and left an estate there; that no administration was ever had; that appellee took charge of the estate, paid debts, and in general did what an administrator may do; that there are no creditors; and that he has in his hands money derived from said estate to which interveners are entitled, unless the fact that there has been no administration and the time for having it has not lapsed, is a bar to their having a present judgment ordering appellee to pay same to said heirs.

The essential argument for appellee is that it may not be known that there are no creditors until there has been administration, or until the time for having it is past, and he supports, by many authorities, the assertion that the title to personal property is in the administrator, and not the heirs. These are all sound. See *In re Estate of Acken*, 144 Iowa 519; *Ritchie v. Barnes*, 114 Iowa 67; *Baird v. Brooks*, 65 Iowa 40; *Stahl v. Brown*, 72 Iowa 720; *Haynes v. Harris*, 33 Iowa 516; *Gilliland v. Inabnit*, 92 Iowa 46; *MacGregor v. MacGregor*, 9 Iowa 65, at 78, 79. But are they material? To us it seems that they do not touch the vital question, which is whether one who has intermeddled and constituted himself an executor *de son tort* can urge that he need not turn over to the heirs what he has converted because they might not oblige one who is a legal administrator to distribute the estate until it was duly closed. And so of the claim that there can be no distribution to the prejudice of creditors. *Walworth v. Abel*, 52 Pa. St. 370, 372; *Weaver v. Roth*, 105 Pa. St. 408, at 413; *Jordan v. Hummel*, 96 Iowa 334, 337; *Crossan v. McCrary*, 37 Iowa 684. But what bearing has this here, so long as the only argument is that it is at this time next to impossible to prove that there are no creditors? It is all answered by

pointing out that the demurrer admits that there are no creditors.

II. We are of opinion that the decision here must be controlled by the following propositions:

Transitory actions may be tried wherever personal service is had on defendant. *State v. District Court*, (Mont.) 135 Am. St. Rep. 622. So, while courts cannot sustain jurisdiction of naked questions of title to lands beyond the limits of the state, the jurisdiction of a court of equity is sustainable wherever the person of the defendant may be found, in cases of trusts, of fraud, and of contract, even though lands not within the geographical jurisdiction may be affected by the decree. *MacGregor v. MacGregor*, 9 Iowa 65. So where a bill charges defendant with receiving the rents and issues of real estate situated in another state, as administrator of an estate there, he may be impleaded by the infant heirs in Kentucky, and he will be regarded in a court of equity as a trustee for them. *Atchison's Heirs v. Lindsay*, (Ky.) 43 Am. Dec. 153. And one who here holds unlawfully the property of a decedent is liable as executor *de son tort*, although he may have originally taken possession of it by an agent in another state. Wherefore one holding property of decedent under color of fraudulent sale is, wherever found with the property in his possession, liable as executor *de son tort*, to the extent of the assets thus held, in an action brought against him by the creditors of the deceased. *Hopkins v. Towns*, (Ky.) 39 Am. Dec. 497. A foreign executor residing in Pennsylvania may be sued therein by a resident creditor of decedent. *Laughlin v. Solomon*, (Pa.) 36 Atl. 704. An administrator appointed in Alabama and the sureties on his bond there given became residents of Georgia. Held that they were liable to an action in Georgia by the distributees for a breach of the bond. Semble if foreign executors or administrators come within the jurisdictional limits of a state, they are liable to be sued there by creditors, or to be

brought to an account by legatees or distributees. *Johnson v. Jackson*, (Ga.) 21 Am. Rep. 285.

Courts of chancery may compel a foreign executor or administrator to account for the trust funds which he received abroad and brought with him into this state, upon a bill filed for that purpose by the next of kin of the decedent, without the issuance of letters of administration on the estate of the decedent. *McNamara v. Dwyer*, (N. Y.) 32 Am. Dec. 627. And the courts of Kentucky have power to compel persons within the jurisdiction to execute a trust charged upon Iowa lands by a Kentucky will, not probated in Iowa; and the jurisdiction is not arrested because the title to said land is the essential point on which the Kentucky suit depended. *Gilliland v. Inabnit*, 92 Iowa 46. An administrator appointed in another state and receiving assets there is not, when found and sued in Kentucky, exempt from responsibility for any surplus remaining in his hands after the payment of the debts claimed and allowed in such estate. *Atchison's Heirs v. Lindsay*, (Ky.) 43 Am. Dec. 153. It was said in *McNamara v. Dwyer*, (N. Y.) 32 Am. Dec. 627, that the rule leaning toward the suing of an administrator only in the state of his appointment cannot always effectuate justice. And it is said, suppose the administrator should permanently remove from the state, and take all the assets with him. Shall he go scot-free, or be subject to action where he can be found?

When the widow and heirs have appropriated all the assets of the estate prior to the appointment of the administrator, who is thus without means for the payment of its debts, they are liable therefor as administrators *de son tort*, to the extent of decedent's property which came into their hands; and it is no defense, in an action against them by a creditor, that an administrator had been appointed. *Madison v. Shockley*, 41 Iowa 451. One who intermeddles with

the property of an estate may be sued by a creditor, an heir, or a legatee, and compelled to pay the value of the property converted. *Elder v. Littler*, 15 Iowa 65. A widow cannot settle the estate of her deceased husband, make such distribution and appropriation as to her seems right, and make the property her own; and if she does so, she becomes his executor *de son tort*. *Schaffner v. Grutzmacher*, 6 Iowa 137. Where one intermeddles with the estate of a deceased person, and does what an administrator alone should do, he will become liable as an executor *de son tort*. *Crispin v. Winkleman*, 57 Iowa 523; *Portman v. Klemish*, 54 Iowa 198. This has been held as to one who received a small deposit belonging to an estate and paid it out on claims for expenses of the funeral and of the last sickness. *Bennett v. Ives*, 30 Conn. 329. And one who has presumed without lawful authority to administer an estate is estopped, in a proceeding for an accounting, from denying his liability to account. Wherefore, this appellee is estopped from denying liability or urging the necessity of further administration, and estopped from denying that administration has been had in Kansas. *Damouth v. Klock*, 29 Mich. 289.

## 2-a

For the benefit of creditors, the domicile of the intestate governs in the distribution of his assets wherever they may be situated. *Atchison's Heirs v. Lindsay*, (Ky.) 43 Am. Dec. 153. Plaintiff should not be in a position of having to seek his relief in a foreign jurisdiction when he alleges a complete cause of action as against the defendant, and that he may be subjected in another jurisdiction to suit on an inconsistent claim is no defense to an action in a jurisdiction in which he is properly sued. *Searles v. Northwestern Mut. Life Ins. Co.*, 148 Iowa 65, 70. The court should retain jurisdiction over him, and not send the parties out of court on such unreal possibilities. *Laughlin v. Solomon*, (Pa.) 36 Atl. 704.

2. EXECUTORS  
AND ADMIN-  
ISTRATORS:  
administration  
in general:  
omission: ef-  
fect.

The statutes do not require that the estates of all persons shall be administered, though they may be. Adult heirs may settle the estate without going into court, and if the decedent left no property or debts, administration should not be granted. *In re Estate of Acken*, 144 Iowa 519. Where there are no debts, and those who settle a claim owned by the decedent are his sole heirs, the settlement is valid, without the intervention of an administrator. *Christie v. Chicago, R. I. & P. R. Co.*, 104 Iowa 707; *Douglas v. Albrecht*, 130 Iowa 132.

It is stated in Section 201 of Woerner on American Law of Administration, that the rights of creditors to the assets of a deceased person is the principal reason for requiring official administration. Wherefore, the court sanctions the disposition of the property of the decedent without the appointment of an administrator, where it is certain no debts are owing, and there is a series of decisions in Alabama which assert that, when an estate is entirely free from debt, the distributees may in equity obtain distribution without the delay and expense of administration. And Brickell, C. J., deduces this rule:

"A court of equity will dispense with administration, and decree distribution directly, when it affirmatively appears that, if there was an administrator, the only duty devolving on him would be distribution. Then administration is regarded as 'a useless ceremony.'"

And where there is an administrator, and the heirs are parties beneficially entitled thereto, and in possession of personal property, the administrator will not be allowed to recover if it appears that the debts are all paid.

In the absence of administration of the estate of a decedent, a court of chancery will decree a distribution among the heirs. *Watson v. Byrd*, 53 Miss. 480, 483 (citing earlier Mississippi cases); *Ricks v. Hilliard*, 45 Miss. 359.

363. And see *Murphy v. Murphy*, 80 Iowa 740.

It follows that, there being no valid objection to the law forum, the demurrer should have been overruled. Wherefore the cause must be reversed.

III. The delay of appellants in suing, and that it is a greater hardship to make appellee respond in this suit than would result if appellants proceeded to have administration in Kansas, are both matters that are irrelevant to the law questions which the appeal presents. But see *Searles v. Northwestern Mut. Life Ins. Co.*, 148 Iowa 70; *Johnson v. Jackson*, (Ga.) 21 Am. Rep. 285. And appellants concede that distribution shall be made according to the laws of Kansas; and they should. *Atchison's Heirs v. Lindsay*, (Ky.) 43 Am. Dec. 153; *Bean v. Briggs*, 4 Iowa 464; *Sayre v. Wheeler*, 31 Iowa 112; *Davis v. Chicago, R. I. & P. R. Co.*, 83 Iowa 744, at 745, 746; *Barringer v. Ryder*, 119 Iowa 121; *Fitzgerald v. Metropolitan Acc. Assn.*, 106 Iowa 457.

We have no occasion to consider whether appellee may be made to repay what he has paid out. For appellants are willing that he shall have credit for what payments he has made. But see *Bennett v. Ives*, 30 Conn. 329; *Crispin v. Winkleman*, 57 Iowa 523; *Portman v. Klemish*, 54 Iowa 198.

The disposition we make of the appeal makes it unnecessary to pass upon a number of practice points that are argued.

*Reversed and remanded.*

GAYNOR, C. J., LADD and EVANS, JJ., concur.

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S. W. REYNOR, Appellee, v. A. D. MACKRILL, Appellant.

**BROKERS: Compensation—Performance of Contract.** Recovery of  
1 commissions may not be defeated on the plea that the owner  
was not specifically notified that the agent had secured a cus-



tomer, when what was done substantially amounted to the giving of such notice.

**BROKERS: Compensation—Bad-Faith Refusal to Make Sale.** Manifestly, a broker may not be defeated in his action for commissions by the fact that the owner, in order to defeat such commission, refused to make a sale to the broker's customer, but later did so on the unfounded claim that the agent was not instrumental therein.

**BROKERS: Compensation—Performance of Contract —“Able” to Buy.** To be “able” to make a purchase means that one must actually have the cash necessary to make the cash payment, and not merely the property on which he could raise it.

*Appeal from Jones District Court.*—F. O. ELLISON, Judge.

WEDNESDAY, OCTOBER 3, 1917.

SUIT for commission alleged to be due for complying with a written contract to obtain a purchaser for land, and securing a contract of sale. The answer is that plaintiff made no sale; produced no buyer who ever bought, so as to meet the contract; that the one tendered did not have the means to buy; and that, after extensive negotiations and efforts to sell, this person tendered, a Mrs. Blankenburg, failed to buy, and the negotiations were abandoned; that, on account of all this, defendant was compelled to procure a loan on the land to meet a payment due, and compelled to lease the farm; that thereafter he himself sold the farm and deeded it to Mrs. Blankenburg, in which sale plaintiff in no manner assisted or aided, wherefore defendant is in no manner indebted to plaintiff. Plaintiff had judgment upon verdict, and defendant appeals.—*Affirmed.*

*M. W. Herrick and B. E. Rhinehart, for appellant.*

*Remley & Remley, for appellee.*

**SALINGER, J.**—I. Plaintiff wrote defendant that, if he wished plaintiff to try and sell, plaintiff would try for another month on terms previously talked, and, “If I can sell

the farm for \$40 per acre, you will give me \$500 for making the deal—I think I can sell the farm inside of five weeks for \$40 an acre.” Defendant answered:

“If you can sell that place at \$40, please let me know and I will send contract. So please let me know.”

As a witness, plaintiff testifies that defendant asked that plaintiff let him know if plaintiff got a purchaser, and defendant would send the contract.

A point is made of its being necessary, both in law and under the contract, that the owner should be notified that the agent had a customer, and of the terms proposed by him, so that the owner might, if he elected, enter into a binding contract. If that be a requisite, it was met. The proposed buyer, Mrs. Blankenburg, and the owner and the agent met; the owner was advised that this woman was such purchaser; the terms were fully talked over; and the buyer advised the owner that she was there to close up. The jury could find that the owner agreed, and said, “All right, go down and draw up the contract;” that the buyer and seller directed what should be put into the contract; that work on writing up the contract was entered on; and that, while it was not finished, because the owner left to get an abstract, it was being written up while he was away for that purpose. This was on February 20th. Defendant says he stated that the agent had done nothing, and he (plaintiff) was there to sell in person, and that they were together to make a contract, if they could get together. The jury could find that the terms had been talked over in January, and agreed to on this February 20th, and the deal was to be completed at Davenport the next morning; that defendant said that, if plaintiff had sold the farm by the middle of January, he would have been in time. It could find that defendant complained of the delay, and at least

1. BROKERS:  
compensation:  
performance  
of contract.

intimated that this delay had greatly inconvenienced him, that he said the contract had expired long ago, and that he would not go ahead with a new deal unless he got more than the original terms. Plaintiff conceded that the contract time had expired.

It is questionable whether the answer raises the issue of want of notice. Be that as it may, the expiration of the contract time and failure to give notice must not be confused with the claim that the agency was at an end when plaintiff acted. Assume that defendant was justified in not dealing because the contract time had expired, that does not make the position tenable that there is no liability because there was a failure to give notice to the owner. Whatever other defenses defendant may have, failure to notify, where everything the notice could accomplish was effected without the giving of such notice, is not a tenable defense. The citations which plaintiff presents in support of her position are: *Beamer v. Stuber*, 164 Iowa 309, at 312. It holds:

"It is not enough that a parol offer to buy be made to the agent. The proposition should be to the principal, to the end that the statute of frauds may be obviated by reducing the agreement to writing. \* \* \* This does not necessarily mean that the offer shall be made by the purchaser to the seller, but that it shall be made in such circumstances that the latter may then exact the execution of a binding contract if he so elects. There is no reason why the agent of the seller may not communicate to him an offer of purchase, and, if the proposed purchaser is immediately accessible, so that a written contract then and there may be executed, and he is ready, willing, and able to consummate the deal, this is enough."

This opposes rather than supports appellant.

*McDermott v. Mahoney*, 139 Iowa 292, gives no support, nor *McGinn v. Garber*, 125 Iowa 533. *Flynn v. Jordal*, 124

Iowa 457, decides that an agent, to earn his commission for services in finding a purchaser of land where the sale is not consummated, must procure a valid obligation to buy and tender it to the vendor, or bring the parties together so that the sale may be made if the vendor elect. and that there is the right to withdraw an offer before it is accepted, but, if the proposed buyer takes his money from the bank, and advises, upon acceptance, that he has given up taking the land, or, in the absence of such advice, a reasonable time has elapsed wherein to accept, the contract binds neither party, and there can be no recovery unless it was made to appear that the proposed buyer was ready, willing and able, when the contract was tendered.

*Dean v. Goodrich*, 160 Iowa 98, gives no support; so of *Hill v. Dakin*, 162 Iowa 103. Both but hold that the contract made must be performed. And all that *Osborne v. Dannatt*, 167 Iowa 615, decides is that, where a petition based on a commission contract which provides for sale within a specified time, fails to plead performance within that time, and sets up no facts to avoid such provision, it is demurrable.

The point to *Felts v. Butcher*, 93 Iowa 414, is that the petition declares upon a sale made, whereupon commission may not be recovered merely for negotiations for a sale, and that the only contract made was one that neither buyer nor seller could enforce.

II. Since the time fixed for the duration of the contract had expired on February 20th, the defendant was at liberty to refuse the sale his agent tendered. He saw fit to go on, as though the contract time had not elapsed. If waiver is involved, none was pleaded. But there was no objection to testimony addressed to showing that the negotiations went on as if they were being conducted during the life of the contract. It therefore becomes a material ques-

tion why no sale was effected. On this head, the jury could find that a sale and its terms were fully agreed to; that defendant refused to consummate it, either because he objected to paying the agreed commission, or because of some act or omission on his part which was unjustified.

The jury could find that failure of defendant to furnish abstract caused some delay; that the buyer wanted one at once, so that it might be examined at once; that defendant said it was out on a farm with one Milan; that defendant and plaintiff went at once to get it; that Milan told them it was at his sister's; that defendant told the proposed buyer that he would send the abstract right down; that it was arranged it should be brought to Onslow the next day, or sent by mail to that place; that, on the next morning, defendant told the customer there was a slight flaw in the abstract; that it would take some time to correct it; that he could probably deliver it in two or three weeks; that the buyer waited two weeks, and then telegraphed to South Dakota for the abstract, got it later, and then turned it over to her attorneys. The jury could find that there was to be \$500 paid down, and the balance on March 1st, or as soon as the abstract could be brought down to date, and that the customer had a certified check for \$500 ready whenever a merchantable title was shown by the abstract. It appears that defendant had need of his money by March 1st, that plaintiff knew this, and that the buyer was in need of closing by March 1st.

We are told that while, as a general rule, the commission is earned as soon as a buyer who is able and willing to buy on the terms proposed is tendered, this is not so if the sale fails through some fault of the buyer. The support claimed is *Rounds v. Alee*, 116 Iowa 345. But the proposition would seem to need no support. The difficulty is that the proposition is sound, but does not determine the controversy we have for settlement.

III. The owner later sold the land to the same person who was the proposed buyer at the time when the negotiations were abortive. The jury could find that this sale was a mere subterfuge and, in fact, brought about because of what the agent had done. This suffices, though the verdict might not have been disturbed had it been found, instead, that the sale was utterly independent of anything done by the agent, and that therefore no commission was due him.

IV. Mrs. Blankenburg said, over objection, that she was able to pay over the price and always was ready, had made arrangements to pay for the land when she agreed to buy; that the money was ready for her, was at her command; that she always looked out so that, if she had to pay cash, she knew where she could get the money, and it was ready for this deal,—she was able to pay the full amount on February 20th; and she states how arrangement therefor was effected. It may be conceded that this is somewhat shaken by cross-examination and counter testimony. But enough remains to make her ability a fair jury question. There is ample testimony to sustain a verdict finding that she was willing to buy.

V. It is urged that the court should have instructed as to what constitutes a ready, able and willing buyer, and the definition should have been that he is one who actually had the money to meet the cash payment, and not merely one who might have property upon which he could raise the necessary money. The support claimed is *Jones v. Ford*, 154 Iowa 349, at 554. The court charged correctly that:

“To be able means that the purchaser must have the money at the time to make any cash payments that are re-

2. BROKERS:  
compensation:  
bad-faith re-  
fusal to make  
sale.

3. BROKERS:  
compensation:  
performance  
of contract:  
“able” to buy.

quired in order to meet the terms of the seller, and does not simply mean that the purchaser have property upon which he could raise the amount of money necessary, but, as stated, he must actually have the money to meet the cash payment and be in shape financially to meet any deferred payments."

It charged correctly that to be willing "means to be willing to make the purchase upon such terms." This, as said, is correct, though it is held in *McGinn v. Garber*, 125 Iowa 533, at 535, that, though there be general testimony that the money to make the cash payment was on hand, if it does not appear that the buyer owns property out of which a judgment for the purchase price can be enforced, there is a failure of proof as to sufficient financial ability. But, in *McDermott v. Mahoney*, 139 Iowa 292, at 306, where a proposed buyer testified generally that he was able to buy, that he could within a day or two have raised the money to make the necessary cash payment if the owner had not refused to sell, and it appears that there was issue on performing by a specified time, and, at the time at which the ability was questioned, the agent still had ten days to perform, it is held that in these circumstances neither immediate ability nor tender nor actual possession of enough cash to tender, or readiness to tender, is material.

VI. The abstract proposition that it is error and presumptively prejudicial to instruct on an issue upon which there is no evidence, and that instructions should not be based on a theory not presented by plea or proof, is not to be doubted, and we give the citations in support no investigation. The difficulty is that here it is no more than an abstract proposition. So of the proposition that, where the contract of sale is to be approved by the owner, finding a buyer is not enough, and "the principal may refuse to carry out the sale." And so of the statement that one may not recover on contract unless he shows that he has per-

formed in accordance with its conditions.

We find no prejudicial error, and the judgment below must be—*Affirmed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

BERNARD R. SEYMOUR, Appellant, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellee.

**RELEASE:** Validity—Fraud—Expression of Opinion. Fraud sufficient to avoid a release may not be built up solely on the good-faith expression of a mere naked opinion.

Applied where the one giving the release had full knowledge of his own injury and his ability to do work, where the one charged with fraud did not have such knowledge, but stated to the injured party "that he was making a big fuss over his injury, that said injury was of a *trifling* nature, and that he ought to have been at work for the past six weeks."

Applied also where the statement was made "that plaintiff's shoulder (which was injured) would be all right."

Applied also where a physician honestly believed and stated that certain injuries were not permanent, etc.

**RELEASE:** Validity—Fraud—Promise of Employment—Breach—Effect. Fraud sufficient to avoid a release may not be predicated on the breach by the one receiving the release of a promise "to take care of or employ" the releasor.

**RELEASE:** Validity—Fraudulent Concealment—Evidence—Sufficiency. The plea that the physician representing the one to whom a release was executed *fraudulently* concealed from the injured party that said injured party had an incurable dislocation, or one which rendered subsequent dislocations highly probable, is not established by evidence of the condition of the injured party after a second dislocation.

**FRAUD:** Pleading—Avoidance of Release. One seeking to avoid a release of a claim for personal injuries on the ground of fraudulent concealment by those representing the one receiving the release, must, as a condition to the introduction of evidence bearing thereon, specifically plead the ultimate facts constituting such fraud.



**RELEASE:** Validity—Fraudulent Concealment—War of Opinions.

5 The plea of fraudulent concealment in the condition of an injured party, sufficient to avoid a release, wholly fails when the evidence shows nothing more than the expression of an honest opinion by the physician charged with the fraud, and the expression of a contrary and equally honest opinion by other physicians.

**EVIDENCE:** Presumptions—Unsupported Deductions. Quite man-

6 festly, one may not make a *prima-facie* case by drawing conclusions from facts not shown.

**APPEAL AND ERROR:** Harmless Error—Non-Fraudulent Represen-

7 tations—Reliance—Refusal to Permit Showing. While reliance on alleged fraudulent representations is an important element, yet harmless error results from refusing to permit a party to testify that he did so rely, *when the representations are held non-fraudulent*.

**APPEAL AND ERROR:** Issues and Questions in Lower Court—

8 Trial Theory—Counter Theory on Appeal. A trial in the lower court on the theory of *deliberate fraud* will not be reviewed on appeal on the theory of an *honest mutual mistake*.

**PLEADING:** Defenses—Inconsistency. Defenses which are not mere-

9 ly inconsistent with but *destructive* of each other are not allowable.

**RELEASE:** Validity—Mistake—Fact and Opinion Contrasted. Mu-

10 tual mistake sufficient to avoid a release must be a mistake of a past or present material *fact*, and not error in opinion respecting future conditions.

**CONTRACTS:** Rescission—Mutual Mistake—Failure to Tender Con-

11 sideration Received—Effect. Rescission of a contract on the grounds of mutual *mistake* demands, as a condition precedent, a return or a tender of return of the consideration received. (*Reddington v. Blue*, 168 Iowa 34, distinguished.)

*Appeal from Clinton District Court.*—A. J. HOUSE, Judge.

WEDNESDAY, OCTOBER 3, 1917.

PLAINTIFF was injured while in the employ of the defendant and seeks to recover damages therefor; his claims are put in issue generally, and there is a special defense

that there has been a settlement and release. Verdict was directed against the plaintiff, and he appeals.—*Affirmed.*

A. W. Walliker, for appellant.

*Ellis & McCoy, James C. Davis and Henry L. Adams,*  
for appellee.

SALINGER, J.—I. If verdict was rightly directed against plaintiff because of settlement and release, there is no occasion to go into whether he had a case for a jury on the claim made by his petition. So we give precedence to whether plaintiff made a jury question on the plea of avoidance interposed by him against his release.

It is affirmatively defended and admitted that, on the 30th day of September, 1913, a written settlement was entered into and signed by the plaintiff which acknowledges the receipt of \$500 in full satisfaction, contains a statement that the signer has read and understands this release, and that no contract or promise of employment is made with him. It is replied that the settlement is, *inter alia*, not binding because of certain things done by Piersol, assistant claim agent of defendant. The claim is, in effect, that Piersol told plaintiff, with fraudulent intent to deceive and to induce the settlement made, that plaintiff was making a big fuss over his injury, that same was trifling, and that plaintiff should have been at work in the freight service for the past six weeks. As against the motion to direct verdict, we must hold that Piersol did say this. Plaintiff contends that, on the authority of *Haigh v. White Way Laundry Co.*, 164 Iowa 143, 145, such statement made a jury question of whether the settlement was induced by fraudulent representations. We do not so read the *Haigh* case. It does not deal with the naked statement that the injuries were trifling, but with such statement plus one that "the tendons of the hand were not injured." It excludes the idea that a fraudulent representation can be

1. RELEASE:  
validity:  
fraud: ex-  
pression of  
opinion.

made out of a statement of an opinion without a statement of a fact, and without an intent to deceive. The case came here upon a ruling on demurrer, and so was admitted that the representation complained of was made with the intent to deceive and mislead. It does not hold that saying that an injury was trifling will send fraudulent representation to the jury, but that such a statement and the false assertion of a fact, both uttered with intent to defraud, will do so. And see *Houston & T. C. R. Co. v. Brown*, (Tex.) 69 S. W. 651; *Douda v. Chicago, R. I. & P. R. Co.*, 141 Iowa 82, at 87. The greatest length to which the authorities have gone is found in *Hirschfeld v. London, B. & S. C. Ry.*, 2 Q. B. D. 1, in which it is said that, if the statement to induce the settlement is that the injuries are trivial and temporary, and such representation *is fraudulent*, the settlement may be disregarded.

But that the question is not foreclosed does not relieve us from dealing with it. May we say that the statements on part of Piersol were a basis upon which a jury might rightfully avoid the settlement? Piersol is not shown to be a physician, and the record fairly discloses that he was not one. He made no physical examination of plaintiff. The plaintiff was injured on June 1st. From then to September 30th, when Piersol spoke, plaintiff had personal knowledge of his own condition. It does not appear that Piersol ever had such knowledge. Plaintiff was advised by others than Piersol that plaintiff was able to do light work. He desired to do such work, and, on August 19th, so advised the officer to whom Piersol acted as assistant. As early as August 5th, Piersol advised he would look into plaintiff's case. Some weeks before Piersol spoke, he sent plaintiff a check for \$160, and asked that a release sent be executed in consideration. In writing Piersol's principal on August 19, plaintiff asks work, and advises that a doctor had promised that, if plaintiff got work he could do, the doctor would

give him a release, i. e., permission to do such work, and that plaintiff has left said check and release at a stated place pending reply to this his letter. On August 25th, Piersol answered that the \$160 was sent because of the application for assistance that plaintiff had made. He adds that it does not appear that the company was in any way in fault or liable. On September 8th, plaintiff wrote Piersol, reiterating that he would try passenger work until his shoulder got so he could go back on freight. He added:

"As I have been out of work for a long time, and will have some expense now in going to work, would like that you advance me payment for the time I have lost, pending our final settlement."

This letter was answered by one of Piersol, dated September 10, 1913, and which says, concerning request to pay for lost time:

"Until such a time as a settlement is made, I have to say that I thought I was very explicit when you were in my office, and you fully understood that we cannot do anything of this kind at all; that if we pay you any money in this case we must have a complete release. In the first place, it does not appear to me that this company was at fault or liable for the accident with which you met, as I also explained to you when you were here. Whenever you are ready to make an adjustment of this matter, we are willing to make you some allowance, but it will be necessary to sign a full and complete release."

It comes to this: Piersol is not a doctor; he has no personal knowledge of the physical condition of plaintiff; is advised by plaintiff he thinks he can do work; he tells plaintiff that there is no liability for his injury; plaintiff thereafter approaches him of his own volition, and after he has been told that nothing will be paid unless a full release is given: if in these circumstances Piersol said that

plaintiff was making a big fuss over his injury, that same was of a trifling nature and plaintiff should have been at work in the freight service "for the past six weeks," was there a case of fraudulent representation for a jury? We think that saying this, without more, is the expression of a naked opinion, and one upon which plaintiff had, in the circumstances, no right to rely. Such has been the holding where statements of like effect were made by physicians who had made examination. *Nason v. Chicago, R. I. & P. R. Co.*, 140 Iowa 533; *Kilmartin v. Chicago, B. & Q. R. Co.*, 137 Iowa 64; *Douda v. Chicago, R. I. & P. R. Co.*, 141 Iowa 82, 88; *Haigh v. White Way Laundry Co.*, 164 Iowa 143, 146, 147; *Chicago & N. W. R. Co. v. Wilcox*, (C. C. A.) 116 Fed. 913; *Tatman v. Philadelphia, B. & W. R. Co.*, (Del.) 85 Atl. 716; *Owens v. Norwood White Coal Co.*, 157 Iowa 389, 400; *Homuth v. Metropolitan St. R. Co.*, (Mo.) 31 S. W. 903; *Doty v. Chicago, St. P. & K. C. R. Co.*, (Minn.) 52 N. W. 135. And see *Longshore v. Jack & Co.*, 30 Iowa 298. In an action for damages by false representations, the plaintiff has the burden of proving that the representations claimed were made; were false; known at the time to be false; were made with intent to mislead plaintiff; that there was reliance and damage, and no negligence in relying. *Gee v. Moss*, 68 Iowa 318; *Nason v. Chicago, R. I. & P. R. Co.*, 140 Iowa 533, 536; *Kilmartin v. Chicago, B. & Q. R. Co.*, 137 Iowa 64, at 67; *Johnson v. Chicago, R. I. & P. R. Co.*, 107 Iowa 1, at 7. It is fraud that avoids the settlement, and "not error of law or lesion." *Adle v. Prudhomme*, 16 La. Ann. 343. It is not enough that the fact is different from the representation made by the opinion. While an opinion may base the charge of fraud (*Haigh's* case, 164 Iowa 146, 147), that is not because the truth differs from the opinion, but because "the opinion and belief were fraudulently misrepresented." *Stebbins v. Eddy*, 4 Mason (U. S.) 414, 417. Appellant cites *Meyer v. Houck*,

85 Iowa 319. It is not a fortunate selection. Its effect is that a motion to direct a verdict should be sustained when, considering all of the evidence, it clearly appears to the court that, if a verdict were found in favor of the party upon whom the burden of proof rests, it would be the duty of the court to set it aside—that a mere scintilla will not send any case to the jury. The case of *Chicago & N. W. R. Co. v. Wilcox*, (C. C. A.) 116 Fed. 913, adds that the settlement may not be avoided by a mere preponderance. We do not care to go so far as that, but note the case as bearing on whether plaintiff had evidence of the fraud he charges. In *Nason v. Chicago, R. I. & P. R. Co.*, 140 Iowa 533, 536, the condition of plaintiff was much more indicative of serious injury than can be claimed here. So of *Nelson v. Chicago & N. W. R. Co.*, (Minn.) 126 N. W. 902, and *Tatman v. Philadelphia, B. & W. R. Co.*, (Del.) 85 Atl. 716, at 719. The dealing was at arm's length. As said in *Haigh v. White Way Laundry Co.*, 164 Iowa 147, that plaintiff's hand was injured and that this was manifest and known to her must be conceded, and this independent fact was as well known to her as to the company. There was much more opportunity to consult others than was present in *Owens v. Norwood White Coal Co.*, 157 Iowa 389, at 393, or in *Nason v. Chicago, R. I. & P. R. Co.*, 140 Iowa 533, 536, or *Kilmartin v. Chicago, B. & Q. R. Co.*, 137 Iowa 64, 70. There was as much opportunity as in *Douda v. Chicago, R. I. & P. R. Co.*, 141 Iowa 82, 88. What Piersol said is not stronger than a representation by the lawyer of defendant that there was no liability, and that the injured party had no case at all. And that has not sufficed. *Owens v. Norwood White Coal Co.*, 157 Iowa 389, 394; *Johnson v. Chicago, R. I. & P. R. Co.*, 107 Iowa 1. And see *Nason v. Chicago, R. I. & P. R. Co.*, 140 Iowa 533, 537. *Bussian v. Milwaukee, L. S. & W. R. Co.*, (Wis.) 14 N. W. 452, 453, does not, when rightly viewed in all its aspects, run counter to these

of our own decisions. The settlement was as fair a one and made with much more deliberation, freedom and intelligence than we find in *Nason v. Chicago, R. I. & P. R. Co.*, 140 Iowa 533, 537, *Owens v. Norwood White Coal Co.*, 157 Iowa 389, 395, and *Kilmartin v. Chicago, B. & Q. R. Co.*, 137 Iowa 64, 71. The facts distinguish *Winter v. Great Northern R. Co.*, (Minn.) 136 N. W. 1089. We conclude that the statements made by Piersol do not make the directed verdict against plaintiff an error.

II. It is further replied that Richards, the general claim agent of defendant, fraudulently stated and represented to plaintiff that plaintiff's shoulder would be all right, and that, in case anything happened to plaintiff on his resuming his former employment, defendant would take care of him; that defendant has not taken care of him nor given him any employment whatsoever since he was compelled to abandon his services as a freight brakeman; that these "fraudulent representations," too, were made with intent to deceive and mislead plaintiff as to the extent of his injuries, and were relied upon. If we assume that Richards said this as to the shoulder, we have settled the effect of such statement in disposing of what Piersol said.

If there were evidence of the alleged promise, such evidence will not avail the plaintiff. He is not suing upon the alleged contract, but is urging its breach as a fraud that should vitiate his settlement. A breach of such promise is not such fraud. Moreover, the settlement declares in writing that "no promise of employment is made." That is binding if the settlement may not be set aside. True, plaintiff makes the distinction that, while a promise to employ is covered by the contract of settlement, he is not thereby estopped from enforcing an agreement to be taken care of. We have to say: (1) It is clear from all

2. RELEASE:  
validity:  
fraud: prom-  
ise of employ-  
ment: breach:  
effect.

the circumstances that, if there was a promise to take care of plaintiff, it was mutually understood that he should be cared for by employment. The point is developed by rulings excluding testimony, and that offered was what bore on whether plaintiff was offered a position as extra freight brakeman. (2) To go no further, the proffered testimony was not admissible under the issues which on this head were addressed solely to whether the settlement was avoidable for fraud. The authorities relied upon against our conclusion are *Larson v. Smith*, 174 Iowa 619, which holds that parol evidence is inadmissible to show that an option was inserted in a lease after the terms were agreed to, and was therefore without consideration; *Douda v. Chicago, R. I. & P. R. Co.*, 141 Iowa 82, 87, that it is error to submit a promise to the jury when there is no evidence of a promise; Bouvier, that a past, present or future promise is a good consideration for a contract. Finally, there is *Swanson v. Union Pac. R. Co.*, (Neb.) 152 N. W. 744. It is a suit to recover promised salary. To get at its scope and meaning, it is necessary to examine *Tylce v. Illinois Cent. R. Co.*, in the same court, 150 N. W. 1015. Its holding is that, in a suit to recover salary, an oral promise by the employer to pay the employee his regular salary during a temporary disability may be shown by parol to be part of the consideration for a release of the employer's liability for personal injuries, though the employee signed a release for the expressed consideration of a specific sum of money. The *Swanson* case adopts this, and merely adds that the testimony of plaintiff was sufficient, if believed by the jury, to establish the making of the settlement as alleged by him. We find nothing in what Richards said or did to make the direction of the verdict erroneous.

III. Plaintiff left Piersol and went to Hopkins, who was then the chief surgeon of defendant. Doctor Hopkins examined plaintiff, and, we must hold, then told plain-



tiff that plaintiff's injury was not permanent, and that plaintiff would be able to resume his run as a freight brakeman in from four to six weeks, or words to that effect. As to this, too, it is claimed that it was a fraudulent misrepresentation, made to deceive plaintiff into the settlement. Doctor Hopkins testifies that he honestly believed what he told plaintiff. It is only by considering testimony as to plaintiff's condition later than when Doctor Hopkins saw him that there is room to claim that the doctor was mistaken, or that his opinion was an unreasonable one. We have sufficiently indicated that, speaking generally, said statement by Hopkins made no jury question of fraudulent representation. Note further that there is no evidence that the doctor was present at the settlement, or spoke with reference to or in aid of a settlement. See *Nason v. Chicago, R. I. & P. R. Co.*, 140 Iowa 533, 538; *Kilmartin v. Chicago, R. & Q. R. Co.*, 137 Iowa 64, 68.

## 3-a

3. RELEASE:  
validity:  
fraudulent  
concealment:  
evidence: suffi-  
ciency.

Another angle of the attack is, in effect, that Doctor Hopkins knew that plaintiff had an incurable dislocation, or, if not that, knew that the injury present made a second dislocation highly probable, of which fact plaintiff was ignorant, and that the opinion given by the doctor, therefore, amounts to a fraudulent concealment. We may concede that *Gee v. Moss*, 68 Iowa 318, *Lumley v. Wabash R. Co.*, 76 Fed. 66, 70, *Stewart v. Wyoming C. R. Co.*, 9 Sup. Ct. Rep. 101, and *Linton v. Sheldon*, (Neb.) 154 N. W. 724, hold that concealment may operate as a fraud. The question remains whether a concealment which is or may be a fraud exists. The claim that the jury should have had the question rests on the argument that a second dislocation was most likely to occur, that a skilled surgeon like Doctor Hopkins must have known this, and therefore his silence on the point might be a fraudulent concealment.

Whether there was such concealment must, in any view, depend on whether what Doctor Hopkins saw suggested the probability of a second dislocation. It may be conceded that, if the doctor saw what was found after a second dislocation had occurred, he should have known that the recurrence of plaintiff's injury was probable. But on this head, the plaintiff is driven into a most peculiar position, and he attempts to show what Doctor Hopkins should have known, by claiming both that there was and was not a second dislocation, and by showing what his condition was *after* a second dislocation,—evidence which is addressed to conditions that arose after Hopkins had spoken. Plaintiff contends that there was no second dislocation so that he may be able to use the testimony of his witnesses who speak to his condition at a time which was subsequent to the second dislocation, if there was one. He must have it held that all which these witnesses found was perceivable when the claim agents and the surgeon of defendant dealt with him. Only by eliminating a subsequent injury can he claim that the consequences of the first dislocation were so manifest and serious as that a fraud was practiced upon him when he was told that his injuries were trifling, or that he was not permanently injured.

On the other hand, he wants a second dislocation. He needs it to make good his claim that a second was so likely to occur after a first as that, when the surgeon of defendant told him his injury was not permanent, he knew the statement was false, because he must have known that a second dislocation was very likely to occur. He cannot hope to accomplish anything by theories which rest upon both the assertion and the denial of the same basic fact. We must ascertain what is the fact and then proceed upon the ascertainment. We find that there was a second dislocation. Plaintiff, over and again, speaks of his sec-

ond injury,—of his second dislocation. He pleads, and he testifies in terms, that his shoulder was dislocated a second time when he had the accident at Beverly. He compares the pain from the time of the first dislocation with that attendant upon the second one. He complains of the exclusion of testimony seeking to elicit whether Dr. Fairchild ever told him that his shoulder was liable to become dislocated again. He accuses Hopkins and others of concealing that fact, and bases claims upon that concealment. He must follow where the existence of the second dislocation leads, upon his own theory. Since he was examined after he had sustained the second injury, what was found upon such examination is no evidence that pronouncements made by those who examined him before he was injured a second time were fraudulent. His condition after the second dislocation is no evidence of what his condition was before he sustained the second dislocation. See *Kilmartin v. Chicago, B. & Q. R. Co.*, 137 Iowa 64, 68.

## 3-b

It is assigned for error that the court would not let plaintiff say whether Dr. Fairchild ever told plaintiff about the true condition of plaintiff's shoulder, and whether Fairchild ever stated to plaintiff that his shoulder was liable to become dislocated again. The objection sustained was that it was immaterial, irrelevant and incompetent, and does not tend to establish any issue in the case. We think the objections are well taken: First, because this is an attempt to prove fraudulent concealment, which claim has been sufficiently dealt with already; second, because no allegation in pleading covers any act or omission on part of Fairchild. See *Johnson v. Chicago, R. I. & P. R. Co.*, 107 Iowa 1, at 5.

4. FRAUD: pleading: avoidance of release.

## 3-c

What evidence is there that there was any fraud if Dr. Hopkins does differ from some of the medical witnesses for plaintiff on whether a second dislocation was probable? There is some difference of opinion between those very witnesses. True, plaintiff is not bound by any of his witnesses in the sense that he may not show by one witness what differs from what is said by another. But that is not the point. It does not change that, if his own experts differ, it bears on whether Dr. Hopkins was guilty of fraud in also differing. The appellant states his position tersely: He says that, if there is liability to recurrence, no doctor could truly say that the injury is not permanent; that this is so if the experts used by plaintiff agree that there is such liability. Reduced to its lowest terms, this asserts that, if a doctor expresses an honest opinion and other doctors do not share such opinion, its utterance is a fraud. In *Owens v. Norwood White Coal Co.*, 157 Iowa 389, 404, we refused so to hold, though the injury apparent was much more developed and perceivable than the one which Dr. Hopkins spoke to.

## 3-d

The reply alleges that there was a custom that injured employees were not permitted to resume work except upon a "release," i. e., a permission from a doctor, and that both he and Hopkins understood that the granting of such release implied that the employee had fully recovered, and that, therefore, the statements made by Hopkins were intended and were understood to mean that plaintiff *had* fully recovered. Passing that the naked fact that such was the intention and understanding proves no fraud, the

claim involves a *non sequitur*. It arises upon exclusion of testimony. It is presented that the court erred in sustaining objections to the following questions:

"I will ask what you understood from what Mr. Hopkins told you, at the time you were examined by him in Chicago, about your going back to work in four or six weeks? Do you know what the custom of the defendant company was with reference to obtaining defendant's doctor's release before being permitted to resume the former employment in case of injury?"

As said, appellant is urging a *non sequitur*. Suppose he *had* been allowed to say that there was such a custom, and that he understood the doctor to represent full recovery because both knew of the custom, how can anything material be produced by such testimony so long as there is no evidence that, when the doctor spoke, there had been such "release,"—or, if there was, that Dr. Hopkins knew it. The argument for appellant consists of the perfectly inconclusive explanation that these questions were asked for the purpose of showing what the custom of the defendant was in that respect, and what plaintiff understood from what Hopkins told him, and that plaintiff should have been allowed to show the defendant's method of doing business in that respect, and what plaintiff's understanding was.

IV. It is a serious question whether the whole controversy may not be disposed of by holding that such representations as were made stated the truth. Fifteen days before the settlement was made, plaintiff went to work as a passenger brakeman. He quit that service on October 16th and returned to his work as a freight brakeman. This was some 16 days after Dr. Hopkins had given his opinion that the injuries were not permanent. He remained in this service until December 15th. So far as appears, he would be at work still if he had not suffered a second dislocation. The only answer he can make is that his work

consisted of nothing but flagging, sitting in the way car and going back and forth from the hind end. It does not appear, even on what was found after the second injury, that the outward signs disproved the prognosis of Dr. Hopkins made before there was a second injury. We do not care to rest this opinion on a finding that as matter of law the truth was told, but point out the record on that head as some support of the trial court in holding that there were no fraudulent representations.

V. It is assigned that plaintiff should have been permitted to say, in terms, that he relied upon what Richards and Piersol said. That testimony in that form is admissible to establish reliance is elementary.

We have to say that the exclusion was error without prejudice. If the representations made were either true or not fraudulent, it would not help plaintiff that he relied upon them. And it would not help to show that one did rely if, as has been said, he had no right to rely. See *Johnson v. Chicago, R. I. & P. R. Co.*, 107 Iowa 1, at 8. Again, plaintiff was allowed to say what is in effect a statement that it was what Hopkins said that induced settlement; that one would not have been entered into were it not for Hopkins' representations; and it is reasonable that the statement of the doctor instead of the opinion of the laymen controlled. We fail to see how there would have been a case for the jury if the testimony excluded had been admitted, which distinguishes this case from *Campbell v. Park*, 128 Iowa 181. It seems, too, there was no exception to the exclusion.

VI. Finally, it is contended to be immaterial whether those who made the representations did or did not know that same were false. This is put on the ground that a mutual mistake is also pleaded by plain-

7. APPEAL AND  
ERROR: harm-  
less error:  
non-fraudu-  
lent repre-  
sentations: re-  
liance: refusal  
to permit  
showing.

8. APPEAL AND  
ERROR: issues  
and questions  
in lower court:  
trial theory:  
counter theory  
on appeal.

tiff, and that on that issue plaintiff may prevail, though Piersol, Richards and Hopkins did not know or believe that what they said was untrue. The statute permits inconsistent defenses. But even that express permission will not permit defenses which are not merely inconsistent with but destructive of each other. No right exists to base a *petition* upon claims of which one cannot be tenable if the other is. It is impossible to sustain a charge of deliberate fraud, and also that there was an honest mutual mistake. He who uses a falsehood, knowing or believing that it is a falsehood, and with intent to deceive and cheat, cannot be acting upon honest error. The

9. PLEADING:  
defenses: in-  
consistency.

case was not tried on that theory below and will not be here. Aside from the naked and almost casual statement in pleading that a

mistake was made, the entire argument of appellant is an arraignment for deliberate fraud. If that be passed, there

10. RELEASE:  
validity: mis-  
take: fact  
and opinion  
contrasted.

was still no mutual mistake which entitles to relief. That must be a mutual mistake of fact, and not error in opinion, and relief must be had in equity, or, at all events,

upon terms approved by equity. *Tatman v. Philadelphia, B & W. R. Co.*, (Del.) 85 Atl. 716, 720, is a suit in equity, and deals with what is, beyond all question, an honest mutual mistake. A settlement was held not to be binding, but the relief granted is made to depend upon a return of what had been received in settlement. This is, in effect, a description of *Great Northern R. Co. v. Fowler*, (C. C. A.) 136 Fed. 118, and of *Nelson v. Minneapolis St. R. Co.*, (Minn.) 63 N. W. 486. And it is in cases of like effect that it is held that honesty in representing what is in fact untrue is no reason for not setting aside a settlement made because of mutual mistake. See *Pendarvis v. Gray*, 41 Tex. 326; *First Nat. Bank v. Hecht*, (Wis.) 149 N. W. 703; *Tatman v. Philadelphia, B. & W. R. Co.*, (Del.) 85 Atl. 716,

721; *Culbertson v. Blanchard*, (Tex.) 15 S. W. 700; *Cabanness v. Holland*, (Tex.) 47 S. W. 379; *Houston & T. C. R. Co. v. Brown*, (Tex.) 69 S. W. 651; *Berry v. American Cent. Ins. Co.*, (N. Y.) 30 N. E. 254. It is said in the *Tatman* case that, in order to invalidate a release on the ground of mutual mistake the mistake must relate to a past or present fact material to the controversy, and not to an opinion respecting future conditions or results of present facts. It cites *Chicago & N. W. R. Co. v. Wilcox*, 116 Fed. 913; *Nelson v. Chicago & N. W. R. Co.*, (Minn.) 126 N. W. 902; *Houston & T. C. R. Co. v. Brown*, (Tex.) 69 S. W. 651; *Homuth v. Metropolitan St. R. Co.*, (Mo.) 31 S. W. 903; and distinguishes the *Houston* case. And the case of *Winter v. Great Northern R. Co.*, (Minn.) 136 N. W. 1089, is readily distinguishable from the case at bar. And so of *Lumley v. Wabash R. Co.*, (C. C. A.) 76 Fed. 66, and *Union Pac. R. Co. v. Artist*, (C. C. A.) 60 Fed. 365. In *Chicago & N. W. R. Co. v. Wilcox*, (C. C. A.) 116 Fed. 913, a suit in equity to rescind, approved in the *Tatman* case, complainant compromised and released a claim for a broken hip. She knew when she settled that her hip had been broken, and that it was a bad break. She was induced by the statement of her own physician, who was also the company's physician, to believe, and did believe, that she would be well within a year, and she settled upon that basis. She was mistaken, and her injury and disability turned out to be permanent. It is held that her mistake was not a mistake of fact, but a mistake in opinion or belief as to a future event, and furnished no ground for an avoidance of her release—and said:

“Again, it is not every mistake that will lay the foundation for the rescission of an agreement. That foundation can be laid only by a mistake of a past or present fact material to the agreement. Such an effect cannot be produced by a mistake in prophecy or in opinion, or by a mis-



take in belief relative to an uncertain future event. A mistake as to the future unknowable effect of existing facts, a mistake as to the future uncertain duration of a known condition, or a mistake as to the future effect of a personal injury, cannot have this effect, because these future happenings are not facts, and in the nature of things are not capable of exact knowledge; and everyone who contracts in reliance upon opinions or beliefs concerning them knows that these opinions and beliefs are conjectural, and makes his agreement in view of the well-known fact that they may turn out to be mistaken, and assumes the chances that they will do so. Hence, where parties have knowingly and purposely made an agreement to compromise and settle a doubtful claim, whose character and extent are necessarily conditioned by future contingent events, it is no ground for the avoidance of the contract that the events happen very differently from the expectation, opinion, or belief of one or both of the parties."

The test to be applied is:

"Is the evidence in this case clear and convincing that the complainant was induced to compromise her claim and to execute her release by a mistake of a past or present fact material to her contract?"

And see *Owens v. Norwood White Coal Co.*, 157 Iowa 389, at 411; *Tatman v. Philadelphia, B. & W. R. Co.*, (Del.) 85 Atl. 716, at 718; *Kilmartin v. Chicago, B. & Q. R. Co.*, 137 Iowa 64, 68; *Johnson v. Chicago, R. I. & P. R. Co.*, 107 Iowa 1; and *Douda v. Chicago, R. I. & P. R. Co.*, 141 Iowa 82. Again, there is a difference where, as here, the release is general. That difference is noted in *McCarty v. Houston & T. C. R. Co.*, (Tex.) 54 S. W. 421 (*Houston & T. C. R. Co. v. McCarty*, [Tex.] 60 S. W. 429). There, the only injury considered was a broken ankle, while in fact there were internal injuries unknown to all the parties. It was held that, because of the general form of the re-

lease, it could not be set aside, there being no fraud, and the releasor having had an equal opportunity to know the extent and character of his injuries, and said:

"In the face of such an instrument, it cannot be said that all injuries which might be developed as a result of the accident, known or unknown, were not in the contemplation of the parties to the instrument, and were not embraced within its terms."

It is said in *Lumley v. Wabash R. Co.*, (C. C. A.) 76 Fed. 66:

"If one agrees that he will receive a given amount in satisfaction and settlement of his damages sustained through a particular accident, it is not essential that every possible consequence of the tort shall be mentioned, considered, or enumerated. The subsequent discovery by one giving such a release that he was worse hurt than he had supposed, would not, in and of itself, be ground for setting aside the settlement or limiting the release."

In *Reddington v. Blue*, 168 Iowa 34,

11. CONTRACTS:  
rescission:  
mutual mis-  
take: failure  
to tender con-  
sideration re-  
ceived: effect.

we overruled the general assertion that only in a court of equity may a settlement be avoided. Another contention which we held against is that no settlement might be set aside upon any ground unless the consideration received was returned. Addressed to what then was decided, both conclusions are right. They but hold that one who pleads fraud in settlement may avoid the settlement without going beyond an offer to credit what he has received upon what the jury may allow him. See *Owens v. Norwood White Coal Co.*, 157 Iowa 389, at 394. But into the *Reddington* case crept a statement that our procedure is so liberal that no tender was required if mistake was interposed. It is pure dictum, and should not be established. Grant that *mistake* may be urged in a law action to set aside a settlement. It cannot follow that it may there be done without

doing what equity demands as a condition to such relief. If there were no other reason for eliminating the claim of mutual mistake, the failure to restore what was received in settlement is fatal to relief for mutual mistake.

We are of opinion that the judgment appealed from must be—*Affirmed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

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E. S. BROWN, Appellee, v. W. A. VERZANI, Appellant.

**DAMAGES:** Liquidated Damages and Penalty—Forfeiture Clauses—Construction. A clause in a non-fraudulent contract providing that all payments made shall be forfeited in event of failure to comply with the contract, will not be treated as providing for liquidated damages, in the absence of some fair showing that the parties contemplated, or that the non-defaulting party actually suffered, damages in an amount *approximately the same as the payments made*.

*Appeal from Woodbury District Court.*—JOHN W. ANDERSON, Judge.

THURSDAY, OCTOBER 18, 1917.

ACTION to specifically enforce a contract entered into between the plaintiff and the defendant, which contract was executed and delivered in South Dakota, October 29, 1912, covering an exchange of lands in South Dakota, and to recover damages claimed to have been sustained by reason of a breach of the contract by appellant, in case specific performance of the contract could not be had.

Defendant denied the validity of the contract and the right to specific performance thereof, because, as he alleged, the contract was signed and delivered upon the condition that the brothers and sisters of defendant, who owned interests in the land to be conveyed to plaintiff, should, after

being advised of the contract, approve and ratify the same and join defendant in the conveyance to plaintiff; that his brothers and sisters refused to so approve, making it impossible for defendant to convey the title, in accordance with the contract, and because thereof the contract was never completely delivered; second, that the execution and delivery of the contract were induced by the fraudulent representations of plaintiff with respect to the character and value of the land which he was to convey to the defendant, and that because of this fraud the contract was rendered void and unenforcible; and third, that the appellee's title to the land was not good and merchantable.

At the time of the delivery of the contract, defendant paid plaintiff \$1,000 as a part of the consideration for the exchange of the properties, and by cross-petition defendant sought to recover back from plaintiff the \$1,000 so paid, and he asked for general equitable relief. By the terms of the contract, plaintiff sold to defendant 640 acres of land in Lyman County, South Dakota, for a consideration of \$27,200, to be paid: \$1,000 when the contract was delivered; \$4,000 on March 1, 1913, without interest before due; \$7,200 on March 1, 1918, with a first mortgage back; and the remaining \$15,000 to be paid to plaintiff by defendant's conveying to plaintiff 160 acres of land in Clay County, South Dakota; transfer of title and possession to take place March 1, 1913. Under the contract, both parties were to furnish abstracts showing good and merchantable title, and the contract provides:

"Time shall be understood to be of the essence of this contract, and failure on the part of said second party (Verzani) to fulfill all the covenants herein agreed to, shall work a forfeiture of all his rights hereunder, including the amount or amounts paid prior to that time."

The execution and delivery of the contract are admitted. Defendant alleges that, within the time specified

for performance of the contract, he orally notified plaintiff that his brothers and sisters would not convey, and demanded the surrender and cancellation of said contract and the return of the \$1,000.

The alleged false representations are that the Lyman County land was first-class farm land in every respect and worth at least \$40 an acre. The defendant alleges that he afterwards discovered that the land was infested with noxious and poisonous vegetation, and was unfit for live stock or for the purposes for which he bought the land, and that, by reason thereof, he notified plaintiff that he elected to rescind the contract, and that he would not carry out or perform the same. Defendant further alleges that the title was not merchantable and was encumbered with mortgages, judgments and taxes, and he says that it was orally agreed by and between plaintiff and defendant that the contract should be regarded as rescinded by mutual agreement, and the defendant acted and relied upon the agreement and rescission.

Defendant in his counterclaim pleaded the statute of South Dakota, where the contract was executed, which statute is as follows:

"Section 2345. Specific performance cannot be enforced against a party to a contract in any of the following cases:

"1. If he has not received an adequate consideration for the contract.

"2. If it is not, as to him, just and equitable.

"3. If his assent was obtained by misrepresentation, concealment, circumvention, or unfair practice of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled; or,

"4. If his assent was given under the influence of mistake, misapprehension, or surprise, except that where

the contract provides for compensation in case of mistake, a mistake within the scope of such provision may be compensated for, and the contract specifically enforced in other respects, if proper to be so enforced." Compiled Laws, 1913, Vol. 2, Civil Code.

He further alleges that said Section 2345, as above set forth, is now and at all the times in controversy herein was a valid and existing statute of the state of South Dakota, in which state the contract in controversy herein was made, executed and delivered.

The trial court dismissed plaintiff's petition and the defendant's cross-petition, and rendered judgment against plaintiff for costs. The defendant appeals.—*Reversed*.

*E. A. Burgess and J. J. McCarthy*, for appellant.

*C. N. Jepson, J. F. Stecker, and Evans & Evans*, for appellee.

PRESTON, J.—We take it that the real question in the case on this appeal is in reference to defendant's exception to the action of the trial court denying his right to recover from plaintiff the \$1,000 which he paid plaintiff when the contract was signed and delivered. Appellant has argued the other matters set up as defenses, but we are satisfied with the findings of the trial court as to these, and the next question is as to the effect of such findings, and, as said, the real question is whether the \$1,000 paid by defendant to plaintiff upon the execution of the contract should, under the record, be considered as liquidated damages, as found by the trial court.

After the contract in question was entered into, plaintiff sold the land in Lyman County to another party. This was in April, 1914. Plaintiff testifies, in regard to his sale of the land to such other party:

"The transaction with Barrett was closed up volunta-

DAMAGES:  
liquidated  
damages and  
penalty: for-  
feiture clauses:  
construction.

arily on my part, and he paid me the consideration that I asked for the land; that consideration was satisfactory to me; I never notified defendant Verzani that I had sold this Lyman County land in controversy."

The opinion and findings of the trial court are, substantially:

"That the contract for exchange was entered into substantially as claimed by plaintiff, and that the sum of \$1,000 was paid to plaintiff by defendant, and that defendant entered into said contract in good faith and with the intention to perform the same, but that, through no fault of his, he was unable to perform, for the reason that the title to two thirds of the Clay County land was in other parties, and that they refused to convey or to permit the defendant to perform his contract. Under these conditions, the defendant would be liable to the plaintiff for nonperformance in nominal damages only.

"The court finds that the allegations of fraud and misrepresentation as made by the defendant are not sustained by the record, for the reason that it does not satisfactorily appear that the land of plaintiff was impregnated with alkali or other noxious substance, as alleged by defendant, and that if it was so impregnated, it does not satisfactorily appear that the plaintiff Brown had knowledge of such fact. It further appears that the defendant was warned by his sister, who was a part owner of the land, prior to his investigation and inspection of the land, 'to look out for alkali,' and that defendant made a personal inspection and investigation of the land before entering into the contract.

"The contention of defendant that the contract was executed and delivered upon the condition, or subject to the approval of the other parties interested, is not sustained by the evidence. The court is of the opinion that no such condition was made at the time of the execution and delivery of the contract. \* \* \* While the defendant denies the

right of plaintiff to recover or retain this \$1,000 cash payment, the court is of the opinion that the defendant is entitled to retain the same upon the theory that it is and was considered by the parties as liquidated damages for the nonperformance of the contract, and upon the further theory that the plaintiff has been damaged in that amount by reason of the nonperformance upon the part of the defendant."

The question as to whether the \$1,000 paid by defendant should be considered a penalty, or liquidated damages, is not as fully argued as some of the other questions. Appellee argues that, notwithstanding the fact that appellant has argued numerous other questions, there are but two propositions involved in the appeal, and he says there are but two theories upon which appellant is entitled to recover the \$1,000. The first is whether the contract was so tainted with fraud and misrepresentation on the part of appellee that appellant is entitled to have it set aside and recover damages therefor,—and as to this he says that there was no fraud, and that the trial court so found; and the second is that, even though there was no fraud, appellant is not entitled to recover. As to the last proposition, he argues that the contract expressly provides that a failure on defendant's part to fulfill his covenants should work a forfeiture. So that appellee's only reason for claiming that defendant is not entitled to recover the \$1,000 is that, under the contract, it was to be considered as liquidated damages. Appellant contends that the provision of the contract in reference to the \$1,000 is a forfeiture, or penalty, which will not be enforced in equity.

It is not claimed, as we understand it, that the South Dakota statute before set out cuts any figure on this question, in view of the findings of the trial court; although appellant argues that it is a South Dakota contract, and could not be specifically enforced under the statutes of that state,



because defendant was to receive no adequate consideration, in that plaintiff's land was worthless; second, that the contract is unjust and inequitable; and third, that defendant's assent thereto was obtained by misrepresentation; and that, where a court of equity finds that a statute forbids the enforcement of a contract, it will not forfeit to plaintiff a partial payment, but, to prevent the perpetration of a wrong, will order plaintiff, on cross-petition of defendant, to restore to defendant whatever he had paid in part performance. Appellant cites the statute before set out; *Phelan v. Neary*, (S. D.) 117 N. W. 142; *Armour Packing Co. v. United States*, 153 Fed. 1.

There may be force in appellant's claim that plaintiff's land was worthless. The court has discretion in the matter of specific performance, and may consider all the circumstances. Appellant concedes that the South Dakota statute is merely a statutory declaration of the general principles of jurisprudence, as defined and administered by the courts of this country generally, including the courts of Iowa, and cites the *Phelan* case, *supra*, to support this. But in view of our conclusion that, under the record, the provision of the contract as to the \$1,000 should not be considered as liquidated damages, we do not feel called upon to determine appellant's proposition just referred to. Under the authorities, the fact that a contract uses the words forfeiture, penalty, or liquidated damages, is not always controlling.

The case seems not to have been tried on the theory that plaintiff sustained damages in an amount as much as \$1,000, and if it had been so claimed, we think the evidence would not sustain such contention, nor do we think, from all the circumstances of the case, that there was any considerable amount of damage accruing to plaintiff, or that the parties reasonably contemplated such. Plaintiff could have shown that he was damaged, if such was the fact, or the circum-

stances might be such as that the court can say that, plaintiff not having proved the exact amount, there was damage approximating the amount claimed to have been fixed as liquidated damages.

As we said in *Joeckel v. Johnson*, 178 Iowa 231, where, under all the circumstances, the sum stipulated in the contract as liquidated damages is out of all reasonable proportion to the loss sustained or reasonably to be anticipated, the stipulation will be treated as a penalty, since the right to damages for breach of contract is founded upon compensation and not gain; and where, from the nature of the contract, the extent of the damages which would result from the breach thereof is difficult or impossible of ascertainment, the fact that the parties have deliberately named a sum which should be treated as liquidated damages on the happening of a breach, is a matter of importance in determining the question. But in that case, though the exact amount of damage was not proved, the circumstances of the case showed that the party was damaged in approximately the amount fixed, so that the holding was that the amount fixed should be considered as liquidated damages.

In the instant case, the trial court found that defendant entered into the contract in good faith, and with the intention to perform the same, but that, through no fault of his, he was unable to perform, because the title was partly in other parties, and found, too, that under such circumstances defendant would be liable to plaintiff, for nonperformance, in nominal damages only; but later in its finding, or opinion, the court seemed to think that plaintiff was entitled to retain the \$1,000 as such nominal damages; but, as he stated it, as liquidated damages. Under the record, we think it is not shown that there was any damage in any considerable amount, or any amount approximating \$1,000.

At this point, appellee argues that, as he construes

appellant's argument, appellant admits that appellee would be entitled to retain out of the \$1,000 whatever expenses he had been put to in looking at the land, and that this in itself is an admission that the \$1,000 was agreed upon as liquidated damages. We do not understand appellant's argument to be that broad. If it were shown that such expenses were approximately \$1,000, and that the parties so contemplated, there might be force in appellee's claim. The trouble about this is, as we view it, that appellee has not pointed out in argument what such expenses were, and we do not find in appellee's testimony that he testified on that subject. Defendant wrote a letter, December 15, 1912, to Sieh, the party claiming to have been the agent who brought these parties together, upon which plaintiff places some reliance; and in this letter, defendant said, in reference to the plaintiff's land: "I might as well drop the \$1,000 I have in it and let you and Brown split it." But the same letter also says: "You were smooth enough to get a good mouthful, but I will head you off before you get your meal."

It is true that appellee, a resident of Sioux City, Iowa, testified that, after the making of the contract, he would think his Lyman County land had depreciated in value about \$15 per acre. This, on the 640 acres, would amount to \$9,600. We think it cannot be seriously claimed that plaintiff or the defendant contemplated that the \$1,000 paid and referred to in the contract should cover such an item, and furthermore, we are not convinced from the record that there was any depreciation, and we doubt very much whether the land was worth \$15 an acre. On cross-examination, plaintiff himself says, in reference to his land, that in this trade with defendant there was \$12.50 per acre of wind. It is shown that plaintiff's land was in an alkali strip, and witnesses living near it testify that the plaintiff's land, and similar land in that locality, is not suitable for anything; that it is not good for grazing purposes, as

the stock becomes alkalied and worthless, lose their hoofs, hair, become lame, and finally die. The trial court found that plaintiff was not guilty of false representations in regard to the character of the land; but this was mainly on the ground, we take it, that plaintiff did not have knowledge of the character of the land. Witnesses living near the land in question testify as to its value and the alleged depreciation. One of them says that good land for that country sold for \$15 per acre; that plaintiff's land was not as valuable as that; that he did not consider plaintiff's land of any value for stock-raising purposes; that he would not want it at all; that a person could sell it to speculators for \$15 per acre; that for grazing purposes you would have to fool a man to sell it; that it had no market value in October, 1912; that there was a strip about 4 miles wide and 20 miles long of the alkali land. Another witness says that the reasonable market value of land unaffected with alkali in that vicinity, in the fall of 1912, was \$15 per acre. Another witness testifies that the land in controversy, on October 29, 1912, was worth \$8 per acre for speculating purposes, but for stock purposes it was not worth anything, and that nothing occurred between October 29, 1912, and March 1, 1913, to cause land values to fluctuate in the vicinity of the Brown land. Other witnesses give similar testimony.

Appellee relies at this point on the case of *Burton v. Ryther*, (S. D.) 161 N. W. 350. Appellant contends that the case can have no application because in that case the court held that the damages as liquidated by the contract amounted to the rental value of the property, and that, therefore, the vendor was entitled to retain the money paid on the contract.

Appellant contends that, where a party in good faith enters into a contract to convey land which at the time is owned by himself and others, who refuse to convey their interest according to the contract, and the party contract-

ing is unable to perform upon his part, plaintiff should be allowed to recover only the necessary expenses, if any, of inspecting the land and making the contract, and that defendant should be allowed to recover any money paid by him in part performance, less such expenses, and cites Black on Rescission & Cancellation of Contracts, Sec. 211; *Cullumber v. Winter*, 154 Iowa 263; *Eggert v. Pratt*, 126 Iowa 727; 3 Elliott on Contracts, Sec. 2285.

Appellant also contends that, because plaintiff sold his land to other parties, and pending his action for specific performance, wherein defendant was resisting upon the ground that the contract is non-enforceable because induced by fraud, and because of his inability to perform, through no fault of his own, there was an adoption of the renunciation of the defendant, and a voluntary rescission of the contract upon his own part; and that, because plaintiff, by so alienating his own title during the pendency of his suit for specific performance, made it impossible for himself to specifically perform, he was bound to restore to defendant the \$1,000 and place defendant *in statu quo*; and cites in support of this *McWhirter v. Crawford*, 104 Iowa 550, *Wright v. Swigert*, 172 Iowa 743, *Miller v. McConnell*, 179 Iowa 377, *Waters v. Pearson*, 163 Iowa 391, *Prichard v. Mulhall*, 127 Iowa 545. As having some bearing, see, also, *Pardoe v. Jones*, 161 Iowa 426.

This may be so, but we shall not take the time to review the cases, or discuss the evidence as to whether there was a rescission by consent, or a mutual abandonment by both parties. It is enough to say that we hold, in view of the evidence before set out, and our discussion of the question as to the payment of the \$1,000, and the provision in the contract with reference thereto, and under all the circumstances of this case, that the \$1,000 was not liquidated damages, as contended by appellee.

It follows, then, that the trial court was in error in holding otherwise. The judgment and decree of the district court is reversed. Defendant may have a decree in the district court or in this court, at his election.—*Reversed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

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JOHN L. HASWELL, Appellant, v. H. J. THOMPSON et al., Appellees.

**JUDGMENT: Construction and Operation—Decree of Reversal—**

- 1 **Relating Back.** A final judgment, entered, in an action to quiet title, in compliance with a reversing or modifying order of the Supreme Court, *relates back*, and takes effect as of the date of the original decree from which appeal was taken.

**PRINCIPLE APPLIED:** Plaintiff in an action to quiet title was adjudged to be the owner of certain land on condition that he return to defendant a named sum of money. Defendant appealed. *Pending the appeal*, a drainage improvement was established across said land, and plaintiff filed his claim for damages, and \$600 was allowed on the claim. Defendant filed no claim for damages. Thereafter, the above appeal was decided. The decree of the lower court was modified by giving to defendant an election to take a decree in his favor on condition that he pay plaintiff a named sum. Defendant thereafter elected to do so, and, after paying the sum specified by the appellate court, a supplemental decree quieting title in defendant was entered. This latter decree became final. The ditch improvement was actually constructed after the entry of said final supplemental decree. The drainage district was indifferent as to who should receive the \$600 damages.

On the issue as to who was entitled to the \$600 damages, *held* that the supplemental decree related back to the date of the original decree which was modified by the Supreme Court, and therefore defendant owned the land when the drainage improvement was established, and consequently was entitled to the damages.

**DRAINS: Establishment—Damages—Who May Claim. Principle**

- 2 recognized that only the legal or equitable owners of lands taken for the construction of a drainage improvement may claim damages therefor.

**PRINCIPLE APPLIED:** See No. 1.

**DRAINS: Establishment—Damages—Failure to File Claim—Effect.**

- 3 One who files a claim for damages by reason of lands taken for the construction of a drainage improvement, and who is not entitled to the damages allowed because not owning the land, may not defeat the actual owner's claim to the damages on the ground that such actual owner had filed no claim for such damages, when the drainage district did not see fit to raise such question.

PRINCIPLE APPLIED: Sec No 1.

*Appeal from Kossuth District Court.—N. J. LEE, Judge.*

THURSDAY, OCTOBER 18, 1917.

PLAINTIFF brought this action in mandamus to compel the board of supervisors and auditor to draw a warrant to him in payment of a claim for damages from the establishment of a drainage district, which claim had been filed and allowed. Defendant Senneff filed a cross-petition asking mandamus against the auditor and board to deliver the warrant to him. The district concedes that the award is due to either plaintiff or Senneff, and is ready to pay to the one entitled thereto. After trial on the merits, the court found that the equities were with the defendant Senneff, and the plaintiff appeals.—*Affirmed.*

*Burt J. Thompson and Alan Loth, for appellant.*

*Senneff, Bliss, Witwer & Senneff, for appellees.*

PRESTON, J.—The case, or a branch of it, has been here before (*Haswell v. Standring*, 152 Iowa 291). The facts and the history of the case are somewhat complicated, and are set out at considerable length in the former opinion, and there are other matters arising since the former hearing. A better understanding of the case can be had, perhaps, by giving a brief history of the case, although, as we view it, the determination of this appeal turns on one or two of several propositions argued.

1. JUDGMENT:  
construction  
and operation:  
decree of re-  
versal: re-  
lating back.

On January 17, 1911, the legal, or record, title to 160 acres of land described in the petition was in plaintiff, and on that date, Drainage District No. 25 was established so as to include said land. On the same date, a claim for damages because of the establishment of the district and construction of the contemplated ditch was allowed in the sum of \$600, which claim had, prior thereto, been filed by plaintiff. The tax for the payment of this has been levied and collected, and the ditch has been constructed. Actual construction of the ditch was done after defendant Senneff obtained legal title to the land. Senneff is now the record owner of the land, having acquired title through one Hill since the trial and decision of the former case by the Supreme Court.

The defendant Senneff, for answer, set up the matters hereinafter referred to, which we shall state as briefly as may be. Prior to February 18, 1902, plaintiff became the owner of the land in question, through negotiations with John Standring, and paid \$4,000 for the quarter section, and agreed with Standring that, when the same was sold, Standring should have one half the profits. On the date last mentioned, a forged deed, purporting to convey the land in question, was executed to Standring and placed of record. On March 7, 1902, Standring conveyed to Huntley, through whom and intervening grantors and the decree of the court, defendant Senneff acquired title. Some time before March 19, 1903, Standring reported to Haswell a sale of the land to one Howie, on the basis of \$5,600, which report was not true. On the last-named date, Standring sent Haswell \$500, as having been paid by Howie on the purchase. May 13, 1903, Standring sent Haswell \$1,000 on the supposed deal, and on September 1, 1903, he sent another \$1,000 to plaintiff in cash, and a mortgage for \$3,100 covering the land in question, purporting to be signed by Howie, which



would make the total on the supposed sale of \$5,600. This sale, if genuine, would have netted Haswell \$1,600 profit. He returned \$800 of it to Standring for his share of the profits, and plaintiff retained \$1,700 of the cash received and retained the \$3,100 Howie fictitious mortgage. March 16, 1908, plaintiff commenced an action to quiet title to the land in question, bringing in as defendants the parties who, according to the record, had any interest therein, or who had had any interest in the record title subsequent to the date of the alleged forged deed to L. S. Standring. Hill, who was the last record title owner under the forged conveyance, was made a defendant, and, as said, appellee Senneff obtained title through Hill. In that action, the decree of the district court quieted the title in Haswell, but required him to pay into court for the benefit of defendants \$1,782, being the amount, with interest, that Haswell had received and retained out of the supposed Howie sale. That action was appealed by the defendants to the Supreme Court. The drainage district was established, and the \$600 award in question allowed, pending the appeal.

The Supreme Court modified the decree of the district court, and provided that, if defendants would pay plaintiff \$3,100, with interest, the title should be quieted in the defendants. The theory of the opinion, as stated at page 300, was that both plaintiff and defendants were innocent of wrongdoing, but were both the victims of Standring's wrong, and that, if a result could be reached which would give plaintiff all he wanted or expected from the land in question, and at the same time give defendants the advantage of the price fixed by the plaintiff himself, it would as nearly reach an equitable result as could be done. In other words, if plaintiff received all that he could possibly have received for his land, had a sale in fact been made to Howie, he would suffer no actual loss, and defendants might be saved something by reason of the advance in the value of

the land after their supposed purchase; and this court held that, if defendant should pay the sums above mentioned, a deed might be made by commissioner, or the title should be quieted in defendants by decree, as they might elect.

Following the decision of the Supreme Court, defendants in that action paid to the clerk, for plaintiff's use, \$3,885.85, this being \$3,100 with interest; and deed was delivered to the heirs of Hill, he having died. Thereafter, upon proper proceedings, the district court, on February 29, 1912, entered a supplemental decree quieting title in defendant Senneff, to whom deeds from the Hills had been executed. As said, the ditch for which the award of damages was made was not actually dug until after title had been quieted in Senneff. In the instant case, the trial court determined that Senneff was entitled to the \$600, and no appeal has been taken by the board of supervisors or drainage district, so that the finding of the district court is conclusive that Senneff is entitled to the money, unless plaintiff Haswell is entitled thereto.

2. DRAINS: es-  
tablishment:  
damages:  
who may  
claim.

Appellant argues a number of propositions; and they are, substantially, that the owner of the land at the time the right to damages accrues is the person entitled to the payment thereof, and that the right to damages accrues so as to fix the rights of the parties not later than the date of the establishment of the drainage district (citing the statute, Code Supp., 1913, Secs. 1989-a5 to 1989-a7 and Code Sec. 1941, and cases); and the contention is that plaintiff was the legal and equitable owner at the time of such establishment, because the decree of the district court in the first case so held. This last proposition is, we think, the turning point in the case, and will be referred to later.

Appellees' claim is that, when the decree appealed from in the first case was reversed and a supplemental decree entered, the supplemental decree related back; in other

words, that the final decree, after reversal, was simply such a decree as should have been entered in the first instance.

It is thought by appellant that the holding of the Supreme Court in the former case is not favorable to Senneff's rights to the \$600 award. It is true that the question as to this \$600 damages was not in issue in the former case, and in fact the district had not then been established. But the theory of the opinion was to make plaintiff whole, and Senneff acquired the rights of the defendants in that action after the reversal by the Supreme Court, and stands in their place.

It is further contended by appellant

3. DRAINS: es-  
tablishment: that Senneff had no right to the drainage  
damages: award, for the reason that his grantors  
failure to file claim: effect. waived the claim for damages by failing to  
file a claim therefor. But it occurs to us that there could  
be but one claim for damages; that is, the equitable owner  
and the person holding the legal title would not both be  
entitled to damages. The plaintiff filed a claim on the  
theory that he was the owner of the property, and if he  
was not such owner, as was finally determined, then he  
would not be entitled to the damages, even on plaintiff's  
theory that the owner of the land at the time the right to  
damages accrued is the person entitled thereto. Further-  
more, the question as to whether Senneff should not be al-  
lowed the damages, because he had filed no claim, seems  
not to have been raised by the drainage district in the lower  
court. and, as said, the district has not appealed from the  
decision of the lower court that Senneff was entitled to  
the damages; so that, if plaintiff has not established his  
right to the damages, it is not any concern of his whether  
they shall go to Senneff or not.

Appellee contends that Haswell was not the owner of  
the land when he filed the claim for damages; that the  
decree of the trial court which established such ownership

was reversed by the Supreme Court, and the supplemental decree following the decision of the Supreme Court determined the rights of the parties and related back to the original decree, citing *Freeman on Judgments* (3d Ed.), Sec. 481; and they contend that the supplemental decree, carrying out the provisions of the decision of the Supreme Court, had the effect of entirely destroying the decree of the trial court from which appeal was taken, citing *Seevers v. Cleveland Coal Co.*, 166 Iowa 284. We think this must be so, and that the supplemental decree in the first case establishes the rights of defendant Senneff, and relates back and determines the rights of the parties, in so far as plaintiff is concerned. The fact that a supplemental decree was entered, after a reversal by the Supreme Court, does not change the situation, and is no different than it would have been had the Supreme Court reversed absolutely the decree of the trial court and vested title in the defendants, because the opinion gave defendants the right of election, and they elected to have a supplemental decree upon the payment by them of the money ordered. We think that plaintiff's rights were the same when the first decree was entered as they were fixed in the supplemental decree, from which supplemental decree no appeal was taken. It seems to us that, if appellant's contention be sustained, and he is allowed the \$600 in controversy, he will receive \$600 more than the amount which would make him whole. That was the purpose of the Supreme Court, that equity should be done plaintiff, though, as stated, the \$600 in controversy was not in issue in that case. As said, Senneff acquired what rights Hill had. It should have been stated that Hill had served notice on Schumaker and Huntley, his grantors, to defend his rights under his covenants of warranty, and the fixing of the rights of Schumaker and Huntley would determine Hill's rights, in so far as they had any relation to

Haswell. We think there is no merit in plaintiff's plea of estoppel. He did not change his position, nor was he misled to his prejudice, so far as this controversy is concerned, and did nothing with reference to the damage claim that he would not have done but for the things alleged as constituting an estoppel.

We are of opinion that the judgment and decree of the trial court was right, and that it ought to be affirmed. It is—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

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IN RE SELECTION OF OFFICIAL NEWSPAPER.

F. J. BROWN, Appellant, v. A. D. MCGUIRE, Appellee.

**COUNTIES:** Board of Supervisors—Official Newspapers—Selection—Bona Fide Subscribers. The publisher of a newspaper who, in good faith and for a valuable consideration, purchases the subscription list of a defunct newspaper, and, as a part of the contract of purchase, furnishes his own newspaper to such subscribers in fulfillment of their subscriptions, with the express or implied consent of such subscribers, thereby constitutes such purchased list of subscribers bona fide subscribers to his own newspaper.

*Appeal from Wayne District Court.*—H. K. EVANS, Judge.

THURSDAY, OCTOBER 18, 1917.

CONTEST over the matter of selecting an official newspaper. The facts appear in the opinion.—*Affirmed*.

*F. J. Brown*, for appellant.

*D. L. Murrow*, for appellee.

COUNTIES:  
board of sup-  
ervisors: of-  
ficial news-  
papers; selec-  
tion: bona  
fide sub-  
scribers.

PRESTON, J.—In the hearing before the board of supervisors, five publishers filed their applications with their lists of subscribers. Three papers were to be selected. It was conceded by appellant and appellee and the Seymour Leader that the Times-Republican and the Wayne County Democrat were entitled to be selected as two of the three. The Leader was so far behind that no appearance was made for it in the district court, so that the contest is between the appellant and appellee as to which of these two shall be the third paper. The Humeston New Era was selected as the third paper, and Mr. Brown, the publisher of the News, appealed to the district court, and there filed a petition. Paragraph 3 of this petition as amended is as follows:

“Comes now F. J. Brown, publisher of the Allerton News, of Allerton, Wayne County, Iowa, and states:

“Par. 3. That in the list filed by the Humeston New Era and as a part of said list there are 250 names of persons who never subscribed for the Humeston New Era, but said persons did subscribe for a newspaper known as the Millerton Radium, which was published at the town of Millerton, Wayne County, Iowa, and was so published until about the 1st day of December, 1915; that about the 1st day of December, 1915, the publishers of the Humeston New Era purchased and paid a valuable consideration for the subscription list of the Millerton Radium and added the names so bought to the list so filed as aforesaid; that when they purchased said subscription list as aforesaid they agreed to send the Humeston New Era to all of said list of subscribers to the Millerton Radium until the time expired for which they had paid for the Millerton Radium, and did so send the Humeston New Era to the 250 aforesaid, which are included in the list filed by the publishers of the Humeston New Era as a part of the list of subscrib-

ers to the Humeston New Era; on December 1st, the Millerton Radium suspended publication and moved the plant from the county; that on the 9th day of June, A. D., 1916, appellant filed an amendment to his said petition in words as follows:

"That he amends Paragraph 3 to read and to state that in the last issue, to wit, the issue of the first week in December, 1915, the Millerton Radium published a statement that the publisher of said newspaper had sold the subscription list to the publishers of the Humeston New Era and that the said publishers of the New Era would send the New Era in the place of the Radium for such time as the subscribers to said Radium had paid for said newspaper, and the Humeston New Era the same week also published a statement saying they had purchased the said Radium list and would send the New Era in place of the Radium for such length of time as the subscribers to the Radium had paid for said Radium."

The defendant, McGuire, publisher of the Era, demurred to the petition before set out, on the following grounds:

"That Paragraph 3 of said petition shows on its face that said Brown is not entitled to the relief demanded with reference thereto.

"That said Paragraph 3 shows that the 250 subscribers therein referred to were actually receiving said Humeston New Era at the time of the filing of said list by said Humeston New Era and had been receiving said newspaper ever since the 1st day of December, 1915, under an agreement for that purpose; that the Millerton Radium ceased to exist as a newspaper in Wayne County, Iowa, on December 1st, 1915, and has never since existed as a newspaper in Wayne County, Iowa.

"By reason of the above and foregoing, as contained  
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in Paragraph 3 of said petition, the same shows on its face that said subscribers were such subscribers to said Humeston New Era as entitled them to be counted in the selection of an official newspaper for Wayne County, Iowa.

"Wherefore this appellee prays the court to dismiss the pretended cause of action set up in said Paragraph 3 and to enter an order in this case affirming the action of the board of supervisors of Wayne County, Iowa, in selecting the Humeston New Era as one of the official papers for said county."

The demurrer was sustained, and the appellant elected to stand upon his petition. The only question raised by demurrer, and for determination upon this appeal, is whether the transfer of the subscription list from the Radium to the Era, the acceptance by the Era, the payment by the Era of a consideration for the list, and the fulfillment of the agreement by sending the paper to the several subscribers, with the assent of such subscribers, made such former subscribers to the Radium bona fide subscribers to the Era. Appellant cites *Ashton v. Stoy*, 96 Iowa 197, as being in point. In that case, it was held that persons to whom a paper was sent, in accordance with a contract made by a real estate dealer as an advertisement of his business, were not to be counted as actual subscribers to a paper. Appellant says that in that case the parties receiving the papers did nothing, one way or the other, but simply received the papers being sent by another party, and they contend that such is the situation here. But we think there is more in the instant case, and that it involves the question of assent or ratification by the 250 subscribers referred to, after notice of the arrangement published in both the Era and the Radium. This is not a case of combining the subscription list in order to secure the county printing, as was the case in *Packard v. Snyder*, 110 Iowa 628. In *Ashton v. Stoy*, 96 Iowa 197, at 201, we said that



to become a subscriber to a newspaper includes some voluntary act on the part of the subscriber, or something which is in effect an assent by him to the use of his name as a subscriber. It is not claimed that the 250 persons above referred to actually ordered the paper, but, under the second part of the definition given, we think they were bona fide subscribers. It is not disputed that they were bona fide subscribers to the Radium. That paper desired to suspend publication and go out of business. It made an arrangement with appellee to carry out its contract with its subscribers. It notified its subscribers of its intention to suspend, and of its arrangement with the appellee. Appellee gave a like notice to them, and sent the paper to them in accordance with the agreement made with the Radium. We think that the subscribers who, with full knowledge and notice of the arrangement, and without objection, accepted and received the paper of appellee, assented to the use of their names as subscribers. The transaction seems to have been in entire good faith, and accepted and assented to by said subscribers. When the Radium went out of business, its subscribers doubtless could have compelled the publisher to furnish another paper or return to them their subscription which had been paid and not earned. But the owner of the Radium saw fit to arrange with the appellee to fulfill its subscription list, and, as before stated, notices of the arrangement were given. This, we think, was a sufficient notice and a sufficient transfer of the list to require some action on the part of the subscribers to the Radium, if they did not desire to become subscribers to the Era, and that the receipt of the Era by them from week to week would preclude them from recovering the subscription which was unearned by the Radium; and, too, the notice in the Era and the sending of the paper would prevent the Era from recovering from the subscribers for the period for which the subscribers had paid for the Radium.

Under all the circumstances shown, it is our conclusion that the 250 subscribers referred to were bona fide subscribers, and that they should have been counted, and that the trial court properly sustained the demurrer. The judgment is therefore—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

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SCOTT LIGGETT, Appellee, v. ALONZO SHRIVER, Township Clerk, Appellant.

**HIGHWAYS: Township Road System—Superintendent of Roads—**

- 1 **Legality of Contract.** A township superintendent of roads, under Sec. 1527-s13, Supplemental Supplement, 1915, may be something more than a mere "overseer." He may validly contract with the township trustees to *personally* perform the ordinary road work of the township as provided in said section, such work not constituting an "improvement," within the meaning of Section 1527-s15, Code Supp., 1913, prohibiting such superintendent from being interested in contracts for the "improvement" of roads.

**STATUTES: Construction—Prohibitory Statutes—Expression of one**

- 2 **Thing Excludes Another.** Principle recognized that, in the construction of a statute containing prohibitory provisions, the expression of one thing is the exclusion of the other.

**CONTRACTS: Legality of Object, Etc.—Public Policy—Highway**

- 3 **Superintendent—Inconsistent Rights and Duties.** A contract by which one is employed by the township trustees (a) to act as superintendent of roads, and (b) to furnish his own personal labor and teams in the actual doing of the road work, is not, in view of our general highway statute (Ch. 1-A, Tit. VIII, Code Supp., 1913), contrary to public policy.

*Appeal from Wayne District Court.*—THOMAS L. MAXWELL,  
Judge.

THURSDAY, OCTOBER 18, 1917.

ON March 15, 1915, Scott Liggett, appellee herein, was, by written contract, employed by the township trustees of Jackson Township, Wayne County, Iowa, as highway superintendent. A blank form of contract furnished the trustees by the state highway commission was used. On November 29th following, appellee filed itemized statements of the services rendered, charging therefor on the basis of a schedule set out in the written contract. At the time the claims were filed, they were not certified by him, as required by statute, but later, his certificate was attached thereto. The itemized statements were approved, and the amounts claimed allowed by the township trustees, and orders drawn therefor, one in the sum of \$774.50, one for \$22.50, and one for \$1.50. The township clerk, however, refused to pay the larger one, but in open court in this case tendered payment of the two smaller orders. Later, this action was brought against the township clerk, plaintiff alleging in his petition the services rendered and the refusal of payment thereof by the clerk, and praying the issuance of a writ of mandamus to compel appellant to pay the orders issued by the township trustees. The order for \$774.50 included an item of \$210.25 for services claimed to have been rendered by plaintiff while superintending work on the highways. The remainder of his claim is for service of his teams and men employed and paid by him in repair work on the highways of said township. The court granted the prayer of plaintiff's petition, and ordered the writ to issue. Defendant appeals.—*Affirmed*.

*Miles & Steele*, for appellant.

*Carter & Bracewell*, for appellee.

STEVENS, J.— Appellant relies for rever-

1. HIGHWAYS:  
township road  
system: super-  
intendent of  
roads: le-  
gality of con-  
tract.

sal upon two propositions: (1) That the contract entered into between the township trustees and plaintiff is prohibited by Section 1527-s15, Supplement to the Code, 1913;

and (2) that the same is contrary to public policy and void.

The two propositions are so closely related that they will be considered together. Without setting out the contract in detail, it provided substantially as follows: That appellee should make contracts for dragging the roads, supervise the work on draggable roads, keep approaches to culverts and bridges and the openings to all culverts and drainage ditches in good repair, the roadside free from weeds, brush and other material, use such tools and methods as are necessary to keep the roadway rounding in shape, do all permanent grading work, in accordance with the plans and instructions of the county engineer, work out and supervise poll taxes, report unsafe culverts and bridges, notify owners to cut and destroy all noxious weeds, employ such assistants as were necessary, at a compensation to be approved by the board of trustees, certify itemized bills for dragging, maintenance or repair work, make report of all work done by himself and assistants, and perform other designated services.

Section 1527-s13, Supplemental Supplement, 1915, provides:

“\* \* \* Said superintendent or superintendents shall have general supervision of all dragging and repair work on the township road system, including the placing of temporary culverts, and the term of office and compensation of such superintendent or superintendents shall be at the discretion of the township trustees. The superintendent shall see that the approaches to all bridges on said roads are maintained in such manner as to present smooth and uniform surfaces, and keep the openings to all culverts and ditches free from weeds, brush and other material that will in any manner prevent the free discharge of surface water. He shall have charge of all draggable roads of the township road system and make contracts for dragging, and shall see that all draggable roads of the township road system

are properly dragged at such times as are necessary to maintain such roads in smooth condition, at such price as is reasonable and necessary to secure such contracts, to be fixed by the township trustees. For this purpose there shall be expended under the direction of the township trustees, through the road superintendent, upon the township road system not less than the one mill drag tax now authorized by law. The township trustees shall not allow any bills for dragging, maintenance, or repairs work, nor shall warrants in payment therefor be drawn by the township clerk upon funds of the township road system until itemized bills therefor have been certified to by the township road superintendent. A violation of this section shall render the township clerk liable on his bond for the amount of said warrant. The compensation of such superintendent for all duties except any dragging actually performed by him, and the cost of all equipment for dragging, shall be paid for out of the township road funds. He shall at least once a year, or on demand, furnish the township trustees a report of all work done under and by him."

Section 1527-s15, Supplement to the Code, 1913, provides:

"\* \* \* No member of the highway commission, \* \* \* road superintendent or any person in their employ \* \* \* shall be, either directly or indirectly, interested in any contract for the construction or building of any bridge or bridges, culvert or culverts or any improvement of any road or parts of road coming under the provisions of this act."

If the contract in question comes within the purview of this statute, it is void, and plaintiff could not recover for services rendered thereunder.

Without restatement of the above enumerated matters, it will be noticed that, by specific reference, the inhibition

of the statute applies only to contracts for the construction or building of bridges or culverts, or the improvement of roads or parts of roads coming under the provision of the statute. "Improvement work," as that term is used, must be done in accordance with plans and specifications furnished by a county engineer, and an application must be made by the township trustees to the board of supervisors before such work can be done, but, upon application's being made, the board shall furnish an engineer, to be paid out of the county fund, whose duty it shall be to survey and lay off such roads according to the plans and specifications provided for the county road system, and the work shall be done in accordance therewith. Sections 1527-s9 and 1527-s14, Supplemental Supplement, 1915.

Section 1527-s13, quoted above, is permissive in character, and prescribes the duties of a person employed as highway superintendent; while Section 1527-s15 is restrictive, and enumerates the things he must not do after becoming highway superintendent. The two sections are not in conflict, and it will be presumed that the legislature included in the latter section all that it deemed important or necessary to prohibit, and, by implication at least, left the township trustees free to contract in relation to all matters not included within the prohibitory provisions of the statute.

None of the services for which appellee claims compensation comes within the prohibited list. It is true that the services include work and the labor done by his teams and men employed by him, and also the superintending of work upon the highway; but it does not appear that duplicate charges for work and labor and services while superintending are included in the itemized statements filed with the township trustees. The superintendent, of course, could not charge for services as a laborer and at the same time

2. STATUTES:  
construction:  
prohibitory  
statutes: ex-  
pression of one  
thing excludes  
another.

for services as superintendent. None of the services rendered was under a contract directly or indirectly relating to "the construction or building of any bridge or bridges, culvert or culverts, or any improvement of any road or parts of road coming under the provisions of this act," but all services rendered were of the class permitted by the statute and enumerated in his contract with the township trustees. Unless, therefore, the contract in question is, as claimed by counsel for appellant, contrary to public policy, the finding and judgment of the lower court must be affirmed.

It is claimed by counsel that the contract under consideration is ruled by the decisions of this court in *Bay v. Davidson*, 133 Iowa 688, and *James v. City of Hamburg*, 174 Iowa 301, and other cases of like tenor, and that same is clearly contrary to public policy. The term "public policy" is of indefinite and uncertain definition, and there is no absolute rule or test by which it can always be determined whether a contract contravenes the public policy of the state, but each case must be determined according to the terms of the instrument under consideration and the circumstances peculiar thereto. In general, however, it may be said that any contract which conflicts with the morals of the times or contravenes any established interest of society is contrary to public policy. We must look to the Constitution, statutes and judicial decisions of the state to determine its public policy, and that which is not prohibited by statute, condemned by judicial decision, nor contrary to the public morals, contravenes no principle of public policy. *Spead v. Tomlinson*, (N. H.) 59 Atl. 376; *Lipscomb v. Adams*, (Mo.) 91 S. W. 1046; *McGuffin v. Coyle & Guss*, (Okla.) 85 Pac. 954; *Lawson v. Cobban*, (Mont.) 99 Pac. 128; *Atlantic Coast Line R. Co. v. Beazley*,

3. CONTRACTS:  
legality of ob-  
ject, etc.:  
public policy:  
highway super-  
intendent: in-  
consistent in-  
rights and  
duties.

(Fla.) 45 So. 761; *Brooks v. Cooper*, (N. J.) 26 Atl. 978; *Veazey v. Allen*, (N. Y.) 66 N. E. 103; *McClanahan v. Breeding*, (Ind.) 88 N. E. 695.

In the cases cited by counsel for appellant, the doctrine contended for was applied to transactions in which a public officer was involved, and they were cases in which, even though no actual fraud was charged, the officer might, in the performance of his public duty, be placed in a situation where he would be required to choose between his private interests and that of his constituency. It is the public policy of the government, state and national, to require all public officials, in the performance of the duties of their office, to subordinate every private interest to the public welfare, and to avoid transactions of every kind which may place private interests in antagonism to public duty. It is true that while, in the performance of his duties, a superintendent renders other services than as a laborer, they are confined to matters not prohibited by the statute, and in no way conflict with the interests of society or public welfare. He must keep a record of the time and services rendered upon the highway by men employed by him or working under his supervision, prepare an itemized statement thereof, certify that same is true and correct, and file the same with the township trustees, who alone are charged with the duty of passing upon the correctness thereof and allowing or rejecting the same. If the charges made by the superintendent are in accordance with the schedule set out in his contract, and he has correctly kept the time of the men and teams working, his claims should be allowed; otherwise, altered or modified to conform to the facts. Of course, some reliance must be placed by the township trustees upon the integrity of the highway superintendent, but it may be presumed that the trustees will, in the exercise of their discretion as public officers, look well to the character of men selected for this position, and that they will also exercise



the discretion which the statute gives them of promptly terminating the contract with a superintendent found unworthy. There is no greater risk involved in the transaction in question than is present in every transaction founded upon contracts of employment. The authority conferred upon the township trustees safeguards the taxpayers and secures them against any danger of imposition or fraud on the part of the highway superintendent.

We reach the conclusion that the contract under consideration is not one prohibited by law, and that it is not contrary to public policy. The judgment of the lower court is, therefore,—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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A. E. MINION, Appellee, v. CHARLES W. ADAMS, Administrator, et al., Appellants. (Two cases.)

**SPECIFIC PERFORMANCE: Contracts Enforceable—Degree of**

- 1 **Proof.** Principle recognized that the evidence necessary to justify specific performance must be clear, satisfactory and convincing, though not necessarily free from inconsistency. Evidence reviewed, and held to justify the relief prayed.

**WITNESSES: Competency—Transactions with a Deceased—In-**

- 2 **ferred Facts.** Counsel for plaintiff, in an action on an oral contract with a deceased person, may not render his client a competent witness as to the terms of such contract by the simple expedient of directing this client to detail the terms of such contract *but to suppress the name of the person with whom such contract was had*, when the deceased was the only person with whom the client could have had such a contract.

*Appeal from Humboldt District Court.*—D. F. COYLE, Judge.

THURSDAY, OCTOBER 18, 1917.

**ACTION** for specific performance and for injunction.

There was a decree for plaintiff in the first case and for the defendants in the second. The facts will be sufficiently stated in the opinion. Adams et al., defendants in the first case and plaintiffs in the second, appeal.—*Affirmed.*

*Kenyon, Kelleher & Price*, for appellants.

*Robert Healy and Lovrein & Lovrein*, for appellee.

PRESTON, J.—In the first case, plaintiff, Minion, brought his action in equity, asking that the executors of the estate of A. M. Adams, who survived his wife, M. L. Adams, specifically perform a parol contract alleged to have been entered into between said Minion, plaintiff, and M. L. Adams and A. M. Adams, a copartnership, engaged in the publication of the "Humboldt Independent," claiming that, by the terms of such contract, M. L. Adams and A. M. Adams agreed that, if Minion, the plaintiff, would remain in the employ of said partnership and the survivor thereof, in the printing and publishing business, as long as they continued the publication of the "Independent," then the printing plant, including the real estate and books of account, should become and be the property of the plaintiff. The second case was brought by the administrators, asking an injunction against Minion, restraining him from interfering with the administrators in their possession of the assets of the estate of A. M. Adams, and asking an accounting from Minion for the proceeds of the estate, which it is alleged he had converted to his own use, since the death of A. M. Adams.

By stipulation, the two cases were tried together, and are treated as one case on this appeal. For convenience, we shall refer to appellee, Minion, as plaintiff. In the first case, it was alleged, substantially, that, in February, 1903, M. L. Adams, for the partnership, made an oral contract

1. SPECIFIC PERFORMANCE: contracts enforceable: degree of proof.

with plaintiff, by the terms of which, if plaintiff should continue in the employ of the copartnership, and the survivor thereof, as long as the survivor lived, he should have his living out of the business and should have all the property used in connection with the business when the copartnership, or the survivor, was through with it; and that plaintiff complied with the terms of his agreement. It was also alleged that, about June 2, 1909, A. M. Adams, the survivor of the copartnership, orally agreed with the plaintiff that, in consideration of services performed, and of his continuing to stay with Adams until the death of said Adams, plaintiff should have a living from the business, and upon the death of A. M. Adams should have full ownership of the printing and publishing business; and that plaintiff has complied with the terms of said agreement. Plaintiff asked that the administrators be compelled to specifically perform said contract, by conveying to him the said described premises, including the real estate and personal property of the "Humboldt Independent." It is also alleged that, on the death of M. L. Adams, A. M. Adams, her sole legatee, took the interest of the said M. L. Adams and held the same in trust for said Minion. A. M. Adams, the survivor, died in January, 1915, and his wife some time before that.

Defendants denied that either the copartnership or the members thereof had, at the time of the alleged contract with M. L. Adams, in 1903, become the owner of all the property now claimed by plaintiff under the contract; denied the existence of the contracts; averred that Minion was an employe working for wages which were accepted by him in full compensation; denied that plaintiff ever had possession of the plant; and asserted that the contract was in contravention of the statute of frauds; that, by his conduct, admissions and statements for five months subsequent to the death of A. M. Adams, plaintiff estopped himself to assert any individual right or title in the property;

that plaintiff has converted to his own use approximately \$2,000 belonging to the estate, and they ask an accounting; that the contract sued upon was without consideration, and the consideration was inadequate; that the pretended contract was unenforceable in equity on account of uncertainty.

Some time after the cases were tried and submitted, there was filed an amendment to plaintiff's reply, in which it was alleged that an accounting had been had between plaintiff and the administrators. Appellant says that this last pleading is an estray, as it is not supported by any evidence in the record. The evidence is not sufficient for the court to make an accounting, and the trial court so held, and continued that feature of the case until the subsequent term, for that purpose, and the decree did not adjudicate that question. By the decree, plaintiff was given the printing plant and the real estate used in connection therewith, subject to an encumbrance, and the second case was dismissed on the merits. In this second case, the administrators claimed that deceased, A. M. Adams, was the sole owner of the plant; that, subsequent to his death, the administrators took possession of the property and prepared an inventory and appraised the same; that they continued to employ plaintiff until June, 1915, at which time they discharged him; that on the next day Minion returned to the premises and forcibly took possession of the plant; and they asked an injunction restraining him from interfering with their possession as administrators. Minion's answer to this petition was that he became absolute owner of said premises by reason of the agreement before referred to. He denied that he was ever in the employ of the administrators; denied that the administrators were ever in possession of the property.

A brief statement of the facts may be helpful. A. M. Adams began the publication of the "Humboldt Independent" in the early '70's; the plant was run and owned by

him and his wife, M. L. Adams, as a copartnership; they ran the business without the help of employees until the late '70's, when they hired a boy to assist; in May, 1882, the Adamses apprenticed the appellee, then a boy of 14 years; plaintiff remained with them for a period of 33 years, and until the survivor of the Adamses died; the Adamses had no children, and they always referred to plaintiff as their boy or their son; plaintiff did the work of an apprentice at the plant; he did the chores at the Adams home and lived at their home until his marriage; Mrs. Adams, as long as plaintiff continued to live with them, mended his clothes and looked after his welfare, and he was always treated by the Adamses as a member of the family, and so designated by them, often being referred to as their only child; plaintiff referred to Mrs. Adams as mother; in 1890, plaintiff left the Adamses to work for another printer in Humboldt, but remained away only three or four weeks, and then returned to them, receiving an increase in wages; plaintiff was married soon after this; in 1903, after plaintiff had been with the Adamses for a period of 21 years, he resigned; prior to the date of his resignation, he had discussed with his family other openings in the same field, and, on the evening of the day of his resignation, he told his family of his action, and during the evening his resignation and where he would go were the topic of conversation; the talk was that he was going to get something better because he had a growing family; that same evening, Mrs. Adams came to the Minion home, and, according to the testimony of plaintiff's two children, began a discussion in regard to Minion's resignation; plaintiff informed Mrs. Adams that he resigned because of the needs of his family and because he could not continue on his salary, and that he had no future outlook with the "Independent;" Mrs. Adams then told him that he need not continue on the wage he was receiving if he could not get along on it, but that he would be given a liv-

ing, and if he would continue with them they would leave the printing plant to him upon the death of the survivor; and thereupon plaintiff consented to continue.

The plaintiff testified that he had such a contract, but did not say that he had it with the Adamsses; he did testify, however, that he had such a contract with no one other than the Adamsses. Proper objection was made as to the competency of plaintiff as a witness and to his evidence, under Section 4604 of the Code, but appellee contends that the cross-examination was so broad that the objection was waived. At the time of the alleged agreement in 1903, plaintiff was receiving \$12 per week, and at that time, Mrs. Folk, plaintiff's daughter, was between 7 and 8 years of age, and plaintiff's son was 11 years of age. It is claimed by appellants that the testimony of these children is of little or no weight, because of their ages. The daughter testifies that she remembered and told of the transaction soon after it occurred, because she was so tickled over it, to think that Mrs. Adams thought enough of her father, and he enough of her, to stay with them, and that they would give him the office if he did. In his testimony, plaintiff claimed that, subsequent to the conversation he had with Mrs. Adams in 1903, there was a change in his connection with the paper, and that from that time he assumed a different attitude and responsibility in connection with the management of the business. He testifies, over objection, that additions to the plant or business or equipment were to be paid out of the earnings of the business, and that, after the death of Mrs. Adams in 1909, the earnings of the business above the living expenses of A. M. Adams were to be his. As to the property plaintiff was to have, the daughter testified that he was to have the office and everything connected with it; that is, that it would be his upon the death of the survivor. The son puts it that the plant and everything should then be the plaintiff's. Plaintiff puts it that, upon the death of

the survivor of the partnership, the plant, including the building, the real estate, business, and everything connected with the printing outfit, were to be his, upon performance by him of his part of the contract.

The trial court stated in an opinion, and found, that, if the case depended upon the evidence of plaintiff and the two children, the evidence would not be sufficient, because of the tender years of the children, and because of the incompetency of the plaintiff as to at least a part of his evidence, and because of inconsistent statements and conduct of the plaintiff. The court stated, however, that plaintiff was a fair and candid witness. It is possible that the cross-examination at some points exceeded the direct examination, and that some of plaintiff's testimony should be considered. We agree with the trial court that the evidence of plaintiff and his children would not be sufficient, but there was other evidence, which will be referred to later.

It is urged by appellants that plaintiff  
2. **WITNESSES:** was incompetent to testify to the alleged  
competency: contract in 1903 and the one in 1909. Not-  
transactions: withstanding this, plaintiff testified fully,  
with a de- over objection, and his testimony, including  
ceased: in- the direct examination and cross-examination, covers about  
ferred facts. 100 pages of the abstract and additional abstract. Appel-  
lants in argument point out at considerable length inconsis-  
tencies in plaintiff's testimony, and say that the explana-  
tions thereof are not sufficient to overcome the inconsis-  
tencies. It occurs to us that plaintiff's evidence is either  
competent or not competent, and he is either competent or  
incompetent as a witness, and that we may not consider the  
alleged inconsistencies alone.

Appellee relies upon *McElhenney v. Hendricks*, 82 Iowa 657, *Campbell v. Collins*, 133 Iowa 152, and *Secor v. Sirer*, 161 N. W. 769, to sustain his proposition that, because of the

form in which the questions were propounded to plaintiff, he is competent. Under the circumstances here shown, we think plaintiff was incompetent to testify to personal transactions and communications, except in so far as his cross-examination may have exceeded proper direct examination. The cases cited were where a witness was asked as to whose possession a paper was in at a certain time, and the like, and the rule announced was that a party is competent to testify to facts and circumstances from which the truth as to alleged transactions between such party and the deceased may be inferred, even where his direct testimony to such transaction may be excluded. But in the instant case, plaintiff, though by the form of the question he was not to name any parties with whom he had a contract, did in fact testify to the alleged contract between himself and the two Adamses. The contract as testified to could not have been made with any other person than the two Adamses. One question and answer will illustrate:

“Q. Now, Mr. Minion, without naming any parties with whom that contract was made, state to the court what, if any, contract was made between you and any person or persons, regarding the employment and the title of the property, in connection with the ‘Humboldt Independent.’  
A. I was to manage and operate the ‘Independent’ and I was to receive my living, and to conduct the same as my own, and I was to do that until the death of the survivor of either Mr. or Mrs. Adams,—that is, A. M. Adams and M. L. Adams,—and that, upon the death of the last surviving member, the plant, including the building and real estate and business and everything connected with the publishing outfit, was to be mine, clear and free,”—and so on, at great length.

To hold that, under such circumstances, a person may give the details of a contract involving personal transactions and communications with deceased persons, would be



simply to nullify the statute. It should be said that plaintiff testified on other subjects than those involving personal transactions and communications with deceased, and, of course, as to such he was a competent witness. There is no dispute between counsel as to the rule in regard to the quality and quantity of proof required in such cases. The cases are, substantially, that the evidence must be clear, satisfactory, and convincing, such as to convince the mind of the chancellor. It does not mean that the evidence must be entirely free from inconsistencies or that the case must be established beyond all controversy. It is not to be denied that there are some inconsistencies in the statements and conduct of the plaintiff. He failed to make any claim, such as he now makes, for a period of nearly five months after the death of A. M. Adams; he took part in the appraisal of the property as the property of the Adams estate; he asked the administrator whether he desired him to stay after the decease of A. M. Adams; he made and filed an affidavit with the post-office department, as to the estate's ownership of the property, and he attempted to buy the property.

His explanation of these matters is that he had understood, and had been told, that a parol contract such as this could not be enforced, and that he did not know his rights until he consulted attorneys, about the time the suit was brought. That is precisely the claim that defendants are now making in this case, and insisting upon it. The evidence is, too, that plaintiff expected deceased to vest the title in him by will, and that he and others were looking for a will among the papers of deceased, A. M. Adams. Mrs. Adams did make a will, which was duly probated, by which she gave all the property to her husband. It should have been said that we think the case presents, and must be determined upon, fact questions very largely, although appellants contend that the law questions are controlling. As

to the affidavit filed with the post-office department, he says he could not make such affidavit in any other way, because the legal title was in the estate.

Going now to the other testimony, we shall attempt to state our conclusions in regard to it in a general way, without going into details, since, as we have often said, it is not practicable to go into the evidence in detail in fact cases. There were fourteen witnesses, outside of plaintiff and his two children. Four of these testify directly to statements by deceased to the effect that he had made a contract with plaintiff by which plaintiff was to have the plant when the Adamases were through with it. One of these witnesses testifies that deceased had said he had made all arrangements, and, again, that it was definitely understood between deceased and Minion, and that deceased told witness he had promised plaintiff that the plant should be his when the Adamases were dead. Another witness testifies to substantially the same thing, and still a third testifies to a statement made by Adams to the effect that Minion had once left him, and that Adams told him that he got Minion back with the understanding that the property should be his when he (Adams) was through with it, and that the property was really Minion's, really Minion's plant, and that eventually it should be his. Another testified to statements by deceased as to the low wages being paid Minion, and that the reason was that, at Adams' death, plaintiff was to have the property. Several other witnesses testify to a state of facts from which it ought to be inferred, in connection with all the other evidence in the case, that there was a contract. One testifies that arrangements had been made by which the plant was to go to plaintiff when the surviving Adams died, and that arrangements had been made to this effect years ago. Another says that deceased told him that arrangements had been made to leave it all to Minion. Another testifies that deceased told him that every-

thing was fixed and everything had been fixed by which the plant was to go to Minion. Though search was made for a will, none was found, and from the evidence we should conclude that deceased did not make a will. He did talk with one of the witnesses, at one time some two years before his death, about making a will, but when he was informed how the property would pass if he made no will, he said he guessed he did not want to make a will, and did not then make one. It is shown that deceased carefully preserved all deeds, documents and papers, many of which were produced in evidence, but there was no deed to plaintiff; so that it is clear that, if any arrangement was made, or if it was all fixed that plaintiff was to have the property on the death of Adams, it had not all been fixed by a deed or will; so that, under all the evidence, it seems to us there must have been a contract such as is testified to by the different witnesses. The trial court, after having seen and heard the witnesses, and after considering the competent evidence, stated, in his opinion and finding, that he had not the slightest doubt that there was a contract between Minion and Adams.

C. W. Adams, one of the administrators, the brother of deceased, A. M. Adams, testified that he was familiar with plaintiff's history since his marriage up until the time of his brother's death, and that plaintiff was an industrious and honest young man, and that he was continuously in the printing establishment from 1882 to the present time. He testifies that, when his brother was at home, he could not say that the brother was active in the newspaper business, but he did some writing; that it was his habit, ever since witness can remember, to get through the world as easily as he could; that during the last 20 years he had not seen deceased do any of the mechanical work around the plant, though he did that when it first started. The same witness, testifying for defendant, says that, though he saw deceased

often, he never heard him say anything with reference to the disposition of the property to Minion or anyone else; and a sister of deceased's testifies to substantially the same thing, and that plaintiff said, during the last sickness of her brother, that he was not anticipating anything from the estate; that deceased told her that he had to call plaintiff down several times in order to let him know who was boss. Another witness testifies that deceased told her, a year or two before he died, that he would sell the paper to the husband of the witness. But we think this testimony ought not to be taken too seriously, because it is shown that her husband was without any means whatever, and that deceased knew that fact. Another witness for defendant testifies to negotiations in regard to remodeling the upstairs of the building, that deceased might occupy them as living rooms, because there was some talk then that Mr. Adams would marry again. This was in 1914, and the witness says plaintiff was not consulted with reference to the changes. It is thought by appellants that this testimony tends to show the inconsistency of plaintiff's claim that he was in absolute charge of the business and building. Doubtless plaintiff's claim at this point was too broad, because, under the contract as shown, he was not to have the property until the death of both the Adamses. Another witness testifies to a conversation with deceased, which was not in the presence of plaintiff, at about the time it was thought Mr. Adams would marry again. The talk was that plaintiff seemed to have a grievance, and that, because Adams was going to get married, plaintiff figured it would spoil his interest in what Adams should leave, and that Mr. Adams replied that plaintiff had no reason to expect that, that he knew of. This evidence, if competent, is a circumstance, of course, as to Adams' state of mind; and yet, if plaintiff had a valid existing contract before that time, there might have been some question raised had Adams attempted to carry out his

idea which he then had that he would marry the woman and she would continue the business, or that he would sell the property.

Without going further into the evidence, it is our conclusion that there was a contract as alleged, and that plaintiff performed his part of the contract, and that it was in all respects complete, except the vesting of the legal title in the plaintiff. This was not to be done until the death of the survivor. As to the extent of the contract and what property was included, the evidence of the witnesses in testifying to the conversations with deceased was that he sometimes referred to the property as the "plant," sometimes as the "property," sometimes as the "whole thing," sometimes as "this ranch and everything," and so on. But under all the evidence, we think the contract is sufficiently proved as to the newspaper business, the plant, and the real estate used in connection therewith. In proving a contract of this kind, if it is ever to be established in any case, the evidence is made up, very often, in large part by statements of the parties to different persons, and made up of fragments put together as a whole. In making such statements, the party making them would not be likely to use the same language to every person, nor use the same degree of accuracy that he would in drawing a legal document.

Some question is made as to where the money came from that went into the business. Under the evidence, the contract and the understanding between plaintiff and deceased were that plaintiff was to have the newspaper plant and the real estate used in connection with it as it stood when Mr. Adams died. Appellants cite a number of cases, among them *Boeck v. Milke*, 141 Iowa 713, *McDonald v. Basom*, 102 Iowa 419, 424, *Bremer v. Haag*, 151 Iowa 449, *Bevington v. Bevington*, 133 Iowa 351, *Wilson v. Wilson*, 99 Iowa 688, *Holmes v. Connable*, 111 Iowa 298, *Briles v. Goodrich*, 116 Iowa 517, *Ross v. Ross*, 148 Iowa 729, 733,

*Western Securities Co. v. Atlee*, 168 Iowa 650, *Gould v. Gunn*, 161 Iowa 155, and *Collins v. Collins*, 138 Iowa 470, to sustain their propositions that there was no intention upon the part of deceased to contract the premises claimed by the plaintiff, and that no more was intended than an unexecuted purpose to make a will; that there was no change of possession during Adams' lifetime; that the contract was within the statute of frauds, and the services rendered by plaintiff were not exclusively referable to the contract; that plaintiff never had possession during the lifetime of deceased; that a contract may not be considered as established as a matter of law simply because witnesses testify there-to and there is no denial by living witnesses; that such a contract must be mutual and definite.

Appellee contends that the evidence establishes his claim with the certainty required in this class of cases, and cites *Chehak v. Battles*, 133 Iowa 107; *Stiles v. Breed*, 151 Iowa 86; *Horner v. Maxwell*, 171 Iowa 660; *Daniels v. Butler*, 169 Iowa 65; and other cases.

Without going into a discussion of these several cases, it is our conclusion that, under the record, plaintiff is entitled to the relief granted by the district court. The judgment and decree are therefore—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

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STATE OF IOWA, Appellee, v. THEODORE SALMER, Appellant.

**CRIMINAL LAW: New Trial—Matters Not in Evidence.** The act

1 of jurors in stating and reiterating to their fellow jurors, during their deliberations, as of their own personal knowledge, influential facts which are derogatory to the accused, which are wholly aside the record, and which bear strongly on a material and sharply contested issue, demands the granting of a new trial. So held where jurors had stated that they personally

knew that the accused had, for years, been under the influence of intoxicating liquors.

**HOMICIDE: Manslaughter—Evidence—Reckless Conduct—Intoxication.** On the trial of an indictment for manslaughter by means of reckless conduct, evidence is admissible that, at the time of the conduct in question, defendant was intoxicated.

**CRIMINAL LAW: New Trial—Application—Affidavits—Competency.** Affidavits are competent to show that jurors were improperly influenced by prejudicial evidence which was wholly aside the record.

*Appeal from Woodbury District Court.*—GEORGE JEPSON, Judge.

THURSDAY, OCTOBER 18, 1917.

DEFENDANT was indicted on the charge of manslaughter, tried and convicted, and appeals.—*Reversed.*

*Henderson, Fribourg & Hatfield*, for appellant.

*H. M. Havner*, Attorney General, *F. C. Davidson*, Assistant Attorney General, *O. T. Naglestad*, *J. W. Kindig* and *D. G. Mullan*, for appellee.

GAYNOR, C. J.—The defendant, having

1. **CRIMINAL LAW:** new trial:  
matters not  
in evidence. been indicted, tried and convicted on the charge of manslaughter, appeals to this court, and alleges:

(1) That the evidence upon which he was convicted was wholly insufficient to sustain the charge against him; that the verdict is against the clear weight of the evidence; that the evidence was not sufficient to establish the guilt of the defendant of the charge made against him beyond a reasonable doubt.

(2) That the jury, while deliberating upon their verdict, was guilty of gross misconduct.

It was charged in the indictment that, on or about the 31st day of October, 1915, the defendant, while riding in an automobile operated by himself, on the streets of Sioux City, unlawfully and feloniously ran into and over one Vernon Frost, so injuring and wounding him that death ensued as the proximate result thereof; that the defendant at the time was running his automobile in a grossly negligent and reckless manner, and at an excessive rate of speed.

Upon the trial, the State sought to show, not only that the defendant was operating the automobile in a grossly reckless and negligent manner, but that he was intoxicated at the time. There was evidence introduced on the part of the State to sustain this contention. Evidence was also introduced that the defendant neglected to give any warning of his approach, and that his front lights were not lighted. One witness, who was on the scene of the accident immediately after its occurrence, testified:

"Defendant was drinking that night. I won't say that I smelt intoxicating liquor, because I was not close enough to him. After the accident, the defendant drove the automobile to the hospital with the boy in it."

Another witness testified:

"Defendant was drinking, to my notion. I smelled intoxicating liquor on him. The car was going between 20 and 30 miles an hour. I was 10 or 15 feet east of the boy when the automobile struck him."

The policeman who arrested the defendant testified that defendant was intoxicated when he came to the station about 10 minutes of 9 that night. He seemed to be able to walk upright and all right. He came to the station in his own car. He was arrested between 7 and 7:30 P. M. The accident occurred about 6 o'clock P. M.

There was a sharp conflict in the evidence as to the speed at which the defendant was driving that night, and as



to whether the lights were lighted. Under the evidence, it was an open question for the jury as to whether the defendant was under the influence of liquor immediately before and at the time of the accident, and a finding either way would have some support in the evidence.

Upon the first error assigned, we express no opinion. The evidence is conflicting, and defendant is entitled to the verdict of an unbiased jury, one that can and will base its finding upon the evidence produced and submitted to them on the trial, and upon nothing else.

There was no motion for a directed verdict; nor was the attention of the court challenged to the sufficiency of the evidence to justify a verdict, before the cause was submitted. It was suggested for the first time in the motion for a new trial. Since a new trial is to be granted on another ground, we express no opinion as to the sufficiency of the evidence. We refer to the evidence above only for the purpose of indicating that there was a conflict in the evidence touching the condition of the defendant as to being intoxicated or not, at the time of the accident. This question is involved in the second assignment of error, upon which a new trial was asked.

It is a matter of common knowledge that the conduct of men is greatly influenced by the condition they are in at the time they are called upon to act; that men under the influence of liquor do not possess the same cool judgment and discretion that men possess when not under its influence. When one is charged with careless, reckless conduct, or with conduct indifferent to the rights of others, a showing that he was intoxicated at the time is a very persuasive factor in leading the mind to the conclusion that the charge is well founded. Much, of course, depends upon the stage at which the party has arrived at the time. Grossly intoxicated men have scarcely any judg-

2. HOMICIDE:  
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ment and discretion, and, as a rule, little regard for the rights of other people. The same evidence that would fail to convince the mind that a sober man, a man in his sober senses; did a specific act involving a reckless disregard of the rights of others, might readily be assumed to be true in the case of one who is grossly intoxicated, or operating under the influence of liquor. The condition of the defendant as to intoxication was a matter of great probative force upon the ultimate question to be solved by the jury.

It is claimed by the State that, without sufficient light, on a public street, in the nighttime, defendant was driving his car at 30 miles an hour, and this without sounding his horn or giving any warning of his approach; that the boy was in a position to be seen by him at the time, if he had been looking; that he was not looking; that he was taking no precautions for the safety of the public; that in fact he was grossly negligent and reckless in his conduct. To emphasize this, and make it more certain to the minds of the jury, the State sought to show that the defendant was, at the time, intoxicated. Every fact upon which the State predicates its right to a verdict was controverted by the defendant. Between the conflicting evidence, the jury was called upon to determine the ultimate fact. After the jury had retired to determine their verdict, the record discloses that the following took place in the jury room, and before any verdict was arrived at:

The foreman of the jury, Beck, stated, in substance, that he knew that defendant's father had a good deal of trouble with the defendant; that he was a wild boy; had been drunk and drinking intoxicating liquors since he was a youth, and for a long time before the Frost boy was killed by his automobile; that everyone knew these facts. One Agnes, a member of the panel, said to the other jurors that the defendant had not been sober since childhood, and suggested the danger to society in permitting defendant to

run up and down the streets with high-powered automobiles. This juror also stated that he knew the defendant's father very well, and repeated, in substance, the statements of the foreman, Beck. Juror Cleveland, another of the panel, said:

"It would be a humane act to send the defendant to a reformatory where he might have the whiskey and drugs taken out of his system; that this is the place he will be sent, a sort of reform school, where, if he is shut in for a sufficient length of time, he can get away from the society which now has its clutches upon him, and with the large amount of property and income which he has, he might become a valuable citizen to society."

Juror Beck further said that the defendant had been carousing around and drinking liquor and getting drunk ever since he was a boy.

It appears that the jury retired for deliberation at 5 o'clock on the afternoon of Thursday, December 14th. In about half an hour, a ballot was taken which stood 8 for acquittal and 4 for conviction. The jurors were taken to supper, and returned to their room at 8 o'clock. After the jury had returned from supper, the foreman gave what he said was a correct history of the defendant's father; that the elder Salmer left Sioux City and went to Vermilion, South Dakota, where he entered a drug and boot-legging business; that the father's main business had been to make some kind of dope, which he called whiskey, and had it put in molasses cans, in order to defeat government officials, and had shipped it up and down the river in steamboats, and, among other things, repeated the statements hereinbefore set out. Thereupon another ballot was taken, and stood 7 for acquittal and 5 for conviction. These jurors again repeated their statements, to the effect that the defendant had been a drunkard from childhood. Another ballot was taken, and the jury stood 6 and 6. This ballot was taken about 10 o'clock. After breakfast on the next morning, they

returned to the jury room about 9 o'clock, when it was suggested that another ballot should be taken, and Juror Cleveland, who it is claimed led the side for conviction, said it would be of no use, and enough ballots had been taken, and the only thing that could be done was to await their discharge. About 8 o'clock on that evening, another ballot was taken, in which the result was 10 for conviction and 2 for acquittal. Foreman Beck reiterated that he knew the defendant Salmer had been drinking, and had been intoxicated for years, and ever since he was a boy.

Juror Merton says in his affidavit that, while in his opinion and judgment the evidence was entirely insufficient to satisfy him that the defendant had been drinking on that day, and while the evidence indicated that the defendant was entirely sober at that time, the statements by Jurors Agnes and Beck that they knew he had been drinking, and intoxicated ever since he was a young boy—these statements being asserted and reasserted—finally induced him to believe that Beck was stating the truth. On this he changed his vote from acquittal to conviction. Beck, in his affidavit, says, among other things:

"I told the jury that I had known this defendant when he was a little boy. I told some of them what I had read about his escapades while he lived in Sioux City."

Juror Agnes also claimed that he knew the defendant, and he says:

"I am satisfied that the jurors thought that Beck and I, who knew Salmer and his father, ought to and did know more about the defendant than they did, and thought we were in a better position to tell about this boy and the kind of a fellow he was than they, and that those jurors deferred to our opinion, and were governed largely by what we said and told them."

The showing made by the defendant was not controverted, and it is upon this showing that the defendant asks

a new trial. It is true that verdicts will not be interfered with because of arguments made by the jury in support of their conviction, based upon the evidence, nor for deductions made by them from the evidence, although these deductions may not be warranted by the evidence. Those things inhere in the verdict. But a very different question presents itself when the jurors undertake to state, of their own knowledge, facts not shown by the record, facts prejudicial to the rights of the defendant, and which, if true, tend to sustain the contention of the State.

From this it is apparent that these jurors, though probably acting from no improper motive, believing what they said was true, stated to their fellows facts outside the record, which, if believed to be true, would have a very decided controlling force in impelling the mind to a conclusion that the State was right in its contention that the defendant was drunk at the time of the accident. These matters did not inhere in the verdict. It is the universal holding of courts that a showing that prejudicial evidence was introduced and considered by the jury, not in the record upon which the case was submitted to them, vitiates the verdict, and that this fact, as well as the fact that it had some influence on the result, may be shown by the affidavits of the jurymen. As said in *Douglass v. Agne*, 125 Iowa 67:

“It is firmly established that to consider any evidence other than that introduced on trial, which it is reasonably probable influenced the result, is such misconduct as to require a new trial.”

It does not matter from what source this evidence comes to the knowledge of the jury; if it is considered by them in arriving at their verdict, and it is reasonably probable that it influenced the result, a new trial must be granted. The defendant is entitled to have his cause decided

3. CRIMINAL  
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upon the record made in open court. In a criminal case, he has a right to be confronted with the witnesses against him, to test the truth of any evidence offered against him by the usual methods recognized for testing truth. See *Cresswell v. Wainwright*, 154 Iowa 167, at 186; *Jolly v. Doolittle*, 169 Iowa 658.

The defendant is entitled to the judgment of twelve jurors, based solely upon the record made on the trial. That some of these jurors were influenced in arriving at their verdict by the statements made, is too plain to admit of doubt. Defendant did not, therefore, have the judgment of the twelve men impanelled to determine his cause, upon the record as actually made on the trial. The verdict secured in this way is not the verdict of the jury, in the true sense of the word. *State v. Pelser*, 182 Iowa—.

For the error pointed out, the cause must be and is —*Reversed*.

WEAVER, PRESTON and STEVENS, JJ., concur.

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CHARLES TUTTLE, Appellant, v. PHILIP KING, Appellee.

**VENDOR AND PURCHASER: Rescission by Purchaser—Deprecia-**

- 1 **tion in Value.** Depreciation in the value of land after the execution of a contract of purchase affords no ground for rescission when the depreciation is due to conditions known to exist at the time of the execution of the contract. So held where the depreciation was due to a threatened change in the course of the Missouri River.

**EQUITY: Decree—Decree Nonconformable with Proof—Court-Made**

- 2 **Contract.** Decrees in equity must conform to the proofs. Equity may not make a new contract for the parties.

**PRINCIPLE APPLIED:** A purchaser agreed to pay \$15,000 for certain lands. Of this amount, \$12,500 was to be in the form of a ten-year mortgage. A \$6,700 mortgage, on which a balance of \$4,000 was due, existed on the land. The vendor was obli-

gated to remove this lien. The vendor conceived the idea of *himself* borrowing the \$4,000, and *himself* executing a mortgage on the land therefor, and then inducing the purchaser to assume said \$4,000 mortgage and to execute an \$8,500 mortgage, instead of one for \$12,500. *The purchaser agreed to this scheme*, and executed said \$8,500 mortgage and took a deed from the vendor, agreeing to *assume* a \$4,000 mortgage. Through some misunderstanding, these instruments were prematurely delivered. Later, the vendor secured a release of the \$6,700 mortgage without making the \$4,000 loan. In an action by the vendor for specific performance, the court decreed that the *purchaser* should execute to the vendor the \$4,000 note and mortgage which the *vendor* had omitted to execute.

*Held*, unauthorized.

*Appeal from Monona District Court.*—W. G. SEARS, Judge.

THURSDAY, OCTOBER 18, 1917.

THE contract upon which this suit is based is dated November 17, 1914, and by its terms defendant agreed, in consideration of the payment of \$500 cash, \$2,000 March 1, 1915, and the execution of a note to plaintiff for \$12,500, with interest at six per cent, due in ten years, with optional payments, securing the payment thereof by mortgage upon the northeast quarter of the southeast quarter, and the southeast quarter of the northeast quarter, and the east half of the west half of the northeast quarter, all in Section 29-83-45, Monona County, Iowa, to convey to plaintiff the above described premises by warranty deed, and to furnish him an abstract showing lawful title of record, free from incumbrance, except the said mortgage of \$12,500, and, in the event defendant was unable to furnish abstract showing title as stated, he was to have a reasonable time after March 1, 1915, in which to perfect the same. At the time of the execution of the contract, there was of record a mortgage upon the premises for \$6,700, upon which there was a balance due of approximately \$4,000. Defendant was unable to procure a release of this mortgage prior to March 1, 1915,

whereupon he requested plaintiff to execute to him a note for \$8,500, securing the payment thereof by mortgage upon the above premises, and to permit defendant to procure a \$4,000 loan, secured by second mortgage, upon the premises, due in ten years, and that plaintiff assume the payment thereof as part of the purchase price under the contract. Deed was accordingly executed by defendant, conveying the premises to plaintiff, subject to a mortgage of \$4,000, which plaintiff assumed and agreed to pay. The executed papers were left with the agent of defendant, which agent, some months thereafter, under the belief that the \$6,700 mortgage had been released, filed the deed and \$8,500 mortgage for record. On June 3, 1915, defendant executed a mortgage for \$4,000, and on the same date, filed same for record in the office of the recorder of Monona County. This mortgage was, however, released December 14, 1915, but the \$6,700 mortgage had not at that time been released, but proceedings to foreclose the same had been, or were, begun shortly thereafter. These proceedings were abandoned and the mortgage released about the middle of February, 1916. On October 22, 1915, plaintiff filed a petition asking specific performance of the terms of the contract. No appearance was made in this suit on behalf of defendant until March 10, 1916, but the cause had been continued from time to time by agreement of the parties, for the purpose of enabling defendant to carry out his part of the contract. On March 7, 1916, plaintiff filed an amendment to his petition, averring that he purchased the land for purposes of speculation; that he had been unable to sell the same on account of the condition of the title; that the land, which lies adjacent to the Missouri River, was being threatened thereby and was greatly depreciating in value; demanding repayment of the \$2,500 paid to defendant and judgment for damages on account of the depreciation in the value of the land. On the 10th of the same month, de-



defendant filed answer and cross-petition, averring his ability and readiness to perform the contract and praying specific performance thereof, and at the same time defendant filed a motion for continuance, which, over the objections of plaintiff, was sustained. On May 11th following, plaintiff filed a further amendment to his petition, alleging that certain temporary buildings located on the premises at the time of the purchase belonged to and were removed by the tenant who then occupied the same, and praying judgment for the value thereof in the sum of \$250. The lease which defendant had with the tenant upon the premises at the time the contract was executed was duly assigned to plaintiff, to whom the rent for 1915 was paid. On March 1, 1916, plaintiff moved upon the farm in question, and at the time of the trial,—the exact date of which does not appear in the record, but the court announced its decision June 3, 1916,—he had planted a crop of corn and prepared the rest of the cultivatable land for crops. It also appears that he had sowed some wheat upon the farm in the fall of 1915. On August 15, 1916, a decree was filed in the lower court awarding plaintiff damages in the sum of \$250 for the buildings removed by the tenant, and denying the prayer of his petition for rescission and cancellation of the contract. The decree further found that defendant had complied with all the terms and conditions of the contract on his part, and that plaintiff was indebted to defendant in the sum of \$4,000 on the purchase price of the premises, and decreed that the \$250 be allowed as damages and be deducted therefrom, and that plaintiff, within ten days, execute to defendant a note for \$3,750 and mortgage signed by himself and wife to secure the payment thereof, and that, upon his failure to do so, the clerk, who was appointed a commissioner for that purpose, was to execute a note and mortgage in the name of plaintiff and his wife, due in ten years from March 1, 1915, with interest at six per cent, and

deliver the same to defendant. Plaintiff refused to comply with this provision of the decree, whereupon the note and mortgage were executed by the clerk. Plaintiff appeals.—*Reversed and remanded.*

*Prichard & Prichard*, for appellant.

*B. Radcliffe and C. E. Cooper*, for appellee.

STEVENS, J.—I. We will first consider the question of plaintiff's right to rescind the contract on March 7, 1916, the date on which he filed an amendment to his petition praying such relief. It will be observed from the foregoing statement that, at the time of filing said amendment, defendant had perfected the title to said premises by causing all mortgage liens, except the mortgage for \$8,500 executed by plaintiff to defendant, to be released of record, so that no question relating to title was at that time involved, and plaintiff was not in a position to demand rescission on account of previous defects existing therein. Until the filing of the amendment praying rescission, the suit commenced by him for specific performance of the contract was pending.

It is a general rule that depreciation in the value of real property will not afford a ground of rescission or deprive the party seeking the same of the right to a decree compelling specific performance, where the alleged depreciation is due to conditions existing at the time of the execution of the contract, and that were then known to the parties. The possibility of a change in the action of the Missouri River was well known to plaintiff at the time he entered into the contract, and depreciation of the land on account thereof does not entitle plaintiff to a rescission of the contract. *Falls v. Carpenter*, 21 N. C. 237; *King v. Raab*, 123 Iowa 632.

1. VENDOR AND  
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It is a general rule that depreciation in the value of land after the execution of a contract will not alone defeat an action for specific performance thereof. *Nims v. Vaughn*, 40 Mich. 356; *Keim v. Lindley*, (N. J.) 30 Atl. 1063; *Peterson v. Chase*, 115 Wis. 239.

II. Plaintiff by amendment to his petition, also asks damages for the value of the temporary buildings removed by the tenant, and because of his inability to sell the premises on account of defendant's failure to perfect the title thereto, and for the difference in the market value March 1, 1915, and at the time of filing the amendment. What is said above disposes of plaintiff's claim for damages on account of the depreciation in the land, and the court awarded him damages in full for the buildings removed by the tenant.

III. The only remaining question for our consideration arises on defendant's cross-petition, praying specific performance of the contract. Plaintiff is not shown to have at any time been in default in carrying out his part of the written contract. All of the difficulty and delay in consummating the contract prior to the filing of plaintiff's amendment to his petition asking rescission of the contract was due to the default and inability of defendant to perfect the title to the land. He was unable to procure a release of the \$6,700 mortgage prior to the time fixed by the contract for the closing of the sale; and, for the purpose of enabling him to complete the sale, plaintiff orally consented to execute a mortgage for \$8,500 and assume and agree to pay a \$4,000 mortgage upon the land, to be executed by defendant, both notes to mature March 1, 1925. Defendant executed a mortgage for \$4,000, which was placed of record, but it was claimed by him upon the trial that no note was ever given, and he was unable to procure a ten-year loan on that amount, and the note de-

2. EQUITY: decree: decree nonconformable with proof: court-made contract.

scribed in the mortgage was to become due in five years instead of ten. This was, of course, contrary to the terms of the contract, and plaintiff was not bound to accept that arrangement, and refused to do so.

In February preceding the trial, defendant finally perfected the title to the land and caused all liens and encumbrances, except the \$8,500 mortgage executed to him by plaintiff, to be released of record. Defendant's prayer for specific performance is not of the written contract as originally executed, nor as modified by concessions upon the part of the plaintiff, or oral agreement between the parties. Plaintiff at no time agreed to execute a \$4,000 mortgage. The deed executed by defendant and delivered to him contained a provision for the assumption by plaintiff of a \$4,000 mortgage to be executed by the defendant, which plaintiff agreed to pay. Plaintiff cannot be required to execute a note and mortgage upon the land to secure the payment thereof for \$4,000, for the reason that he has neither in writing nor orally bound himself to do so. The written contract did not make time the essence thereof, but provided that defendant should furnish an abstract showing title as therein designated, within a reasonable time after March 1, 1915. The record shows that both parties were doubtless eager to consummate the sale, but, on account of defendant's inability to comply with his agreements, but little progress was made toward a final settlement. Concessions were made to defendant by plaintiff; his action for specific performance was continued from time to time without appearance of record by defendant; plaintiff received an assignment of the lease for the cropping season of 1915, received the rent for that year, planted a portion of the land to wheat in the fall of 1915, moved thereon about March 1, 1916, and at the time of the trial, was in possession of the farm and had planted about ninety acres to corn, and had the rest of the tillable land prepared for

cropping. The title at this time was perfect in the plaintiff, and nothing remained to conclude the sale except the payment of the balance of \$4,000 due on the purchase price.

While defendant is not entitled to a decree requiring plaintiff to execute a note for \$4,000 and secure the payment thereof by mortgage upon the premises in question, nevertheless, considering the concessions granted defendant, plaintiff's acquiescence in the delay, and all other facts and circumstances surrounding the transaction, and the position in which the parties have voluntarily placed themselves, we are reluctant to reverse this case without remanding the same for further proceedings in the court below, in harmony with the views herein expressed.

The note executed by the clerk of the district court as a commissioner appointed by the court should be canceled and the mortgage released, and plaintiff given an opportunity to execute a note and mortgage for \$4,000, due March 1, 1925, or, at his option, to have a cancellation of the \$8,500 mortgage, and permission to execute a new note and mortgage for \$12,500 due March 1, 1925, the amount found due plaintiff as damages to be paid by defendant, upon execution of note and mortgage. It will be observed that plaintiff's wife did not sign the contract, nor is she made a party to this suit. Should plaintiff fail or refuse to execute note and mortgage in accordance with an election to be made by him, as above suggested, within a reasonable time to be fixed by the court, plaintiff's petition and defendant's cross-petition shall be dismissed by the court, and defendant left to pursue any other remedy he may have to enforce payment of the balance due on the purchase price of said land, the court to make such decree or apportionment of the costs as shall appear to be just and equitable.—*Reversed and remanded.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

SOPHIA B. VAIL, Appellant, v. CITY OF CHARITON, Appellee.

**MUNICIPAL CORPORATIONS: Public Improvements, Etc.—Assess-  
1 ments—Plans and Specifications—Substantial Compliance.** Evi-  
dence reviewed, on the issue of substantial compliance with the  
plans and specifications of a paving contract, and held to au-  
thorize an assessment.

**MUNICIPAL CORPORATIONS: Public Improvements—Assessments  
2 —Presumption.** Principle recognized that an assessment of  
benefits is presumptively correct.

*Appeal from Lucas District Court.*—FRANCIS M. HUNTER,  
Judge.

THURSDAY, OCTOBER 18, 1917.

APPEAL from special assessment imposed on five lots, or  
parts of lots, belonging to the plaintiff. The trial court  
sustained the proposed assessments against the properties,  
and the plaintiff appeals.—*Affirmed.*

*Stuart & Stuart and James A. Howe*, for appellant.

*J. W. Kridelbaugh*, for appellee.

PRESTON, J.—1. The trial in the district court was  
upon objections filed before the city council, except that,  
after the appeal had been taken, plaintiff filed an amend-

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| <p>1. <b>MUNICIPAL<br/>CORPORATIONS:</b><br/>public im-<br/>provements,<br/>etc.: assess-<br/>ments: plans<br/>and specifica-<br/>tions: sub-<br/>stantial com-<br/>pliance.</p> | <p>ment to such objections, setting up fraud.<br/>A motion to strike this amendment was sus-<br/>tained, and thereafter plaintiff filed another<br/>amendment raising the same matter, but<br/>stating her claim more specifically.</p> |
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The fraud alleged is that there was a  
departure between the work and the contract and speci-  
fications, and that the discrepancies were so great as that  
there was fraud. It was sought thereby to bring the case,

or this feature of it, within the rule announced in *Atkinson v. City of Webster City*, 177 Iowa 659. In the *Atkinson* case we held that, under the evidence, there was such a departure and such discrepancies that in fact there was no good-faith attempt to comply with the contract, and that this was not known to the property owner at the time the objections were filed, and could not have been discovered until the pavement was cut up and the evidence introduced at the trial.

But in the instant case the trial court found that the evidence failed to show that there was a substantial variation in any of the requirements of the contract and specifications, but that, on the other hand, it was shown that a very substantial compliance therewith had been had; that the city's officials and employes were very jealous of the plaintiff's interest, and a good and substantial improvement was afforded her property and the city's thoroughfare; that the charge of collusion and fraud was not established, nor was it established that the engineer and inspectors, or either of them, were so incompetent or so negligent that the improvement is an inferior one in any way, or that the contractors benefited thereby, and that the plaintiff suffered correspondingly. After reading the record, we agree with the finding of the trial court. This disposes of plaintiff's main contentions.

The appellant relies on the *Atkinson* case, *supra*, and like cases, while appellee relies largely on the case of *In re Appeal of Apple*, 161 Iowa 314, 320, and similar cases. We think that the case is more like the *Apple* case, and that such case is controlling here. No further attention need be paid to the claim of fraud.

The objections filed before the council are, stated as briefly as may be, substantially that the cement concrete foundation was not five inches in thickness, as required by

the contract; that the stone was of inferior quality, containing dust and dirt, and not of the required hardness; that the sand used contained dust and dirt and was not as required; that the gravel was unwashed, or did not have the dirt removed as required; that some of the brick were checked and cracked, and that they were not thrown out, and that they did not comply with the test; that the engineer placed in charge of the work by the defendant was incompetent and negligent. Plaintiff says in argument that, from the record, the contractor was violating the terms of his contract, defrauding the plaintiff and other taxpayers, and thereby perpetrated a constructive or legal fraud, even though actual fraud was not intended or established by the record. We have already disposed of the question of fraud. As to the engineer, appellee concedes that the first engineer, who had charge of the first two blocks of pavement laid, which two blocks did not include any of the paving in front of plaintiff's property, was not satisfactory, and he was removed. A competent engineer was put in his place, who accepted and approved the work.

It may be well to refer to the evidence in a general way, but in these fact cases it is not our practice to set it out in detail. As to the stone, the trial court found that it was suitable for foundation purposes. Appellant introduced evidence that the stone was dark in color, or appeared yellow, and stated how it could be crushed. The specification does not say that the limestone required must be so hard that it cannot be crushed by the means testified to, and appellant introduced no evidence to prove that hard limestone could not be so crushed, or that it might not be of a dark color, or yellow. A witness for appellant testifies that he thinks the quality of the rock was pretty fair; that it was limestone. Another witness for appellant says that, upon the instruction of the city engineer, he sent some of the



stone to Ames to find if it was suitable for the purpose intended. The report on this was that it was magnesia limestone, and suitable for the purpose if free from dirt. It was passed by the engineer representing the city. A witness for appellee, who was the engineer in charge of sewer construction, and who had had experience in paving, described one pile of stone, and stated that it would meet the requirements of the specifications. Another witness says that this pile of stone was the same as used in all the pavement. Another witness says that he dug into the concrete near plaintiff's property, and that it was unusually hard. One of appellant's witnesses says that they drilled through the cement, and it was very hard, and that he noticed the texture of the cement foundation, and it was solid; that he did not see where a mixture of cement could be better, or a mixture of crushed stone and sand; that he used a chisel and sledge hammer to take it up with; that he tried, but could not cut it with an ordinary pick; that this condition applied to the block in which plaintiff's property is situated. Another witness of experience says he found the concrete hard, and that it required a chisel to cut it. At the time of the trial, the pavement had been laid a year and a half, and there was no evidence to show that, at the time of the trial, there was any defect in the pavement, so that we think there was clearly a substantial compliance with the contract as to stone.

Another claim of appellant's is that there was so much dirt in the stone that it would not make good concrete. One witness says that there was more or less dirt in that special pile, and he thought it was dirt that got there in handling, probably out of the bottom of the car. Other witnesses say that it was not dirt, but seemed like particles of rock, and that it came from the abrasion in the handling of it—dust from the rock as they proceeded to handle it; did not notice the dust when they were not handling it. Another says it

had some dust from the crushing of the rock, but does not think there was any street dirt or soil. The witness who stated, as above, that there was dirt, was employed by the property owners where this stone was used, to see that they got a good job. He never made any complaint to the city officials regarding the quality or the dust or the dirt. Other witnesses testify that cement will not mix with dirt, but they agree that there is always dust present in a large pile of stone, and that, unless there is a large quantity, it is not screened. It seems to us that, if there had been dirt, the pavement would not have been as hard as the evidence before set out shows it was.

As to the brick, it is true that many were rejected and thrown out, but the weight of the evidence is, taking it all together, that the brick used complied with the test, and that all defective brick was rejected. Some of the brick was rejected before it was unloaded. The manufacturer of the brick was brought. The city sent to Ames and secured a man from the testing laboratory there, who stayed two or three days, and pronounced the brick sufficient under the specifications. On the first two blocks of paving, and before the beginning of the work on the pavement in issue, the city became dissatisfied with the inspectors, and the city thereafter selected its own inspectors.

Another objection is as to the quality of the sand used, and the thickness of the sand cushion between the concrete and the brick. The specifications required that it should be river sand, free from loam and dirt, and that it should be spread so as to insure a uniform thickness of  $1\frac{1}{2}$  inches. Another provision is that no sand shall contain, under any condition, more than 10 per cent. of loam or organic matter. Appellant claims that the sand was dirty. Two witnesses so testified, but one of them said that the dirty sand was on another street. None of the witnesses

attempt to fix the percentage of loam or organic matter in the sand, and, even though there may have been some loam found in it, it is not shown that it was more than 10 per cent., which was allowed by the contract. It was passed by the city officials, the engineers and inspectors. As to the thickness of the cushion, but one witness testified that less than  $1\frac{1}{2}$  inches was used, but this witness was not present when the brick were laid, and does not testify that the brick were laid on the cushion which he claims he measured. Unless there is such proof, we ought not to say that the city officials and the inspectors and engineers did not perform their duty.

Finally, it is contended that the concrete base is less than 5 inches in thickness, as required by the contract. We quote from the opinion of the trial court on this point, and we are of opinion that his finding as to the fact is sustained by the evidence. The court said:

"The testimony upon this claim is very meagre. Quite a number of test holes, small holes, were bored through the concrete base, in a distance of three blocks, two of which were in front of plaintiff's property. These two holes measured  $3\frac{1}{2}$  to  $4\frac{1}{2}$  inches in thickness, but other holes showed 4 to 6 inches, and thereby averaged 5 inches or more. A small hole bored through a pavement from top to earth, and an attempt to measure the bottom few inches, with the bottom uneven, as it is bound to be, is an unsatisfactory measurement. No doubt the foundation was not of uniform depth of 5 inches, or the sand cushion of  $1\frac{1}{2}$  inches. In the performance of work of this character, it is safe to say that compliance with every term and condition of the specifications, with mathematical exactness, is never attained, and where the variation is of a trivial and negligible character, and more especially where, as in this case, the city's engineers and inspectors, overseeing the work, acting in good faith and without collusion or fraud, passes the

work without objection, and the engineer finally accepts it, no ground is afforded for disapproving the assessment."

Without going into further detail as to the testimony, it is our conclusion, after reading the record, that there was, as found by the trial court, a substantial compliance with the contract, and that there is a good pavement. The holding in the *Atkinson* case did not change the rule of the prior cases as to substantial compliance with paving contracts, though the writer of that opinion expressed his own view that there should, perhaps, be a more strict compliance with the contract than that required in some of the cases. As we have stated, the finding in that case was that the contract was substantially ignored. It was also recognized in that case that in some instances property owners object to an assessment against their property, even where there has been full or substantial compliance with the contract, and that trivial objections are made in an attempt to defeat the assessment.

2. MUNICIPAL CORPORATIONS: public improvements: assessments: presumption.
2. It is contended by appellant that her property received no benefit, and it is argued that, this being so, no special assessment should be made, and that, in any event, the assessment should not exceed the actual benefit to the property. But counsel have not pointed out any evidence tending to show the amount of benefits to plaintiff's property less than the amount assessed; that is, we find no evidence as to the extent of the actual benefit. Under the authorities, it has been held that some benefit is presumed. Appellant has the burden to show that the benefit is not equal to the finding of the council, and, in the absence of evidence as to the extent of the actual benefit conferred, that determined by the council should be allowed to stand. *Camp v. City of Davenport*, 151 Iowa 33; *Owens v. City of Marion*, 127 Iowa 469; *Andre v. City of Burlington*, 141 Iowa 65.

3. Appellant contends that the engineer who prepared the plat and schedule was, as a witness, unable to give the facts, and was unable to explain what he did or how it was done. He was asked as a witness to give the different items of cost, and he stated that he could not do it without starting at the beginning and going over the whole matter, and the only reason he did not do so was because of the length of time it would take to figure it out. He does testify fully, however, how he made up the plat and schedule, and, after reading his testimony, we think the point made by appellant is not well taken.

It is our conclusion that, under the whole record, the decree of the trial court was right, and it is therefore—*Affirmed.*

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

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A. D. WILSON, Appellee, v. CITY OF OTTUMWA, Appellant.

**MUNICIPAL CORPORATIONS: Torts—Nuisance—Unauthorized**

- 1 **Nuisance by Private Parties.** A city which has in no manner assumed jurisdiction or control over a natural watercourse within its corporate limits, is not liable in damages resulting from the acts of private parties in converting said watercourse into a nuisance by depositing offensive matter in said watercourse without the knowledge or consent of the city authorities.

**MUNICIPAL CORPORATIONS: Police Power—Manner of Exer-**

- 2 **cise—Abatement of Nuisance.** Principle recognized that the statutory power of municipalities (Sec. 696, Code Supp., 1913) to abate nuisances must be exercised solely by means of duly enacted ordinances.

*Appeal from Wapello District Court.*—SENECA CORNELL,  
Judge.

THURSDAY, OCTOBER 18, 1917.

AN action for damages against the defendant city on account of the alleged maintenance of a nuisance. Judgment for plaintiff for \$1,264.50. Defendant appeals.—*Reversed.*

*Merrill C. Gilmore*, for appellant.

*Steck & Steck*, for appellee.

1. MUNICIPAL CORPORATIONS: torts: nuisance: unauthorized nuisance by private parties.

STEVENS, J.—What is now known as Fairview Addition to the City of Ottumwa was platted in 1890 and annexed to said city in 1903. Prior to 1890, a creek or natural watercourse extended from the premises of plaintiff to a point northeast, for a distance of between a quarter and a half mile. About the year 1890, private owners of the property covered it, for a distance of about a block and a third, by a brick arch. As originally constructed, the brick arch was above Second Street, but in the same year was extended across Second Street by the board of supervisors. Prior thereto, there was a bridge across the waterway on this street.

There has been, and is now, a spring close to Fourth Street, somewhat more than a block above where the waterway enters the premises of plaintiff. The waterway in question is variously referred to in evidence and by counsel in argument as a "sewer," a "storm sewer," and a "waterway." It appears from the evidence that it extends for something over a block on Grand Avenue, and then is located on private property, except where it crosses streets and alleys of said city. It has always served as an outlet for water flowing from the spring, and surface waters accumulating and flowing therein along its course. The purpose of constructing the brick arch appears to have been to confine and control surface waters coming down from above in the

waterway, and to carry the same on to the southwest. But slight changes have been made in the streets crossing said waterway or adjacent thereto, but a catch basin has been constructed in Second Street over said waterway, for the purpose of providing an outlet for surface waters flowing down this and perhaps other streets. It is not claimed that the defendant city has in any way changed the watercourse or interfered therewith, except to construct a catch basin, as above stated, nor has the same in any way been made a part of the sewer system of defendant, nor have the surface waters discharged therein from the streets of defendant been in any way increased or altered since the annexation of Fairview Addition.

In two amendments to plaintiff's petition, it was claimed that some of the filth complained of was carried from the street in drains and waterways constructed by defendant through the catch basin into the waterway and upon the premises of plaintiff, but all allegations relating to said matters were withdrawn by plaintiff, and no claim is now made that the city, by ditches, drains or waterways constructed or improved by it, has contributed to the condition complained of. The claim of plaintiff is that, since the annexation of Fairview Addition to defendant city, modern residences have been erected on either side of Grand Avenue; and that, with the knowledge, consent and permission of the officers of defendant, numerous residents have constructed private drains from their sinks and water-closets in said residences and connected the same with said waterway, and there is discharged therefrom filth and fecal matter, which is carried to and deposited upon the premises of plaintiff, and becomes stagnant and emits foul and unhealthful vapors and odors, and that same has so polluted the spring water, formerly valuable for watering stock and other purposes, as to render the same unfit therefor.

There is little conflict in the evidence as to the effect

upon the spring water of the fecal matter, or the condition claimed by plaintiff to exist upon the premises in question, but the defendant city denies that it at any time gave consent to anyone, or in any way knowingly permitted any person, to connect private drainage with said waterway; and that, if such use has been made thereof by the residents of said city, as claimed by plaintiff, it has been without the consent or permission of the defendant. As before stated, the defendant has at no time attempted to, in any way, connect private drainage therewith or make same a part of the sanitary sewerage system of said city. Plaintiff, some time before the commencement of this suit, gave notice to the officers of defendant of the conditions complained of, whereupon an investigation was made by said officers, which resulted in causing connections from two or three residences with said waterway to be destroyed; and at one time the defendant, at plaintiff's request, flushed the arched waterway. The size and manner of construction of the alleged arched sewer or waterway are not shown, except that same is constructed of brick in the form of an arch. Except as covered in the manner described, the waterway for the rest of its course is open, and filth from barns and other buildings, and from other sources along its course, may be carried into the same by surface water without obstruction, and on through the arched portion thereof.

If the term "storm sewer" is applicable to that portion covered by the brick arch, it is solely on account of said arch. It does not appear that the waterway was in any way changed or altered by the construction thereof. It is not a sewer, as that term is ordinarily understood, and as it is used in the decisions cited. *City of Durham v. Eno Cotton Mills*, (N. C.) 57 S. E. 465; *Mound City Land & Stock Co. v. Miller*, (Mo.) 70 S. W. 721; *State Board of Health v. Mayor of Jersey City*, (N. J.) 35 Atl. 835. It is



rather, as appears from the foregoing statement, a natural drain or watercourse, by which the surface waters accumulating in the vicinity thereof are carried away to the southwest and onto the premises of plaintiff.

No evidence was offered to show that defendant granted permission or consented that residents on Grand Avenue or elsewhere might connect private drainage with said waterway, or make same an outlet for waste matter from the residences adjacent thereto, or that the city had knowledge that same was so used, except such as came from the appearance of fecal and other foul matter along the course of said waterway and in the vicinity of plaintiff's residence. The evidence does not show who, if anyone, maintained sewer connection with the waterway. Authorities are cited by appellee to the effect that it is the duty of a municipality to maintain and keep its sewers in repair and in proper working order, to prevent the same from becoming a source of discomfort and injury to others. None of the cited authorities, however, go so far as to hold that a duty is imposed upon the city to prevent private parties from creating a nuisance upon private property, or polluting water flowing in a natural watercourse over which the city has assumed no other control than follows from the location thereof within the corporate limits of said city, and which has not in some way been made a part of the sanitary sewerage system of such city, or used in connection therewith or as a part thereof, or into which the city has provided no outlet for street drainage not in the ordinary course of nature tributary thereto. The following concession appears in the abstract:

"It was conceded by defendant that the brick archway, which is referred to as the brick sewer in this case, was constructed by Mr. Stevens and his associates, owners of the land now included in Fairview Addition to Ottumwa, in

1890, in order to take care of the water in the natural water-course, running through what is now Grand Avenue, and that the spring water referred to in the plaintiff's evidence flowed through the brick sewer."

The condition of the waterway appears to have been the same at the times complained of as when Fairview Addition was annexed to defendant city. The court submitted the case to the jury upon the theory that the defendant had negligently permitted residents along the waterway to connect private sewers therewith and to discharge offensive matter therein as above stated, and also permitted filthy water, soapsuds and other objectionable matter to be discharged into said waterway from the streets, through the catch basin on Second Street; but the allegations of plaintiff's petition as to the latter were withdrawn by plaintiff.

In the absence of evidence from which it may be inferred that the defendant has in some way adopted the waterway in question as a part of its sewer system, or as an outlet therefor, or by some affirmative act or permission given consent to residents residing in the vicinity thereof to construct and connect private drainage therewith, or has in some way contributed to the alleged nuisance complained of, it has violated no duty owed by it to plaintiff, and therefore is not liable for damages resulting from the alleged wrongful acts of residents upon the street or along the course of said waterway. *Hines v. City of Nevada*, 150 Iowa 620; *Dillon on Municipal Corporations*, Section 1736; *Knostman & Peterson Furniture Company v. City of Davenport*, 99 Iowa 589.

The defendant city owed no duty to plaintiff to prevent the water from the spring in question from becoming polluted and unfit for use, or to abate a nuisance to which it in no wise contributed, or for which it was not in some way responsible. The defendant, so far as the record before us

shows, has in no way, by any act of its officers or employees, contributed to or caused the conditions complained of, and cannot be compelled to respond in damages on account thereof. *Finley v. City of Kendallville*, (Ind.) 90 N. E. 1036; *Collins v. City of Waltham*, (Mass.) 24 N. E. 327.

It is contended by appellee that Section 696, Supplement to the Code, 1913, authorizes municipal corporations to abate nuisances when necessary to prevent injury or annoyance from anything dangerous or offensive; but this power can be exercised only in accordance with ordinances regularly and legally adopted. *City of Sioux City v. Simmons Hardware Co.*, 151 Iowa 334; *City of Georgetown v. Commonwealth*, (Ky.) 73 S. W. 1011; *Mayor, etc., of City of Chattanooga v. Reid*, (Tenn.) 53 S. W. 937; *Butz v. Cavanagh*, (Mo.) 38 S. W. 1104; *Calwell v. City of Boone*, 51 Iowa 687; *McFadden v. Town of Jewell*, 119 Iowa 321; *Ogg v. City of Lansing*, 35 Iowa 495; *City of Ottumwa v. Chinn*, 75 Iowa 405; *Board of Councilmen of City of Frankfort v. Commonwealth*, (Ky.) 75 S. W. 217; *Miller & Meyers v. City of Newport News*, (Va.) 44 S. E. 712; *Joplin Consolidated Min. Co. v. City of Joplin*, (Mo.) 27 S. W. 406; *Robinson v. City of Danville*, (Va.) 43 S. E. 337; *Town of Monticello v. Fox*, (Ind.) 28 N. E. 1025; *Knostman & Peterson Furn. Co. v. City of Davenport*, 99 Iowa 589; *Hull v. Town of Roxboro*, (N. C.) 55 S. E. 351 (12 L. R. A. [N. S.] 638); *Crystal Spring Brook Trout Hatchery Co. v. Village of Lomira*, (Wis.) 162 N. W. 658. It does not appear that ordinances have been adopted by defendant for the purpose of carrying out the provisions of this statute.

At the close of plaintiff's testimony, the defendant moved the court to direct a verdict in its favor. The motion should have been sustained. The evidence wholly failed

2. MUNICIPAL  
CORPORATIONS:  
police power:  
manner of ex-  
ercise: abate-  
ment of  
nuisance.

to establish either negligence or action upon the part of defendant causing, or contributing in any way to, the nuisance in question.

For the reasons pointed out, the judgment of the lower court is—*Reversed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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L. B. CARSON, Appellee, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

**PRINCIPAL AND AGENT: Powers of Agent—Railroads—Employ-**  
1 **ment of Physicians—Ratification.** Authority in a railway employee to take injured employees to physicians who were not regularly employed by the company may be inferred from evidence that the company repeatedly paid such physicians for their services.

**PRINCIPAL AND AGENT: Powers of Agent—Railroads—Employ-**  
2 **ment of Physicians.** Authority in subordinate agents, etc., of a railway company to engage the services of physicians to care for employees of the company who are injured *while in the line of their duty* to the company, does not embrace authority to employ a physician to care for employees who are injured while "off duty," and consequently *not in the line of any duty* to the company.

PRESTON, J., dissents on the question of fact raised by the record.

**PRINCIPAL AND AGENT: Powers of Agent—Emergencies.** Principle recognized that the implied authority of a servant, in cases of great emergency, to employ assistance at the expense of the master, arises only *when some interest of the master is to be conserved*.

**PRINCIPAL AND AGENT: Powers of Agent—Authority—"Hold-**  
4 **ing Out"—Ratification.** He who bases his claim to recovery on an employment by an agent of the defendant, must show actual authority in the agent to employ, or, failing in this, (1) that the agent was held out by defendant as having such authority, or (2) that the defendant ratified the act of the agent.

*Appeal from Jackson District Court.*—WM. THEOPHILUS,  
Judge.

SATURDAY, OCTOBER 18, 1917.

ACTION to recover for services rendered by plaintiff as a surgeon, in treating an employee of defendant's named Watson, and for services of Dr. Armstrong in assisting, and for hospital charges, the latter claims having been assigned to plaintiff. Trial was had to a jury, and on verdict for plaintiff, judgment was entered. The defendant appeals.—*Reversed.*

*Hughes & Sutherland* and *F. W. Myatt*, for appellant.

*F. D. Kelsey* and *A. W. Sokol*, for appellee.

LADD, J.—One Watson, a colored man. had been employed by the defendant on grading or cement work in the vicinity of Brown. The 20th of September, 1913, was rainy, and he and other colored men, having laid off for the day, had gathered at a house in the village. At about 5 o'clock in the afternoon, some of them informed Simpson, assistant foreman of defendant, that a man had been cut. Upon entering the house, Simpson found Watson bleeding and his intestines protruding. With the aid of others, he loaded him on a passing train to be taken to Preston. At the instance of the company's station agent there, Dr. Armstrong was at the station when the train came in, and directed the wounded man to be taken to his office. Either the foreman, Jones, or his assistant, Simpson, called Haskell, the assistant engineer in charge of the work being done by defendant, and Dr. Armstrong talked with him. Armstrong then replaced the intestines as best he could, and took the patient on the 7:15 o'clock train to the Maquoketa hospital, where, in the same evening, with his as-

1. PRINCIPAL  
AND AGENT:  
powers of  
agent: rail-  
roads: em-  
ployment of  
physicians:  
ratification.

sistance, the plaintiff performed a successful operation. The patient remained at the hospital two weeks, and in this action the plaintiff seeks to recover compensation for the services rendered by him as surgeon, as well as for those rendered by Armstrong, and for the hospital charges. Included also are hospital charges for the care of one Zania. The rendition of the services in the treatment of Watson, as alleged, and that he and Zania were cared for at the hospital, and assignments of the claims to plaintiff, are not questioned. That neither Jones nor Simpson was authorized to engage the services of a physician is conceded.

Was the evidence sufficient to carry to the jury the issue as to whether Haskell was authorized to engage the services of Armstrong to treat Watson, empower Armstrong to engage plaintiff's service, and to incur expenses for the care of these patients? Haskell was shown to have been in charge of the improvements being made along defendant's line of railroad between Green Island and Oxford Junction. Wood, the district engineer, acting for defendant, had employed him, and Wood testified that the extent of Haskell's authority was to see that the grade work being performed by contractors was properly done, and that he was in direct charge of the concrete construction of bridges and culverts, with authority to employ and discharge the men engaged in such construction. The witness testified further that:

"As regards his authority as assistant engineer, with reference to the employment of physicians he had no authority aside from a list of physicians. He was given a list of the company's physicians along the line, and he was to call on them if any of the men were injured or sick while working on the company's work. He was expected to call the company's physician when an employe was injured while engaged in the work of the company, and that was the extent of Mr. Haskell's authority. \* \* \* I would say the

order was to go to the nearest physician in emergency cases.

\* \* \* In case Mr. Haskell couldn't find, at the place he desired, a regularly retained physician of the railway company, what would he do in such an emergency? A. I suppose just like anyone else would. I say he only had authority to go to the railroad company's physician. He hadn't authority to go to anyone else. By the Court: Q. I take it that there were a number of emergency cases where parties had been personally injured, under your supervision, and required immediate attention from some doctor. Now what is the usual custom of the road in cases where the injured party requires immediate attention, and a railroad doctor is not within reach? Do you allow them to die, or do you send them to some doctor that can be reached? A. All such cases are handled by the superintendent. The usual custom was to get them to a doctor as quick as possible. Q. And if the doctor of the company cannot be reached you will find some doctor; isn't that the case? A. Certainly; yes, sir."

The witness then explained that the authority to employ physicians was limited to employees who became sick or were injured while in the line of duty or service of the company. Neither plaintiff nor Armstrong had been employed as company's physician, but the evidence tended to show that employees injured while at work were taken to physicians other than the company's when the latter were absent, and that the defendant uniformly paid for the services by them rendered. The company's regularly employed surgeon was absent when Armstrong was engaged, and, without reviewing the evidence, we are of opinion that it was sufficient to have warranted the jury in finding that Haskell had authority to engage Armstrong's services, had Watson been injured while in the line of employment. Surely, ratification of his action in repeatedly taking em-

ployees to physicians other than those regularly employed by the company, by compensating them for services so rendered, was evidence that he had authority so to do.

In no instance other than that involved

2. PRINCIPAL AND AGENT: powers of agents: rail-roads: employment of physicians.

in this action, however, does it appear that he ever directed an employee, injured when not engaged in the company's work, to be taken to a physician, whether regularly employed by the company or not, or that the company ever paid for medical or surgical services or care at a hospital in such a case. Though physicians were shown to have aided in the care of those injured in a wreck at Riggs, and Haskell was in charge as representative of the company, there was no showing that he had had anything to do with their employment. That Armstrong was employed by Haskell, we have no doubt. When Watson was brought into his office, either Jones or Simpson called Haskell by telephone, and Armstrong talked with him. The latter testified:

"He called up Haskell at Delmar Junction, who asked him for me. I talked direct to Haskell, and I told him how bad the man was hurt. He asked me if I couldn't get him to the Clinton hospital, and I informed him that the train had gone, and that the roads were so muddy it was impossible to take him in an automobile. He asked me the nearest place we could take him, and I told him the only place we could get him would be Maquoketa. He ordered me to take him to Maquoketa and give him the very best attention, and he says, 'If you can't go along with him, why go as far as Delmar, and I will send the doctor from there with him to Maquoketa.' That was all that was said at that time, and in order to make myself safe, then, in about twenty minutes I called him up again, and he repeated the same story. So then I proceeded to bring him to the hospital."

We need not stop to ascertain whether this conversation conferred authority on Armstrong to employ plaintiff to



perform the operation; but see *Smith v. Chicago & N. W. R. Co.*, 104 Iowa 147; *Bushnell v. Chicago & N. W. R. Co.*, 69 Iowa 620; *Terre Haute & I. R. Co. v. Brown*, (Ind.) 8 N. E. 228; *Louisville, N. A. & C. R. Co. v. Smith*, (Ind.) 22 N. E. 775; *Burke v. Chicago & W. M. R. Co.*, 114 Mich. 685 (72 N. W. 997). It is evident from the facts recited that Haskell was without actual authority to employ Armstrong in behalf of the defendant or to authorize him to engage the services of plaintiff or procure the care of the patient at the hospital. None such had been expressly conferred on him, nor, as we think, impliedly by virtue of his position.

The board of directors of a railroad company, strictly speaking, is its agent and representative, but, in a practical sense, such board in its relations to the public is the corporation itself. Unless conferred by the articles of incorporation, all authority to act for the corporation must emanate from the board of directors, and before it can be bound by contracts of agents, officers or employees, it must be made to appear that power to enter therein has been conferred on such agent, officers or employees by said articles, or given by the board of directors or governing body, either expressly, impliedly or by ratification. Having designated agents, however, the corporation will be bound by whatever they may do or omit to do within the scope of their employment. Many courts have held that the extent of the agent's authority is often to be implied from the title of his position; for that such title, as general manager, general superintendent, or general agent, indicates large discretionary powers or authority as to the manner of carrying on the business of the company or the department thereof. See *Louisville, E. & St. L. R. Co. v. McVay*, 98 Ind. 391 (49 Am. Rep. 770); *Atlantic & Pac. R. C. v. Reisner*, 18 Kan. 458; *Toledo, W. & W. R. Co. v. Rodrigues*, 47 Ill. 188 (95 Am. Dec. 484); *Bedford Belt R. Co. v. McDonald*, 17 Ind. App. 492 (60 Am. St. 172). See, also, *Cushman v. Cloverland*

*Coal & Mining Co.*, 170 Ind. 402 (127 Am. St. 391); *Atlantic Refining Co. v. Leffingwell*, (Fla.) 34 L. R. A. (N. S.) 351; *Marquette & O. R. Co. v. Taft*, 28 Mich. 289; *Stephenson v. New York & Harlem R. Co.*, 2 Duer (N. Y.) 341; *Chaplin v. Freeland*, (Ind.) 34 N. E. 1007; *Holmes v. McAllister*, (Mich.) 48 L. R. A. 396.

But there is nothing in the designation "assistant engineer" warranting the inference of large discretionary powers in representing the company. Indeed, the name suggests limited, rather than general, powers. The circumstance of being "assistant" imports subordination to another, and puts all on inquiry as to the scope of his activity in helping another or others. The duties of an assistant ordinarily are circumscribed. Authority to employ a physician is not to be inferred from the mere fact that an employee is roadmaster (*City of Lafayette v. James*, 92 Ind. 240 [47 Am. Rep. 140]), or is a conductor (*Tucker v. St. Louis, K. C. & N. R. Co.*, 34 Mo. 177), or is a foreman (*Rankin v. New England and Nevada Silver Mining Co.*, 4 Nev. 78), or is a yardmaster (*Marquette & O. R. Co. v. Taft*, 28 Mich. 289), or is a station master (*Cox v. Midland R. Co.*, 3 Welsby, H. & G. [Ex. R.] 268), or is a general surgeon (*Smith v. Chicago & N. W. R. Co.*, 104 Iowa 147). One court has held that this is true also of a division superintendent (*Brown v. Missouri, K. & T. R. Co.*, 67 Mo. 122), but as to this there is some conflict in the authorities. See *Union P. R. Co. v. Winterbotham*, 52 Kan. 433 (34 Pac. 1052). See note to *The Kenilworth*, 4 L. R. A. (N. S.) 58, in which the authorities are collected; 1 Elliott on Railroads, Section 222.

We have no difficulty in reaching the conclusion that Haskell was without authority to employ a physician to treat or operate on an employee injured while not engaged in the line of his duty or service and within the scope of his employment. Nor does it appear from this record that he had ever done so previously, or that defendant had ever au-

thorized him or anyone else to do so, or that the company had ever approved or paid for the service of a surgeon so rendered. Nor is there any showing that defendant ever held Haskell out as having such authority, or did anything to mislead anyone into so believing. Haskell, then, was without actual or ostensible authority to bind defendant in engaging the services of Armstrong. Not only was Watson not engaged in the work of the defendant, but he was off its premises at considerable distance, and in a house with companions, passing the time according to his own notions. The company was under neither legal nor moral obligation to care for him or to see to the healing of his wounds. Though the wound may have been such as to require immediate attention, the injury was not suffered while engaged in the service or in the performance of a duty for defendant, and therefore the authority of another employee to render assistance by securing medical attention cannot be implied. See cases collected in note above referred to in 4 L. R. A. (N. S.) 63. For all that appears, the company exercised no control over its employees, save when engaged in its work and in the performance of their duties in its behalf.

At other times they are presumed to have been free to do as they chose. If it can be said, then, that the wound was such as involved an emergency and required immediate attention, the situation was not such as that authority of defendant's subordinate officers or employees,

3. PRINCIPAL  
AND AGENT:  
powers of  
agent: emer-  
gencies.

such as foreman or assistant engineer, to employ medical aid, would be implied. This happens only when the employee is injured in the actual service or in the performance of some duty for the master. See *Terre Haute & I. R. Co. v. Brown*, supra; *Bedford Belt R. Co. v. McDonald*, 12 Ind. App. 620 (40 N. E. 821); cases collected in note above referred to; 4 L. R. A. (N. S.) 63; *Ohio & Mississippi R. Co. v. Early*, (Ind.) 28 L. R. A. 546;

*Arkansas Southern R Co. v. Loughridge*, 65 Ark. 300 (45 S. W. 907). No duty to provide for medical aid could have been implied save from the circumstance that the emergent injury occurred in effectuating the purposes of the party held liable, and we have found no case to the contrary.

But it is argued that plaintiff and Armstrong were not required to ascertain at their peril whether the employee was injured while actually engaged in the line of his employment. It is elementary that those dealing with agents are bound to know the extent of the agent's authority. If they do not know, they must ascertain at their peril. On the other hand, the principal is not charged with knowledge of anything the agent may do in excess of his authority, and is not bound thereby, save upon ratification, unless the party dealing with the agent has been misled to his injury by the principal's having clothed the agent with apparent or ostensible authority to do the things he has done in excess of authority. As heretofore pointed out, there was no evidence of ratification by defendant, or that it had clothed Haskell with the appearance of having authority to enter into contracts such as he did with Armstrong. It follows that defendant was not bound by the arrangement made with Armstrong by its assistant engineer, nor by that by Armstrong with plaintiff and the hospital. It is doubtful whether the claim for the care of Zania was allowed by the trial court, but whether so or not, there was no showing that Haskell, or anyone authorized so to do in defendant's behalf, engaged the services of the hospital, save that he was cared for.

The motion for new trial should have been sustained on the ground that the evidence was insufficient to sustain the verdict.—*Reversed*.

4. PRINCIPAL AND  
AGENT: pow-  
ers of agent:  
authority:  
"holding  
out;" rati-  
fication.

GAYNOR, C. J., WEAVER, EVANS, SALINGER AND STEVENS, JJ., concur.

PRESTON, J. (dissenting).—I agree that the evidence is not sufficient to justify the finding of the jury as to the Zania item of \$25. The substance of the evidence is that the doctor had, prior to the services he performed for Zania, done work for injured employees of the company sent him by Haskell; and the argument is that he had a right to presume, from this usual course, that he was performing this service for the company. But this assumes that the patient Zania was sent by Mr. Haskell, but I think the evidence is not sufficient to show that fact. The doctor testifies, over objection, that he had a book account of the charge for the Zania treatment, and that he had charged it to the defendant. But this charge of itself would amount to nothing unless the company, or someone authorized, or ostensibly authorized, employed the doctor.

I dissent, however, from the holding of the majority as to the patient Watson. I think there is other evidence in the record that has a bearing, but I shall not take the time to set it out. It seems to me that the evidence was sufficient to take the case to the jury, as to the Watson items, on the question as to whether Haskell had been clothed by the defendant with apparent or ostensible authority, and to show that plaintiff, in good faith, relied thereon, and was misled.

I would affirm on condition that appellee file a remittitur for the Zania charge.

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CENTRAL STATE BANK, Appellant, v. M. FORD et al., Appellees.

**TRIAL:** Direction of Verdict—Disputed Questions. Clearly disputed questions of material fact must be passed on by the jury,

irrespective of the court's opinion as to the credibility of witnesses and the weight of their testimony.

**GUARANTY: Discharge of Guarantor—Dissipation of Security—**

- 2 **Pro Tanto Discharge.** A guarantor who pleads that he has been *fully* released by the act of the one holding the guaranty in wrongfully permitting the principal debtor to dissipate other security held for the debt, must show that such dissipation was to the full amount of the guaranty.

*Appeal from Linn District Court.*—JOHN T. MOFFIT, Judge.

SATURDAY, OCTOBER 20, 1917.

ACTION at law upon a promissory note made by the defendant Miles and a separate written guaranty thereof by defendant Ford. The guarantor denied liability, upon grounds explained in the opinion. On the issue joined between plaintiff and Ford, there was a directed verdict for the latter, and from the judgment entered thereon, the plaintiff appeals.—*Reversed and remanded.*

*Randall, Courtney & Harding* and *George F. Buresh*, for appellant.

*Deacon, Good, Sargent & Spangler*, for appellees.

WEAVER, J.—On March 14, 1914, the defendant Miles made and delivered to the plaintiff bank his promissory note for \$2,500, with interest, payable 15 days after date. The indebtedness represented by the note was a loan then made to Miles, who was a manufacturer of brick at Cedar Rapids. The transaction was conducted on the part of the bank by its cashier, E. B. Zbanek, and on the part of Miles, in person. With said note, Miles executed, acknowledged and delivered to Zbanek a bill of sale of 600,000 brick, then in his brickyard in that city, and later in the day, and before the money was paid over, Miles brought and delivered to Zbanek the written guaranty in controversy, which in-

strument had been prepared or dictated by Zbanek, and reads as follows:

"Cedar Rapids, Ia. Mar. 4, 1914.

"For value received, I hereby guarantee the payment of a note dated at Cedar Rapids, Iowa, March 4, 1914, for \$2,500, due 15 days after date, payable to the Central State Bank or order, at its banking house at Cedar Rapids, Iowa, with interest payable quarterly at the rate of six per cent per annum after date until paid, the said note being signed by Matt J. Miles, at maturity or any time thereafter, with attorneys fees if suit be instituted hereon, waiving demand, notice of non-payment and protest. The above note is further secured by a bill of sale signed by Matt J. Miles to Ed Zbanek on all brick now located at the plant in the Cedar Rapids Brick Company of Cedar Rapids, Iowa.

"M. Ford."

The note was not paid when due, and on August 19, 1914, this action was begun. The petition sets out the note, the bill of sale, and the written guaranty. It describes the bill of sale as having been made and delivered to the bank as a part of the same transaction in which the note was given, and alleges that the guaranty also entered into the transaction as a part thereof. Nonpayment of the note is averred, and judgment asked against both defendants for the full amount of principal and interest. By an amendment to the petition, after the cause had been pending about eight months and had been reached for trial, plaintiff withdrew the allegation that the bill of sale had been made to it to secure the debt, and in place thereof alleged that said instrument had been given to Zbanek to secure Ford against liability on his guaranty.

Answering the petition, Ford admits the note made by Miles to the plaintiff, and admits executing the guaranty. He denies that the bill of sale to the cashier was made to

secure him, and alleges that, before he had executed or delivered the guaranty, the bill of sale had been made to the cashier of the bank to secure payment of the loan to Miles, and that it was this debt, as thus secured to the bank, which he undertook to guaranty. He further alleges in substance that the bank not only negligently failed to protect its said security but, without his consent and at the request of the debtor, Miles, it withheld the bill of sale from record, and permitted him to dispose of the brick covered by said bill to an amount more than sufficient to secure and pay the amount of the note, thereby destroying the security, and that, by such conduct on plaintiff's part, the defendant has been released from all liability on his guaranty.

The principal fact propositions about which the contest on the trial below centered were those attending the execution of the written guaranty. The only persons having personal knowledge of these circumstances are the defendant Ford, the maker of the note, Miles, and the plaintiff's cashier, Zbanek. The testimony of Ford and Miles tends strongly to show that Miles first applied to the bank for a loan, but the bank refused to let him have the money on his personal note, and suggested that he get some responsible surety. Miles, who had not yet approached Ford on the subject, asked Zbanek if Ford would be an acceptable security, and was told that he would. Zbanek then prepared a note, with which Miles went to Ford and requested his signature. Ford refused this request, and Miles returned to the bank and reported his failure. Later, he came back to the bank and proposed to give a bill of sale on his stock of brick. At that time, he had about 800,000 brick in his yard, of the market value of about \$7 per 1,000. Zbanek refused to consider the idea of lending money on that security, but the inquiry arose, at whose instance it does not appear, whether, if a bill of sale were given upon the stock of brick, Ford might not then be willing to sign



the note. With this plan in view, Miles again went to Ford, who still refused to sign the note, but said that, if the bank would take the bill of sale, he would enter into a separate agreement to guarantee the debt. Going once more to Zbanek, Miles made to the bank the note now in suit, and the bill of sale to Zbanek, and then made his final visit to Ford and procured his signature to the guaranty which Zbanek had prepared. Upon thus completing the papers, Zbanek or the bank turned over the money to Miles. On the same day, according to Miles, he asked Zbanek if he would be permitted to go on selling the brick to his general trade, and also requested that the bill of sale be withheld from record, as he expected to take up the note within a few days. This request he says was answered affirmatively, and Zbanek promised not to record the bill. The stock of brick was rapidly depleted, and the money obtained by Miles from that source went to pay other debts, and the note in suit was dishonored. Ford swears that he had no knowledge of the arrangement between Miles and Zbanek to keep the bill from the record or to permit the sale of the brick. Later, he says, when notified of the nonpayment of the note, he went to Zbanek, asked him to apply the proceeds of the sales upon the note, and surrender the security or bill of sale to him and he would pay the remainder of the debt, and then for the first time learned of the failure to record the bill and of the dissipation of the security. As against this theory, Zbanek swears that he did not take or offer to take the bill of sale to secure the bank, for he was satisfied with the security offered by Ford's guaranty of the note, but that he took it solely for the benefit and accommodation of Ford, and never considered it as anything belonging to the bank or assumed any responsibility for it. He does not say that Ford requested him to do it, but that Miles said that both he and Ford wanted it done. He admits that Miles asked him not to record the bill, and

told him also that such was the wish of Ford. There was additional evidence by these and other witnesses, but for the purpose of this appeal, further recitation thereof is unnecessary.

At the close of the testimony, counsel for the defendant Ford moved the court for a directed verdict in his favor, on the ground that the evidence shows without conflict that the bank took the bill of sale to secure the payment of the note, that such bill of sale afforded ample security for the payment, and that, by the bank's failure to record the instrument, and by permitting the sale by Miles of the property covered by it, the security which would have protected both the bank and the guarantor was wholly lost. The motion to direct was sustained, and verdict returned for defendant, and thereupon judgment was rendered against plaintiff for the costs.

As we read the record, it does not sustain the proposition on which the motion was grounded, and the issue should have been submitted to the jury. It may be, and indeed is, true that the jury could well have found that a preponderance of the evidence was in favor of the theory of the defense, but the evidence in that regard was not undisputed. If Ford and Miles are to be believed, the conclusion is, of course, inevitable that the bill of sale was made to the cashier primarily to secure the bank for the loan to Miles; but if Zbanek is to be believed, then he, Zbanek, as a mere trustee or agent, took the bill of sale, not for the benefit of the bank, but for Ford, as a kind of counter security to him against his liability on the guaranty.

But the credibility of the witnesses on either hand and the weight and value of their testimony in arriving at the truth of the controversy were for the jury alone, and the legal relations and the rights of the

1. TRIAL: direction of verdict: disputed questions.

2. GUARANTY: discharge of guarantor: dissipation of security: pro tanto discharge.

parties depend very materially upon how this issue of fact is decided. If it be found that Zbanek took the bill of sale for the bank, to secure the note made by Miles, and that it was the note as thus secured of which Ford undertook to guarantee payment, and that the bank, or its cashier, without the knowledge or consent of Ford, withheld the bill of sale from record and permitted Miles to dispose of the brick covered by the bill and thus dissipate or destroy the security which it afforded, then the right of Ford to defend against an action on his guaranty would differ materially from the right which would be his if the bill of sale was made primarily for his security and taken and held by Zbanek as his agent only. If the bill of sale was taken by the cashier for the benefit of the bank, then, while the bank would ordinarily be under no duty to pursue and exhaust such security before calling on Ford to pay the note, it was bound in good faith to preserve the lien of the bill of sale, to be turned over to Ford upon his making such payment; and it would be a manifest violation of this duty for the bank, without his consent, to grant the request of the debtor to withhold the bill from record and permit him to dispose of the property which was the basis of this security. We are of the opinion, however, that such act on the part of the bank does not necessarily relieve the guarantor from all liability, but that his right to be released from the guaranty is limited to the amount of injury he has sustained by reason of the matters of which he complains. A guarantor in such case occupies no better or stronger position than does a surety, and if the creditor releases, or by his fault loses, a security to which the surety or guarantor would have the right to be subrogated, then such guarantor or surety will be released *pro tanto*, but is not necessarily entirely discharged, unless the security so lost equals or exceeds in value the amount of the secured debt.

"A loss of securities by the fault of the creditor only

releases the surety to the extent of the loss." *Mingus v. Daugherty*, 87 Iowa 56, 61; *Hendryx v. Evans*, 120 Iowa 310, 316. This rule is quoted approvingly in *Whitehouse v. American Surety Co.*, 117 Iowa 328, 330. See also *Springer v. Toothaker*, 43 Me. 381; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119; *Baker v. Briggs*, 8 Pick. (Mass.) 122; *Bankers Surety Co. v. Linder*, 156 Iowa 486, 496; *Nelson v. Munch*, 28 Minn. 314 (9 N. W. 863); *Hancock v. Wilson*, 46 Iowa 352; *Burr v. Boyer*, 2 Neb. 265. On the other hand, if the jury should find that the bill of sale was taken and held by Zbanek solely as agent or representative of Ford, then the bank would be charged with no duty with respect to the preservation of the security, and the failure of Zbanek to have the bill recorded would not be a defense, either partial or entire.

It follows, without further discussion, that the issues should have been submitted to the jury for its verdict, under instructions fairly presenting both the theory of the plaintiff and the theory of the defendant; and for the error in directing a verdict, the judgment must be reversed and the cause remanded for a new trial.

Other alleged errors have been argued, but, as they involve questions which will not necessarily arise upon a new trial, or are of a character to be controlled by the views we have already expressed, we shall not further consider them. Whether the language of the guaranty sued upon estops the plaintiff from denying that it held the bill of sale as security for the payment of the note, is a question not definitely argued by counsel, and we express no opinion thereon, but mention it here only to avoid any inference that the subject has been foreclosed by this decision.—*Revised and remanded.*

GAYNOR, C. J., PRESTON AND STEVENS, JJ., concur.

CIVIC IMPROVEMENT LEAGUE OF TOLEDO, Appellee, v. MATT  
HANSON, Appellant.

**INTOXICATING LIQUORS: Nuisance—Injunction—Who May**  
1 **Maintain.** A corporation may not maintain an action to enjoin  
an intoxicating liquor nuisance. (See Sec. 2405, Code, 1897;  
Sec. 2406, Code Supp., 1913.)

**WORDS AND PHRASES: "Citizen."** A corporation is not a "citi-  
2 zen" within the meaning of the statute which authorizes "any  
citizen," etc., to maintain actions for the enjoining of liquor  
nuisances. (Sec. 2405, Code, 1897; Sec. 2406, Code Supp., 1913.)

**INTOXICATING LIQUORS: Nuisance—Injunction—Law Control-**  
3 **ling.** The right to an injunction to restrain the unlawful sale  
of intoxicating liquors depends on the state of the law *at the*  
*time the action is brought.*

*Appeal from Tama District Court.*—B. F. CUMMINGS,  
Judge.

SATURDAY, OCTOBER 20, 1917.

THE opinion state the case.—*Reversed.*

*M. W. Hyland*, for appellant.

*J. R. Caldwell*, for appellee.

WEAVER, J.—Because of the novelty of  
the question presented by this appeal, we  
quote the petition in its entirety, omitting  
only the caption and signature. The plain-  
tiff states:

1. **INTOXICATING LIQUORS:**  
nuisance: in-  
junction: who  
may main-  
tain.

"1. That it is a corporation duly organized and in-  
corporated under the laws of Iowa, in the name and style  
of The Civic Improvement League of Toledo, Iowa, and  
doing business at Toledo, Iowa.

"2. That it is not a corporation for profit but for the furtherance of public interest.

"3. That plaintiff is interested in the peace, welfare and good order of the community and county and brings this action for the abatement of a nuisance; that the practice of matters complained of menaces the welfare of the community, is destructive of morality and defeats a desire on the part of the people to prevent the sale of intoxicating liquors by unauthorized persons.

"4. That Toledo is 'dry territory,' and no one has a permit to sell liquor for any purpose in Toledo, Iowa,—that the county is 'dry' except where tolerated, and the sentiment of the people is against traffic in intoxicants.

"5. That defendant has for years past been coming to Tama County and cities of Tama and Toledo for the purpose of soliciting, taking and accepting orders for the purchase, sale, shipment and delivery of intoxicating liquors; that he has various places and buildings in said towns, where he arranges to meet parties, a particular description of which buildings is unknown to plaintiff; that he makes a business of soliciting and taking orders for intoxicating liquors from people of Tama County, and that he collects the agreed purchase price from time to time; that unless restrained he will continue to do so; that the effect of his coming is that more liquor is sold than if he did not so solicit.

"6. That defendant is not a resident of Tama County, Iowa; that if defendant is permitted to continue as in the past it will necessitate a great many actions for single offenses and a multiplicity of suits.

"7. That defendant has no right or permit to sell intoxicating liquor in Tama County; that a continuance of such sales, purchase, shipment and delivery of intoxicating liquor upon the streets of Tama, Toledo and Tama

County and the use of buildings so used will continue to be a nuisance to the irreparable injury of plaintiff and citizens of the county.

"Wherefore, plaintiff prays that defendant be enjoined, by himself, agents or servants from in any manner selling intoxicating liquors in violation of law or from soliciting, taking or accepting orders for the purchase, sale, shipment and delivery of intoxicating liquors; that he be restrained and enjoined from using any buildings or places of business in the town of Toledo as a place of meeting with purchasers of said intoxicating liquor and soliciting, taking and accepting orders therefor; that said nuisance be enjoined; that a temporary injunction issue in accordance with this prayer, and that on final hearing said injunction be made perpetual, and for such other relief as may be deemed equitable in the premises, and for costs, including a reasonable attorney's fee."

The defendant, answering the petition, admits the corporate capacity of the plaintiff and that the defendant is a nonresident of Tama County, and denies all other matters charged against him.

The action was begun March 8, 1915; issue was joined April 1, 1915; trial was had March 16, 1916; and on March 20, 1916, a decree was entered for a permanent injunction against the defendant as prayed. Defendant appeals.

I. Of the questions presented and argued, we think it necessary to consider but one, and that is the capacity of the plaintiff corporation to maintain an action of this character.

The right to abate or restrain a liquor nuisance by injunction is of statutory creation, and if plaintiff is empowered or entitled to sue for such relief in the public interest, the authorization must be found in some legislative enactment. Looking into the development of this legislation, we find the subject first treated in Section 12 of

Chapter 143 of the Acts of the Twentieth General Assembly, where, after the "erection, building or place" in or upon which unlawful traffic in intoxicants is carried on is declared to be a nuisance, punishable as an indictable misdemeanor, the following provision is found:

"Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity to abate and permanently enjoin the same."

At the next session of the general assembly, the act last above mentioned was revised and elaborated to some extent, but no change was made in the provision as to the person or party authorized to bring suits of that character (see Acts of the Twenty-first General Assembly, Chapter 66). The same may be said of Chapter 73 of the Acts of the Twenty-second General Assembly. The law as thus framed was carried forward into the Code of 1897, Sections 2405, 2406, substantially as enacted by the twentieth and twenty-first general assemblies, the right to bring injunction proceedings in such cases being given to "any citizen of the proper county." The legislature, in Chapter 84, Acts of the Thirtieth General Assembly, extended the scope of liquor injunctions to include the business of bootlegging, but made no change with respect to the parties who might legally maintain such actions. But bootlegging as there defined did not include such acts as were here charged to defendant. This was the state of the statute law upon this question when this action was begun, and, so far as it relates to the proper parties plaintiff in actions of that nature, such is the law today.

We come, then, to the question, Is a corporation a citizen, within the meaning of these statutes?

2. WORDS AND PHRASES:  
"citizen."

The plaintiff's petition does not reveal the character of the plaintiff corporation or the purpose for the promotion of which it is organized, except to say that it is not a cor-



poration for pecuniary profit; but this, perhaps, is not a fatal omission if, as a matter of fact or law, a corporation can be classed as a citizen for the purposes of the injunction statute. But if its capacity for citizenship were admitted, we have further to say that nothing is alleged showing the corporation to be a citizen of Tama County. The fact that a party is "doing business at Toledo, Iowa," would not necessarily make him a citizen there.

Passing this defect, and coming directly to the construction of the statute, we think it must be held that a corporation is not a citizen, within the legislative meaning. The word has been variously defined. It is sometimes said that "citizen" is the equivalent of elector, or a person entitled to vote and enjoy the general political privileges of the government under which he lives. See *Bouvier's Law Dictionary* and *Webster's Dictionary*. In some connections it is held to mean no more than "resident" (*Devanney v. Hanson*, [W. Va.] 53 S. E. 603), or a person native or naturalized, of either sex, who owes allegiance to a government and is entitled to protection from it (*Greenough v. Board*, 30 R. I. 212). The phrase "citizen of the county" is said to describe one who is a citizen of the state and a resident of the county (*Gruetter v. Cumberland Tel. & Tel. Co.*, 181 Fed. 255). Again, "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States." *In re Look Tin Sing*, 21 Fed. 905. Citizens are members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their welfare and the protection of their individual as well as their collective rights. *United States v. Cruikshank*, 92 U. S. 542. A corporation is not a citizen, within the meaning of the constitutional guaranty of the privileges and immunities of citizens against dis-

criminatory state legislation. See numerous cases cited in 2 Words and Phrases 1168. As an apparent exception to the general rule, a corporation is classed as a citizen for the purpose of determining the right to remove an action from the state to the Federal courts because of diverse citizenship of the parties. *Chicago & N. W. R. Co. v. Whitton's Admr.*, 80 U. S. 270. But, except for the purpose of determining the jurisdiction of the Federal courts, the rule is that ordinarily the term "citizen" means only a natural person, and will not be construed to include a corporation unless the general import and purpose of the statute in which the term is found seem to require it. *State Internat. & Life Assurance Co. v. Haight*, 35 N. J. L. 282; *Tatem v. Wright*, 23 N. J. L. 429, 445; *State v. Kilroy*, 86 Ind. 118; *Scarborough v. Eubank*, (Tex.) 52 S. W. 569, 571; *State v. County Court of Howard County*, 90 Mo. 593; *Paul v. Virginia*, 75 U. S. 168 (19 L. Ed. 357). There is nothing in this statute or its apparent purport or purpose which requires the extension of the word "citizen" to include a corporation. On the contrary, we think it clearly excludes any such broadened definition. The evident reason prompting this particular provision was, doubtless, to prevent the law from being brought into contempt by lax enforcement at the hands of hostile or indifferent or negligent officers charged with that duty. The authority thus given to a private individual to interpose and in his own name enjoin offenders against the law was an unusual one,—an authority which could hardly be extended to all persons indiscriminately and unconditionally without being abused; and it was a wise restriction that its exercise should be confined to citizens whose established and settled relations as members of the organized community within the county would serve in some degree as a guaranty of good faith on the part of complainants, and a check upon reckless and ill-founded prosecutions. There doubtless are some reasons why citi-

zens desiring to have the law enforced, but shrinking from personal litigation, with its attendant publicity, trouble and costs, would find the use of a corporation to effect their purpose a welcome expedient, and we can respect the feeling which prompts the thought; but the legislature has not authorized it, and the court is without power to engraft it upon the law as written.

3. INTOXICATING  
LIQUORS:  
nuisance: in-  
junction: law  
controlling.

II. Counsel for appellee calls our attention to the law of the thirty-sixth general assembly (Code Suppl. Supp., Sec. 2461-a) so defining the term "bootlegger" as to make

it include persons carrying on the business or doing the acts charged against defendant in this case, and to permit the issuance of an injunction against one who so offends. Even if this statute were held otherwise applicable, it would not serve to avoid the insuperable objection that the plaintiff had not then and has not now the capacity to maintain the suit; but very manifestly, the defendant's liability to injunction must be governed and disposed of under the law as it stood when the suit was brought, unaffected by a statute which did not come into effect until three months later.

The injunction cannot be sustained, and the decree of the district court is—*Reversed*.

GAYNOR, C. J., PRESTON AND STEVENS, JJ., concur.

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MARGARET DE WALL, Appellee, v. CITY OF SIOUX CITY,  
Appellant.

**MUNICIPAL CORPORATIONS: Torts—Defects in Streets—Snow  
1 and Ice—Knowledge of Danger.** Negligence does not necessarily follow from the act of passing over a *known* defective walk. So held where the one injured knew that the walk was cov-

ered with rough and uneven ice.

**MUNICIPAL CORPORATIONS: Torts—Defects in Streets—Duty**  
**2 to Take Safe Route.** The plea that one injured by a defective street ought to have taken another route cannot prevail in the absence of evidence that such other route was a safer way than the one actually taken.

**TRIAL: Verdicts—\$400—Excessiveness.** Verdict of \$400 for painful  
**3 injuries held non-excessive.**

*Appeal from Woodbury District Court.*—J. M. ANDERSON,  
 Judge.

SATURDAY, OCTOBER 20, 1917.

DEFENDANT appeals from a judgment in favor of plaintiff for \$400 damages which she claims to have suffered because of the icy condition of an alley crossing in defendant city.—*Affirmed.*

*Griffin & Page and Schmidt & Pike, for appellant.*

*Oliver, Harding & Oliver, for appellee.*

STEVENS, J.—I. The injury complained of was received upon one of the principal business streets of defendant city, and it is alleged that it was caused by

1. MUNICIPAL CORPORATIONS: torts: defects in streets: snow and ice: knowledge of danger.	the city's negligently permitting accumulations of snow and ice to remain upon an alley crossing after the surface thereof had become rough, rigid, slippery and uneven.
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Plaintiff testified that she had frequently, previous to the injury in question, passed over the place of the accident, and knew of the presence of snow and ice upon the crossing and that same had, by the tramping of pedestrians, and other causes, become rough and uneven.

Evidence was introduced that, on the 5th of February, 1915, there were 13 inches of snow on the ground, and no thawing or snow thereafter prior to the 9th; that, on the evening of February 9th, there were 9.5 inches of snow on

the ground, and on the evening of the 11th, 8.4 inches; that, on the 12th, the maximum temperature was 35 degrees and the minimum 20; that, on the afternoon of the 12th, about 4 o'clock P. M., it began to rain, which continued until about 2 o'clock the following morning. Plaintiff claims that the accident in question occurred about 7 o'clock on the morning of the 13th and the evidence shows that, at 8 o'clock that morning, the temperature was 30 degrees above zero. According to the testimony of plaintiff, the morning was cloudy and not very light; the surface of the snow was rough and icy, and it was "dirty frozen snow." Other testimony as to the condition of the crossing was offered by plaintiff, which tended to corroborate her statement. No testimony was offered by defendant tending to show that the crossing was not in the condition claimed by plaintiff. Plaintiff testified that she did not realize that the crossing was dangerous.

It has been repeatedly held by this court that, where snow which has fallen upon the sidewalk is permitted to remain until the surface thereof, by thawing and freezing, or by reason of travel thereover, has become rough, uneven, rigid and slippery, and where this condition has existed for such length of time that same has become known to the authorities, or should have been known to them in the exercise of reasonable care, the municipality will be liable for damages to one injured while attempting, in the exercise of ordinary care, to pass over said walk. *Huston v. City of Council Bluffs*, 101 Iowa 33; *Dempsey v. City of Dubuque*, 150 Iowa 260; *Beirness v. City of Missouri Valley*, 162 Iowa 720; *Griffin v. City of Marion*, 163 Iowa 435; *Finnane v. City of Perry*, 164 Iowa 171; *Hodges v. City of Waterloo*, 109 Iowa 444; *Rose v. City of Ft. Dodge*, 180 Iowa 331; *Covert v. Town of Lovilia*, 167 Iowa 163.

Recent rains may have caused the rough and uneven places upon the crossing to become more slippery and dan-

gerous than before, and the injury might not have occurred if the crossing had been in the same condition as it was prior to the rain; but this does not necessarily relieve the city from liability. It was said, in *Langhammer v. City of Manchester*, 99 Iowa 295, that:

"When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible, the municipality is liable, provided that the injury would not have been sustained but for such defect."

See *Hodges v. City of Waterloo*, 109 Iowa 444; *Rose v. City of Fort Dodge*, supra.

Whether plaintiff was, at the time of the accident, in the exercise of that degree of care and prudence which the law requires, whether another and safer way was conveniently open to her, and whether she did, or in the exercise of ordinary care and prudence should have, appreciated and known the dangerous condition of the crossing before attempting to pass over the same, and whether she was in fact negligent in attempting to do so, were all questions of fact to be submitted to the jury, and we cannot say, as a matter of law, that the defendant was not negligent in permitting the crossing to become in the condition described, or that plaintiff, under the facts disclosed, was guilty of contributory negligence.

While it is argued by counsel that she could have taken another route, there is no evidence tending to show that such was a better or safer way than the route traveled.

The rule is that, if a pedestrian knows that a walk is defective, but believes, as an ordinarily prudent person, that he can cross the same in safety, then he is not required to pursue another route, although there may be

2. MUNICIPAL  
CORPORATIONS:  
torts: defects  
in streets:  
duty to take  
safe route.

one open to him. *Jackson v. City of Grinnell*, 144 Iowa 232.

II. Defendant also contends that the  
3. TRIAL: ver-  
dicts: \$400:  
excessiveness. verdict is excessive. Evidence was offered  
tending to discredit plaintiff's claim that  
she suffered a fracture of one of the bones of her left leg, but  
undisputed evidence shows that her injuries were painful;  
that she was confined to her bed for several weeks, resulting  
in much loss of time. The verdict is small, and the trial  
court refused to grant a new trial on the ground that the  
same was excessive. No reason appears in the record for  
the interference of this court.—*Affirmed*.

GAYNOR, C. J., WEAVER AND PRESTON, JJ., concur.

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W. M. DICKSON et al., Appellees, v. J. R. COOPER et al.,  
Appellants.

**CHATTEL MORTGAGES:** Validity—Mortgage by Nonresident on  
Exempt Property Without Joinder by Wife. A chattel mort-  
gage, executed in a foreign state by a nonresident of this state,  
without his wife's joining therein, and upon property which  
would have been exempt from general execution had the mort-  
gagor been a resident of this state, instantly attaches and *con-*  
*tinues* as a valid lien on such property, even though, shortly  
prior to its execution, the mortgagor had been a resident of  
this state, and, shortly subsequent to its execution, returned  
and became such resident in compliance with the agreement  
attending the execution of said mortgage. (See Section 2906,  
Code, 1897.)

PRESTON, J., dissents.

*Appeal from Taylor District Court.*—THOMAS L. MAXWELL,  
Judge.

SATURDAY, OCTOBER 20, 1917.

SUIT to enjoin the foreclosure of a chattel mortgage and  
the sale of property covered thereby. Decree for plaintiff.  
Defendant appeals.—*Reversed*.

*Wm. M. Jackson and G. B. Haddock*, for appellants.

*Flick & Flick*, for appellees.

STEVENSON, J.—The plaintiff W. M. Dickson was a tenant of the defendant J. R. Cooper's during the year 1915, and his co-plaintiff is his wife. Plaintiff agreed to pay the defendant, as rental for the demised premises, \$1,825, and otherwise became heavily indebted to the defendant. On September 4, 1915, plaintiff executed his promissory note to defendant for \$4,874.34, due February 1, 1916. At the time of the execution of the above note and mortgage, the plaintiff and his wife, who had clandestinely left the state of Iowa after disposing of the larger part of all his personal property, except that taken with him, went to Andrew County, Missouri, probably to reside. He was pursued by the defendant, who instituted an attachment suit in that county, where plaintiff executed the note and mortgage in question, covering all of the personal property he had in Missouri and all that he left undisposed of in Iowa, for the purpose of securing the payment of said note. At this time, the property was in possession of the sheriff under a writ of attachment.

The note is dated "Conway," and made payable at the Farmers Bank, Conway, Iowa. The mortgage describes the parties as residents of Iowa. A stipulation was entered into between the parties by which plaintiff agreed to return to Iowa, and, upon the return of the property to Iowa, the attachment was to be released. The note and mortgage were delivered to defendant immediately upon the execution thereof, and the mortgage later recorded in Taylor County, Iowa. The property was returned to the demised premises, and plaintiff and his wife returned and resided thereon. Later, when defendant undertook to enforce a sale of the mortgaged property, this suit was brought to enjoin the

CHATTEL MORT-  
GAGES: valid-  
ity: mort-  
gage by non-  
resident on  
exempt prop-  
erty without  
joinder by  
wife.



enforcement of the same, upon the ground that plaintiff was a resident head of a family, and that his wife did not sign the mortgage, and that the property sought to be sold was exempt to him. The evidence satisfactorily shows that plaintiff left Iowa with the intention of avoiding payment of the indebtedness due the defendant, and that, at the time of the execution of the note and mortgage, he was, whether a resident of Missouri or not, a nonresident of the state of Iowa.

The contention on behalf of appellee is that the contracts executed were to be performed within the state of Iowa, were executed in contemplation of the immediate return of plaintiff and the property in question to the state of Iowa, and that, therefore, the contract is, in its inception, an Iowa contract, and must be construed according to the laws of this state, and that, as a mortgage upon exempt property is not valid in Iowa unless signed by the wife, the mortgage, in so far as the property in controversy is concerned, is void, as it is conceded that the same would be exempt to plaintiff from sale under a general execution.

Appellant contends that, at the time of the execution of the contract, plaintiffs were residents of Missouri, and that, under the laws of that state, it was not necessary to the validity of the mortgage that same be signed by the wife, even though covering property exempt in that state from execution. In the view we take of the matter, it is immaterial whether the mortgage is construed according to the laws of Missouri or the laws of Iowa. If construed according to the former, it is clearly valid, and if construed according to the laws of Iowa, is likewise valid. Without reference to the laws of which state the contract is construed under, its validity must be determined as of the time same was delivered and became effective, if at all, as a lien upon the property.

It is not claimed that the mortgage was invalid under

the laws of the state of Iowa on any other ground than that the property was exempt from general execution at the time of the institution of this suit. As to all other property described in the mortgage, it was valid without the signature of the wife. The question, then, conceding that the contract must be construed according to the laws of Iowa, is: Did the mortgage, at the time of its execution and delivery, become a valid lien upon the property described therein? Suppose the property covered by the mortgage in question had been returned to Iowa, but plaintiffs had continued to be nonresidents of this state, or suppose the mortgage had been executed by nonresidents of this state upon property wholly within the state of Iowa, and, by express provision, the contract was to be performed in this state, and the mortgagors did not subsequently become residents thereof, would not the mortgage in either case have created a valid lien upon the property? The exemption laws of this state are to residents thereof only, and the question presented upon this appeal is, Did the mortgage, executed at a time when plaintiffs were nonresidents of the state of Iowa and could make no claim of exemptions in this state, become a valid lien upon the property? There would seem to be but one answer to this question. If, then, the mortgage became a valid lien upon the property at the time of its execution, the only remaining question for consideration is, Was the lien destroyed by the subsequent removal of plaintiffs to the state of Iowa?

It is contended by counsel for appellees that exemption statutes are to be applied as of the time of the enforcement of the contract. No doubt, the necessity for claiming the exemption did not arise until the mortgagee sought to enforce the lien of his mortgage. No authority is cited to the point that a valid lien upon personal property ceased to be such by the removal to the state of Iowa of the mort-

gagor, who was a nonresident when the instrument was executed. The cases cited by counsel are not in point. It is undoubtedly true that the judgment debtor need not claim the exemption of his property when a sale is threatened under general execution, until a levy has been made thereon. The right to the exemption would depend upon the facts shown to exist at the time of such levy, but that is not the situation presented in this case. At the time of the execution of the mortgage, plaintiffs were nonresidents of the state of Iowa and could make no claim to exemptions in this state. The mortgage was valid under the laws of Iowa when executed, and a valid lien was created thereby upon the property in question without the wife's joining therein, and was not affected by plaintiffs' subsequent removal to Iowa. The property is, of course, exempt from sale under a general execution, but is subject to the lien of appellant's mortgage.

For the reasons stated, the judgment of the lower court should be, and is,—*Reversed*.

GAYNOR, C. J., LADD AND WEAVER, JJ., concur.

PRESTON, J. (dissenting). I dislike to dissent. I would be willing to concede that the question is close. I am of opinion that the mortgage should, under the record, be held to be an Iowa contract. True, it was signed in Missouri, and Dickson had absconded, but some of the property covered by the mortgage had not been taken from Iowa; some of it was in Missouri, but held by the sheriff under attachment until it was returned to Iowa. The mortgage recites that Dickson is a resident of Iowa. It was recorded in Iowa. Dickson did return to Iowa with his family. It was contemplated by the parties, at the time the mortgage was signed, that all these things should be done, as they were. I think it was contemplated that the mortgage should not be effective until the things enumerated were done. To all

intents and purposes, though the mortgage was signed in Missouri, it was really executed and to take effect in Iowa. At that time Dickson was, and is now, a resident of Iowa and the head of a family. The contract must be enforced here if at all. Dickson himself may not be entitled to much consideration, but the exemption laws are for the benefit of the family, and should be liberally construed in favor of the debtor.

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H. O. Hess, Appellant, v. F. R. Dicks et al., Appellees.

**SALES: Delivery—Intention.** Actual physical possession of property is not always necessary to constitute full delivery.

**FRAUDS, STATUTE OF: Sale of Personal Property—Part Delivery—Effect.** In a contract of sale of personal property, delivery of a *part* of the property takes the contract out of the statute of frauds.

**FRAUDS, STATUTE OF: Sale of Personal Property—Delivery—Separate Contracts.** Delivery such as will take one contract out of the statute of frauds cannot possibly have such effect on another separate and distinct contract.

*Appeal from Woodbury District Court.*—W. G. SEARS,  
Judge.

SATURDAY, OCTOBER 20, 1917.

PLAINTIFF in his petition seeks to recover \$840 due from the defendants F. R. and Eral Dicks as rent for a farm cultivated by them during the season of 1915. Defendants, in answer, deny that they were indebted to plaintiff in any sum, and allege that, in January, 1916, there was a complete settlement and adjustment of the rent; that plaintiff purchased of the defendant certain hay in the stack, corn in the field, oats in the bin, cornstalks, and a span of horses, the agreed value of which exceeded the amount of the rent due.

The exact quantity of hay, oats and corn was not, at the time, definitely ascertained, but it is alleged that plaintiff agreed to pay for the corn which was ungathered in the field at the rate of \$5 per acre; for the hay, \$10 per ton; for the oats, the market price; and for the team, \$200. It is further alleged by the defendants that plaintiff took possession and control of the property above described, except the team; that the oral contract for the sale of the team was on January 24th, and the rest of the property, the 17th of January preceding. Defendants asked judgment against plaintiff in the sum of \$23. The jury returned a verdict in favor of the defendant for \$1. Judgment on the verdict for \$1 and costs. Plaintiff appeals.—*Reversed*.

*Hess & Hess, C. H. Rinker, and J. A. Prichard, for appellant.*

*Griffin & Page and H. B. Walling, for appellees.*

1. SALES: de-  
livery: in-  
tention.

STEVENS, J.—The evidence is somewhat confusing as to exactly what was said in the conversation of January 17th with reference to the sale of the team of horses, but defendants, in their answer, aver that the oral contract for the sale of the hay, corn, oats and stalks was had on the 17th of January, and that for the sale of the team on the 24th. In submitting the case to the jury, the court treated the transactions as separate.

It is contended by counsel for plaintiff that none of the property in question was delivered to plaintiff, and that the contract is void under the statute of frauds. There was evidence offered on the trial from which the jury may have found that a portion of the hay was baled under the immediate direction and according to the wishes of plaintiff; that the other property, except the team, which was the subject of the negotiations on January 17th, was clearly pointed out and designated. The oats were in a certain

granary; the corn, in certain fields upon the leased premises. It was not, at the time, possible to make immediate physical delivery of the corn, which was sold by the acre, to be gathered by plaintiff. It is not always necessary, in order to constitute a valid sale of personal property, that actual possession be taken thereof, but same is often controlled by the intention of the parties, which, in case of a dispute in the evidence, becomes a question of fact for the jury. All of the property was ready for delivery, and, as above stated, it is claimed by defendant that plaintiff actually took charge of the baling of the hay, and gave directions with reference to the delivery thereof to purchasers who might subsequently come for the same. Delivery of a portion of the property under the law was sufficient to take the case out of the statute of frauds. *Sempel v. Northern H. Lbr. Co.*, 142 Iowa 586; *Farmers Sav. Bank v. Newton*, 154 Iowa 49; *Smith & Son v. Bloom*, 159 Iowa 592.

2. FRAUDS,  
STATUTE OF:  
sale of personal property:  
part delivery: effect.

There was a sharp dispute between the parties concerning the alleged contracts. Defendants contend that they were completed in every detail, whereas plaintiff testified that, notwithstanding the fact that negotiations were had regarding the purchase of the property in question, no conclusion or agreement was ever reached. This question, the court properly submitted to the jury. There is no claim that the team of horses was delivered to the plaintiff, and it is admitted that delivery thereof could not be made on the 17th, because there was a chattel mortgage on the team, which defendants claim was to be released before delivery. It is also claimed that arrangements were made for the release thereof, but it was admitted on the trial that same had not been released.

Shortly after the dates on which it is claimed the above transactions were had, plaintiff commenced suit against the

defendants for the recovery of the rent claimed to be due, and took possession of all of the above designated personal property under a landlord's writ of attachment. It will be observed that two separate contracts were pleaded by the defendants, one of January 17th, and the other of January 24th. The cause was tried below and submitted to the jury upon the theory of separate contracts. While, as above indicated, there was doubtless sufficient evidence to justify the submission to the jury of the question whether there was delivery of any or all of the personal property referred to in the transaction of January 17th, there was no evidence offered tending to show delivery of the team, and as to this item, plaintiff's motion for a directed verdict should have been sustained. Delivery of part or all of the property forming the subject of the contract of January 17th would not tend to validate the alleged sale of the team under a separate oral contract entered into several days later.

Because of the error here pointed out, this cause must be reversed. Other alleged errors relied upon by appellant need not be discussed in detail, as they are not likely to arise upon a retrial of this cause.—*Reversed.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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HATTIE HIRSCH, Appellee, v. MRS. ED BUTLER, Appellant.

**APPEAL AND ERROR: Harmless Error—Admission of Conclusion**

- 1 **Evidence.** Allowing a witness to state "that he delivered to defendant all the property which he had sold to defendant" is harmless when such statement came at a time after the witness had been fully examined by both parties as to each and every item of property which the witness claimed to have so sold.

**WITNESSES: Examination—Cross-Examination—Undue Limita-**

- 2 **tion.** A cross-examiner's right to test the recollection of a witness as to the value of articles sold, when material, is in no wise lessened by the fact that the number of articles is very large.

**APPEAL AND ERROR: Harmless Error—Erroneous Refusal of Instructions—Curing Error.** It is harmless error to refuse proper instructions when the same result was reached by those actually given by the court.

*Appeal from Woodbury District Court.*—W. G. SEARS, Judge.

SATURDAY, OCTOBER 20, 1917.

ACTION in replevin. On or about the 12th day of April, 1915, plaintiff sold to defendant a quantity of furniture, located in a rooming house in Sioux City, Iowa. The description in the bill of sale did not itemize the property, but designated it in general terms, concluding with the words: "and any and all furniture, and all articles of whatsoever nature and description in above described premises." The consideration of \$1,000 was paid by the giving of \$500 in cash, and by the execution of a note of \$500 secured by a mortgage upon the aforesaid property, to be payable \$30 on the 1st of June, 1915, and \$30 on the first day of each and every month thereafter until fully paid. Defendant defaulted in the payments on the note, and plaintiff brings this action in replevin for the recovery of the property covered by the mortgage. Defendant, in her answer, admits the agreed consideration, the execution of the note and mortgage, but denies that she received all of the property sold her, and asserts that the property turned over was worth less than the \$500 paid, and that the plaintiff represented that she was selling to defendant all personal property in the rooming house in question and that was exhibited to her on the day of sale, and that, in truth and fact, she was the owner of but a part thereof, and that said representations were made for the purpose of inducing defendant to purchase said property, and that same was the property of various persons occupying rooms in said rooming house. The jury returned a verdict for plain-



tiff, fixing the value of plaintiff's interest in the property replevined at \$490.48. Defendant appeals.—*Affirmed.*

*H. F. Fellows* and *L. H. Salinger*, for appellant.

*Sears, Snyder & Boughn*, for appellee.

STEVENS, J.—Appellant relies for reversal upon alleged errors of the court in ruling upon objections to testimony, the refusal to give a requested instruction, and the instructions given by the court upon its own motion. That the court erred in respect to some of the matters complained of is manifest, particularly in the admission of the conclusion of plaintiff that she delivered all of the property sold to the defendant, the admission of the writ of replevin, and in sustaining the objection to the cross-examination of plaintiff with reference to her recollection of the value of the several items of property claimed to have been delivered to the defendant. The only question presented with respect to these matters is whether there should be a reversal of this cause on account thereof.

I. The conclusion stated by the plaintiff followed her testimony in direct and upon cross-examination, which brought out specifically each separate item which she claimed to have sold and delivered to defendant, and we do not see how this testimony could have been understood by the jury to refer to any other property than that which she had referred to in detail in her testimony.

The admission of the writ of replevin could in no way have prejudiced defendant. The more serious question arises on the ruling of the court sustaining the objection to the cross-examination of plaintiff. The cross-examination was with reference to the value of the different articles plaintiff claimed to have delivered to the defendant, and the location of the property in the rooming house, and was in

1. APPEAL AND  
ERROR: harm-  
less error:  
admission of  
conclusion of  
evidence.

2. WITNESSES:  
examination:  
cross-ex-  
amination:  
undue limita-  
tion.

part for the purpose of testing the recollection of the witness. There was a controversy between the parties as to the property covered by the bill of sale, plaintiff claiming that she had sold to the defendant certain designated articles, a complete itemized list of which she offered in evidence, whereas defendant claimed that she purchased all of the property located in the rooming house at the time the bill of sale was executed, but that a considerable portion thereof in fact belonged to roomers and was not delivered to her, so that the cross-examination was upon a material point, and was manifestly proper.

The court, upon suggestion of counsel that he had the right to test the recollection of the witness, remarked that the witness could not be expected to remember so many things. The items were numerous, and the witness may not have been able to remember each one separately, but this did not affect counsel's right to cross-examine the witness in the manner attempted in reference thereto; but the record discloses that counsel for defendant had previously interrogated plaintiff with reference to the value of such articles to the extent desired, and the examination appears to have been quite thorough. There was little dispute between the parties as to what property was actually delivered to the defendant. The remark of the court might well have been omitted, but we cannot say that any right of defendant's was materially prejudiced by the ruling upon the objection or by the remark of the court, and in our opinion, there should not be a reversal of this case on account of the above matters.

3. APPEAL AND  
ERROR: harm-  
less error:  
erroneous re-  
fusal of in-  
structions:  
curing error.

II. Counsel for defendant requested the court to instruct the jury in substance that, if it found that defendant was induced to purchase the property in controversy and to execute note and mortgage therefor by reason of misrepresentations made by plain-

tiff to defendant as to the quantity of valuable furniture on the premises occupied by her, and which she agreed to sell defendant, and that, in truth and in fact, a large quantity thereof, which she claimed to own and agreed to deliver to defendant, belonged to other persons, and that the property delivered to plaintiff did not exceed in value the cash payment of \$500, plaintiff would not be entitled to have her mortgage enforced, and the verdict should be for the defendant. The court refused to give this instruction, but instructed the jury that, if it found that plaintiff failed to deliver any part of the property sold to defendant, it should determine the value thereof and deduct the same from the amount due on the \$500 note. The jury in its verdict itemized the property which it found was sold and delivered to defendant, and fixed the value thereof. Under the issues, defendant was entitled to an instruction, substantially at least, as requested; but, unless the refusal to give the same was prejudicial to defendant, such refusal would not justify a reversal of this case.

One of the questions necessary to be determined by the jury was what property plaintiff sold to defendant, and whether same, or what part thereof, was delivered to her. The requested instruction, if given, could in no wise have aided the jury in determining these questions. It may be assumed that the verdict as to the contract and the delivery of the property sold would have been the same had the requested instruction been given as it was under the instruction submitted by the court. The finding of the jury upon the contract and plaintiff's performance thereof was conclusive against defendant's theory of the transaction. The instruction could not have aided her. We are compelled, therefore, to conclude that, while the requested instruction correctly embodied the theory of the defense offered, the refusal to give it was not prejudicial.

III. It is also argued by counsel for defendant that

the verdict is contrary to and not sustained by the evidence, and contrary to the instructions of the court. There was sharp conflict in the testimony upon all material points, and nothing appears in the record which indicates that the verdict was the result of passion or prejudice on the part of the jury. We are unable to find that the verdict of the jury is contrary to the court's instructions, and the judgment of the lower court is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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MATIE MARTENS, Appellee, v. HERMAN MARTENS, Appellant.

**LIBEL AND SLANDER:** Words Actionable—Imputation of Unchastity. It is slanderous *per se* to charge a woman with having been pregnant prior to her marriage. Evidence reviewed, and held sufficient to support such charge.

**LIBEL AND SLANDER:** Evidence—Repetition of Slander. On the trial of an issue of slander, evidence of the speaking of substantially similar statements to persons other than those charged may be admissible.

**LIBEL AND SLANDER:** Trial—Instructions—Scurrilous Adjectives—Effect. When the plaintiff bases a claim to recovery solely on the speaking of terms which were manifestly slanderous *per se*, it is not reversible error for the court to refuse to instruct that certain other vulgar terms applied by defendant to plaintiff were non-slanderous *per se*.

**LIBEL AND SLANDER:** Trial—Instructions—Separation of Actual and Exemplary Damages. Defendant has no arbitrary right to demand that the jury be instructed to so return their verdict that the same will show separately the amount allowed as actual and the amount allowed as exemplary damages.

**APPEAL AND ERROR:** Parties Entitled to Allege Error—Estoppel by Requesting Instruction. He who requests an instruction on a question of fact may not thereafter contend that there was no evidence to justify the submission of such question.

**TRIAL:** Instructions—Inapplicability to Proof—Refusal. Instructions not applicable to the proofs are properly refused.

**WITNESSES: Examination—Leading Questions—Discretion.** Principle recognized that the trial court has a wide discretion in the matter of allowing leading questions, especially in the examination of foreigners handicapped with imperfect knowledge of the English language, plus sluggish temperaments.

*Appeal from Crawford District Court.*—E. G. ALBERT, Judge.

SATURDAY, OCTOBER 20, 1917.

ACTION to recover damages for an alleged slander. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

*L. H. Salinger and Clement J. Welch*, for appellant.

*Conner & Powers and Andy Bell*, for appellee.

WEAVER, J.—Plaintiff is the wife of defendant's brother, Ed Martens. As a cause of action, she alleges that defendant, speaking to her husband of and concerning her, said, in substance:

1. **LIBEL AND SLANDER:**  
words actionable: imputation of unchastity.

"You (meaning Ed Martens) had better take that damn bitch, that bobtail bitch of a woman of yours to the hospital again and have two or three more kids taken away from her, as was done before her marriage,"—meaning thereby to imply that plaintiff had not been a virtuous woman prior to her marriage to her then husband, etc. And that plaintiff suffered thereby great distress of mind, humiliation and disgrace, and suffered in her good name and reputation with her neighbors and acquaintances, and was damaged thereby in the sum of \$12,000, etc. She also alleges that, on another occasion, the defendant, speaking of her to one L. C. Hohse and one Jennie Hohse, said: "She, Matie Martens (meaning the plaintiff), was not a virtuous woman before her marriage and had three illegitimate children before her mar-

riage to her present husband,"—meaning thereby to charge of and concerning the plaintiff that, before her marriage, she had been unchaste, and had had sexual intercourse with other men. The answer is a denial of the alleged slander. A further plea of privilege was stricken out on motion of plaintiff. The issues were tried and submitted to a jury, which returned a verdict in favor of plaintiff for \$600. Defendant's motion for new trial was overruled, and he appeals.

I. The evidence in plaintiff's behalf as to the language used by defendant in speaking of her to her husband is more or less vague and involved, a condition of the record which is due to some extent to the fact that the parties and witnesses on both sides are Germans, who, though speaking the English language, have quite imperfect command of it, and not infrequently their answers indicate lack of complete comprehension of the inquiries of counsel; but we think it fairly tends to sustain the allegations of the petition. Plaintiff's husband, as a witness, first stated his version of the words spoken to him by the defendant as follows:

"He says to me, 'You had better take that damned old bitch of a woman back to the hospital and get two or three kids taken away from her.' I says, 'Can you prove it?' and he says, 'Yes, I can; John was there and he knows it,' and he said, 'John was there and he knows,' and I said to him, 'You are framing up that you will have to prove.' He says, 'Get you a lawyer and I will show you,' and I walked away. That was the conversation that day."

Again, he says:

"Yes, I forgot another little thing in there, 'That God damned old bobtail,' is what he called her, that comes in there where he said, 'You had better take that God damned old bitch, that God damned old bobtailed bitch back to the hospital and get two or three more kids taken away from her.'"

The defendant argues that these words, even if spoken

as stated, do not charge unchastity, and, if construed to mean merely a charge that plaintiff had submitted to an abortion, or had before been pregnant, it would not constitute slander *per se*, in the absence of any showing that, at the time referred to by the defendant, she was an unmarried woman. These objections would doubtless be good, if the testimony quoted were all that there is upon that subject; but the witness, at another stage of his examination, testified as follows:

"Q. Well, you say that he said it was before your wife was married that these kids had been taken away from her; now just tell where that came in and how it was said, that part of the answer; or did he say it was before she was married? A. Yes, sir, he said it was before she was married."

It was true that this witness was, upon cross-examination, led into more or less contradictory and inconsistent statements having legitimate tendency to discredit him, but his credibility was a question for the jury alone. The witness L. C. Hohse, speaking of the words charged to have been spoken by defendant to him concerning the plaintiff, testifies:

"Well, all he said was that she had children before she was married. I can't remember how he said it; that was too long ago. All I know is that he mentioned that she had children before she was married, and he called her a bob-tail."

While the separate alleged cause of action based upon the defendant's statement to this witness was withdrawn from the jury, we think the evidence is admissible for its bearing upon the issues joined on the other count of the petition.

2. LIBEL AND  
SLANDER:  
evidence:  
repetition of  
slander.

It follows that the record is not without support for a finding by the jury that defendant stated that plaintiff did become pregnant and have children, born or aborted, before she was married; and this we have no doubt is slanderous *per se*.

3. LIBEL AND SLANDER : trial : instructions : scurrilous adjectives : effect.

II. The defendant objects that the words "bitch" or "damned old bitch" said to have been applied by him to plaintiff are not slanderous *per se*, and the court erred in not so instructing the jury, as requested by the defense. That these words alone are not slanderous *per se* may be admitted, but the charge on which plaintiff relies is not that these contemptuous terms were spoken of her, but of the other words used in connection therewith, which plainly charged that she had borne children before she was married. If such language was used, it clearly imported a charge against the woman's character for virtue. It needed no colloquium in the petition to make the charge definite or complete, and no proof that those who heard the words spoken understood them in a defamatory sense. While the instruction asked might well have been given, we are not disposed to hold that its refusal was error.

III. Error is assigned upon the giving of certain instructions, but, as no exception was taken thereto in the manner prescribed by statute, at or before the time when the jury was charged, the errors, if any therein, must be deemed waived.

4. LIBEL AND SLANDER : trial : instructions : separation of actual and exemplary damages.

In the motion for new trial, counsel made affidavit that, before the charge was given the jury, they orally asked the court that, in submitting forms of verdict for the not so instructing the jury, as requested by case the jury found in plaintiff's favor, it should separately state or assess the actual or exemplary damages allowed her; and error is assigned upon the court's



failure so to do. Assuming, but not holding, that the question may be properly raised in the manner here attempted, no error is shown. There is no statute or settled rule of practice giving a party the right to make such demand. If there be, in the judgment of the court, any good reason for this sort of cross-examination of the jury, it is perhaps within its discretion to submit such form of verdict, but the wisdom or propriety of it as a rule is not apparent. This is especially true in a case of alleged slander *per se*, where there is neither charge nor proof of special damage. Actual damages in such case are presumed, and, like exemplary damages, are left to the discretion of the jury—a discretion which the court cannot overrule, except where it is exercised so unreasonably as to indicate clearly the influence of passion or prejudice. In a slander case so submitted on the mere presumption of damage, it is safe to say that no jury ever attempts to fix a sum by way of actual damages for the presumed injury, and then to add thereto another definite sum by way of example, but rather to name some reasonable amount which shall fairly answer both purposes. The jury has enough conundrums to answer without adding to its embarrassment a command to separate the unseparable.

IV. The defendant moved for a directed verdict in his favor, on the ground that there was no testimony on which a verdict could be sustained, and has assigned error on the refusal of this motion. For reasons already stated, the ruling must be sustained.

Moreover, if there were any error in this respect, it would have to be treated as waived. It is a well settled rule that a party asking instructions which, if given, would submit to the jury an issue of fact, cannot thereafter be heard to say that there was no evidence for the jury's consideration. *Cheney v. Stevens*,

5. APPEAL AND  
ERROR:  
parties en-  
titled to allege  
error: estoppel  
by requesting  
instruction.

173 Iowa 289; *Gordon v. Chicago, R. I. & P. R. Co.*, 154 Iowa 449; *Carnego v. Crescent Coal Co.*, 163 Iowa 194. The defendant here requested the court to charge the jury as follows:

"The question of the plaintiff's character for virtue and chastity is not in this case. A verdict for the plaintiff would not prove that she was a virtuous or chaste woman, and a verdict for the defendant would be no evidence that she was impure or unchaste. The only things to be considered by you are: Did the defendant speak the words the plaintiff charges him with, and what damage has plaintiff sustained?"

Modifying it somewhat in form, the court gave the instruction as follows:

"The real character of the plaintiff for virtue and chastity is not an issue in this case. A verdict for the plaintiff would not prove that she was a virtuous or chaste woman, and a verdict for the defendant would be no evidence that she was impure or unchaste. The only things to be considered by you are: Did the defendant speak the words, or substantially the words, charged by the plaintiff? And if you so find by a preponderance of the evidence, then what damage, if any, has the plaintiff sustained?"

Practically the only material change made in the form of the instruction as asked was in the insertion of the phrase, "or substantially the words," where they appear in the last sentence of the paragraph. It thus appears that the defendant, adopting the theory that the record presented a case for the jury, asked the court to charge that the one issue to be considered was whether defendant did or did not speak the alleged slanderous words, and if so, to determine the amount of plaintiff's damages. Acquiescing in that theory, the court did so instruct, and no error can be successfully assigned upon the ground that no case for the jury was presented, or that the speaking of the alleged words did

not amount to slander *per se*. The modification of the instruction does not materially affect the situation, because: First, the modification was proper; and second, even if the court erred in respect thereto, or had refused the instruction entirely, the asking of it would still work a waiver of the right to urge an exception to the submission of the cause to the jury.

V. It is further said by appellant that the court should have instructed the jury that, if the alleged slanderous words were spoken in German, no recovery could be had by the plaintiff, because her petition alleged the words to have been spoken in English.

The petition does not in terms aver that the words were spoken in English, but such is the fair, if not the necessary, implication. But we think there was no evidence upon which the jury would be justified in finding that the words, if spoken at all, were in German. The defendant does not say they were in German, for he denies using the opprobrious words at all; while the plaintiff's husband, the only other witness attempting to repeat the interview, says they were spoken in English. At one place in his testimony, while speaking of the quarrel in general terms, the witness does say that the talk was partly in English and partly in German; but, when his attention was directed to the particular words of alleged slander, he says specifically that they were spoken in English; and, assuming that the jury found, as it evidently did find, that the slander was in fact uttered as charged, there could be no finding or proper inference that it was spoken in the German tongue. The assignment of error must be overruled.

VI. The point for reversal most elaborately argued is that the court erred in permitting counsel for plaintiff to put leading questions to his own witnesses. This has

6. TRIAL: in-  
structions: in-  
applicability  
to proof: re-  
fusal.

7. WITNESSES:  
examination:  
leading ques-  
tions: dis-  
cretion.

special reference to the examination of Ed Martens, the husband of plaintiff.

Appellant has brought into the record very considerable portions of the examination, questions and answers, to illustrate the point so made. We shall not extend this opinion for their reproduction. It must be admitted that plaintiff's counsel were given a wide margin of liberty in this examination, and at times its permission came perilously near the boundary line between sound judicial discretion and its abuse; but the circumstances were such that we do not feel justified in holding that this boundary was actually transgressed. The witness, as we have before noted, was evidently a man of foreign birth, and had acquired but very imperfect mastery of the language of his adopted country; and this handicap, emphasized by an evidently sluggish mental equipment, made his examination one of real difficulty. To get anywhere with such a witness, a degree of leading is permissive which would be wholly out of place under other circumstances. It is a very rare occurrence where an appellate tribunal will order a reversal on such grounds, and we think such an exceptional case is not here presented.

Other points are made in argument, but all appear to be ruled by the conclusions hereinbefore stated. We find no reversible error in the record, and the judgment of the district court is—*Affirmed*.

GAYNOR, C. J., PRESTON AND STEVENS, JJ., concur.

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STATE OF IOWA, Appellant, v. PHILLIP BOGGS, Appellee.

**MALICIOUS MISCHIEF: Evidence—Operation of Automobile—Consent of Owner—Effect.** When the original taking and operating of a motor vehicle is with the *consent* of the owner, as required by Section 4823, Code Supplement, 1913, the taker and

operator may not be convicted under *said* section, even though the consent was fraudulently obtained and the use and operation of the car were in excess of the permission so obtained.

*Appeal from Wapello District Court.*—D. M. ANDERSON,  
Judge.

SATURDAY, OCTOBER 20, 1917.

DEFENDANT, who was indicted under the provisions of Section 4823 of the Supplement to the Code, 1913, was tried and acquitted by the jury. An instruction requested by the State was refused, and exception taken. The State appeals. The material facts are stated in the opinion.—*Affirmed.*

*H. M. Havner*, Attorney General, *H. H. Carter* and *F. C. Davidson*, Assistant Attorney Generals, and *Elmer K. Daugherty*, County Attorney, for appellant.

*A. W. Enoch* and *W. S. Asbury*, for appellee.

PER CURIAM.—The indictment in this case is based upon Section 4823 of the Supplement to the Code, 1913, the material part of which is as follows:

MALICIOUS  
MISCHIEF:  
evidence:  
operation of  
automobile:  
consent of  
owner: effect.

“ \* \* \* or if any chauffeur or other person shall without the consent of the owner take, or cause to be taken, any automobile or motor vehicle, and operate or drive or cause the same to be operated or driven, he shall be imprisoned \* \* \*.”

At the close of the testimony, counsel for the State requested the court to give the following instruction:

“ \* \* \* that consent given by the owner of the car given for specific purpose or for a stated time would not be consent to use the car for a different purpose, nor generally, nor for an unlimited time, and consent to use the car for a period of fifteen or twenty minutes would not be consent to drive the car to Muscatine.”

The court refused to give the above instruction, but in lieu thereof gave the following:

"5. The gist of the offense charged is the taking and driving of the motor car in question without the consent of the owner. The defendant is not on trial in this case for any other offense than that charged in the indictment. If the owner consents to the person charged taking and driving the car, then the person charged cannot be convicted of taking and driving the car, even though he may drive it for a long distance, or may damage the car or may even convert it to his own use. If the owner consents to the taking and driving and suffers any wrong therefrom, then his remedy is something other than a prosecution under the statute for taking and driving without his consent."

The above statute was evidently enacted for the purpose of providing punishment for the taking and operating of an automobile or other motor vehicle, or causing the same to be taken and operated without the consent of the owner, under circumstances not amounting to larceny. The taking of a motor vehicle and operating the same without the intention of appropriating it permanently to the use of the person so taking and operating it is not larceny, and could not be punished as such.

It appears from the evidence that defendant obtained consent of the owner to take and operate his automobile for fifteen or twenty minutes, and that, after obtaining possession thereof, he drove the same about Ottumwa, and then, with some companions, to Muscatine, where the car became disabled and was left in a garage. It is contended on behalf of appellant that consent obtained by trick, deceit or misrepresentation is not consent in fact. The word "consent," as used in this connection, we think, should be interpreted as meaning voluntarily yielding the will to the proposition of another; acquiescence or compliance therewith. The owner's consent must precede the act of taking, or

assuming possession of, the motor vehicle, and does not relate to what transpires thereafter. As stated by the court, the gist of the offense is the taking and operating, or causing a motor vehicle to be taken or operated, by another without the consent of the owner. The statute was not designed to punish one who, by misrepresentation or for a fraudulent purpose, obtains consent of the owner to take and operate his motor vehicle, but one who takes possession thereof without permission or consent of the owner.

The instruction of the court was substantially correct.  
—*Affirmed.*

GAYNOR, C. J., WEAVER, PRESTON AND STEVENS, JJ., concur.

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STECKEL & SON et al., Appellants, v. MARTIN SMITH et al.,  
Appellees.

**PRINCIPAL AND AGENT: Mutual Rights—Agent Speculating on**  
1 Subject Matter. An agent who takes an assignment of the subject matter of his agency will be *presumed* to have intended to account to his principal for all profits realized.

**PRINCIPLE APPLIED:** Defendant purchased a farm of Morain and executed his \$500 note to Morain. This left \$2,000 to be raised in cash. Plaintiff was defendant's agent, and it was agreed that plaintiff would secure a loan for said \$2,000. Defendant executed his \$2,000 note and mortgage to plaintiff, his agent, but plaintiff advanced nothing thereon. The deed to defendant, and all other papers, were held by plaintiff in escrow. Plaintiff was unable to get the loan. Controversy ensued between defendant and Morain. Defendant claimed damages of Morain on one feature of the contract. Litigation was started. At this point of time, plaintiff, *with defendant's consent*, took an assignment from Morain of all his interest in the deal. For this assignment plaintiff paid Morain \$1,625, and defendant waived his claim for damages against the vendor. Plaintiff later sued defendant on the \$500 note to the vendor, and on the \$2,000 note to himself, on the theory that the said assignment to him simply placed him in the shoes of the vendor.

*Held*, plaintiff was entitled to recover his \$1,625 only—that he was not entitled to make a profit out of his principal, the defendant.

**TRIAL: Reception of Evidence—Reopening Case—Laches.** After 2 full submission of a cause to the court, complaint may not be made of the refusal of the court to reopen the cause for additional testimony, when the materiality of such testimony was apparent from the inception of the trial.

**BILLS AND NOTES: Consideration—Failure.** The payee of a 3 note may not recover thereon when the consideration is the unfulfilled promise of payee to pay a debt owed by the maker to a third party.

*Appeal from Davis District Court.*—D. M. ANDERSON,  
Judge.

SATURDAY, OCTOBER 20, 1917.

PLAINTIFF'S principal cause of action is based upon three promissory notes. There was one for \$2,000 and one for \$500, each dated March 5, 1913, with interest thereon at 7 and 6 per cent respectively, payable semiannually, and, in case of default in the payment thereof when due, both principal and interest to draw interest at 8 per cent. The \$2,000 note was made payable to Steckel & Son; the \$500 note to William H. Morain. Both were signed by Martin Smith, Mary Smith and David Smith, and secured by separate mortgages on the real estate hereinafter described. There was also a note for \$531.45, bearing date March 1, 1913, with interest at 8 per cent, payable semiannually, and several smaller notes and accounts which are not at this time important. The first two notes grew out of the following transactions: On March 5, 1913, William H. Morain and Martin Smith entered into a written contract, by the terms of which the former, in consideration of \$5,000 to be paid to him by the latter, agreed to convey to him the south one half of the northeast quarter and the north fractional one



half of the northwest quarter, and a pass way between said tracts on the northeast corner of the southeast quarter of the northwest quarter, all in Section 3-70-13, Davis County, Iowa, said consideration to be paid as follows: Grantee to assume and pay a note of \$2,500, payable to H. K. McVey, with interest thereon at 6 per cent from and after March 27, 1913, secured by first mortgage upon the above premises, to pay \$2,000 in cash, and to execute a note of \$500, to be signed by himself, wife, and David Smith, his father, and to be further secured by a mortgage upon the above premises, which was to be subject to a prior mortgage of \$2,500, and one for \$2,000. The note for \$531.45 was given in payment of a balance due appellant on a \$1,300 note, and is payable to the order of Steckel & Son. Included in this note was an item of \$72, referred to in the evidence as the La Force judgment. On the same day, W. J. Steckel wrote the deed, which was executed by Morain, the notes and mortgages above referred to, and also an application to the Mutual Benefit Life Insurance Company for a loan of \$2,000. These notes and mortgages were signed by the parties about the 11th of April. The papers, after being duly executed, were turned over to W. J. Steckel, to be held by him, except the \$500 note, which Martin Smith claims to have mailed to him on March 17th by mistake; but in any event, all of the above papers from the latter date have been in the possession of appellants. No money was advanced by appellants to Martin Smith or any other person, upon any of the notes, except that two installments of interest upon the McVey note were paid by the bank. The application for the \$2,000 loan was declined, on the ground that the land was in separate tracts and remote from a public highway. Steckel notified Smith of his inability to get the loan from the insurance company. In the meantime, the owner of the land adjoining the above described tracts refused Smith the use of

the pass way referred to, and Smith immediately notified Steckel not to turn the \$500 note over to Morain, as he intended to claim damages. Steckel failed to obtain a loan for Smith, who was, therefore, unable to carry out the terms of his contract with Morain; and, about the first of March, 1914, the latter commenced suit against Smith for possession of the premises. While this suit was pending, and on March 12, 1914, Steckel procured from Morain a written instrument purporting to assign to him all his right and interest in the warranty deed to Smith, the \$500 note and some other small items, and providing for the endorsement of the \$500 note to plaintiff without recourse, and containing some provision regarding the encumbrances upon the land. Appended to the above instrument was a brief statement signed by Martin Smith, in terms agreeing to the contract and waiving all claims against Morain. The defendants, for answer to plaintiffs' petition, admitted the alleged relationship of plaintiffs, which was wholly mutual, and that they signed the \$2,000 note and mortgage to secure the same, and averred the execution thereof without consideration and for the purpose of procuring a loan. They also admitted the execution of the note for \$531.45, but allege full payment thereof. Amendments were filed to plaintiffs' petition, and by defendants to their answer, reciting in detail many matters not necessary to be set out here, as there is little, if any, controversy concerning them. In so far as the same are material, they will be hereafter referred to. The court found that the note for \$531.45 had been fully paid by the proceeds of the sale of the personal property described in the mortgage; that the mortgage had been entirely satisfied; that defendants should pay plaintiff \$1,625, with interest on the notes for \$2,000 and \$500; and that defendants were indebted to the plaintiff upon other items aggregating \$431.49; and rendered judgment against the defendants for \$2,291.59, costs and attorney fees, and

decreed the foreclosure of the two real estate mortgages, and appointed W. J. Steckel receiver to take charge of the mortgaged premises, and rent and care for the same pending the further progress of this litigation. From this judgment and decree, plaintiff appeals.—*Affirmed.*

*Payne & Goodson*, for appellants.

*E. Rominger, T. P. Bence, and J. F. Scarborough*, for appellees.

STEVENS, J.—I. It will be observed from the foregoing statement that all of the papers referred to were prepared by W. J. Steckel, and that the contract between Morain and Smith, the deed executed by Morain, the \$2,000 note, the mortgage given to secure the payment thereof, and the application for the \$2,000 loan, were, after their execution, turned over to appellant. He therefore held the contract and deed as the agent for both Smith and Morain, and the other papers, except the note for \$531.45, as the agent of Smith. At the time Smith signed the application for the loan, he paid Steckel \$25. Plaintiff, in his petition, asks judgment upon both notes for the full amount thereof, with interest thereon from date, according to their terms. Appellees contend that the court rightly allowed plaintiff only the amount paid by them to Morain, with interest thereon from March 12, 1914, the date of the payment; whereas appellant claims that, by the transaction with Morain, it, with the knowledge and consent of Smith, became the owner of the \$500 and \$2,000 notes, and that whatever profit resulted from the transaction with Morain should belong to appellant, and not to appellees. This is the principal controversy presented upon this appeal.

As before stated, the relation of plaintiffs and Martin Smith, during all of the time covered by the several transactions, was that of principal and agent. Steckel had un-

dertaken to procure a loan for Smith, to enable him to complete the purchase of the land from Morain, and the \$2,000 note and mortgage were executed therefor. No money was advanced upon this note, and both parties, impliedly at least, understood that it was to have no force or effect until the loan was made. The \$500 note, Smith undoubtedly sent to Steckel by mistake, which note Steckel held as his agent only, and he had previously received notice from defendant not to deliver the same to Morain, as he claimed damages on account of the controversy over the pass way between the two tracts of land. The result, therefore, of the alleged assignment, coupled with defendant's claimed consent, was to give effect to the \$2,000 note as a valid indebtedness, and to waive such claim as defendant may have believed he possessed against Morain for damages, at a cost to plaintiff of \$1,625. The manifest improbability of defendant's consenting to permit his agent to traffic in a note for \$2,000 for which he had received no consideration, and a \$500 note against which he believed he had a defense, in whole or in part, without even the probability of some reciprocal benefit to himself, is so contrary to ordinary transactions and methods of doing business as to require further consideration.

At the time of this transaction, a suit was pending against defendant for possession of the farm, and all papers forming the subject of the alleged assignment were held by plaintiff as the agent of Smith, while the unrecorded deed was held by him as the agent of both Smith and Morain. It is an elementary principle of the law of agency that, in all matters touching the subject matter thereof, the agent must act in absolute and perfect good faith toward his principal. The relation between them is fiduciary in character, and the vital principle of it is good faith, without which the relation cannot exist. That an agent who deals with the

property of his principal in such a way as to produce a profit must account to the principal therefor, is familiar doctrine. The Supreme Court of Missouri, in *Harrison v. Craven*, 188 Mo. 590, 606, referring to the duty of the agent to the principal, says:

"Assuming the fiduciary relation resulting from the contract of agency, it is elementary law, not needing fortification by citation of authority, that an agent may not speculate off of his principal in the subject matter of his employment, that he may not place himself in a situation where self-interest impels him to overreach his principal, that he may not seize benefits with both hands, coming as well as going, and further, that a court of conscience, when a trust results from such wrongful conduct, will stretch forth its arm and strip him of all benefits acquired at the expense of his principal and which should inure to the principal's advantage under the terms of the employment."

Sec, also, as bearing upon the question of the duty and responsibility of the agent to the principal, *Bergner v. Bergner*, 219 Pa. St. 113; *Eoff v. Irvine*, 108 Mo. 378; *People v. Township Board*, 11 Mich. 222; *Holmes v. Cathcart*, (Minn.) 92 N. W. 956; *Supreme Sitting of the Order of Iron Hall v. Baker*, (Ind.) 20 L. R. A. 210; *Mechem on Agency*, Secs. 1188 to 1191, inclusive; *American Mortgage Co. v. Williams*, (Ark.) 145 S. W. 234. In the absence of evidence from which the contrary may necessarily be inferred, we may presume that plaintiff, as the agent of Smith, in assuming to procure a loan for him and in dealing with the papers of appellee in his possession, intended to account to his principal for whatever profits resulted therefrom. It is undoubtedly true that the principal may consent that the agent may deal with the property for his own benefit, and may waive any rights to profits accruing from transactions in relation thereto; but the situation in which the defendant was placed and the relation between the parties to this suit

were not such as to lead to the conclusion that the transaction in question was of this character. In the absence of evidence to the contrary, it must be presumed that defendant, at the time he signed the brief memorandum appended to the alleged contract of assignment, did not intend to aid his agent to speculate upon the papers held by him at a profit of \$875. As above stated, the \$2,000 note, which was at the time in the possession of Steckel, did not represent an indebtedness due from defendant to plaintiff or any other person. Steckel would have been compelled to deliver both notes to defendant upon demand. It is quite inconceivable that either party understood, or intended, that the transaction was in the interest of plaintiff and without regard to the reasonable interests of the defendant.

There is no apparent reason why Smith should desire thus to deal with Steckel or consent that he be so dealt with. During all the time of the controversy, Steckel had been the confidant and agent of the defendant, as well as of Morain. Smith, in agreeing to the alleged assignment, must have understood that he was to be at least so far benefited thereby as to receive compensation for the damages he claimed against Morain, and be placed in a position to complete the purchase of the land. There is no other way of reconciling the transaction and conduct of Steckel with the integrity and good faith required of an agent. He was a man of large business experience and capacity, whom Smith had constituted his agent and confidant, and was bound to deal with him with perfect fidelity. The transaction as above construed was wholly provident upon the part of Steckel. He stood to lose nothing. The payment of the notes was amply secured, while, upon appellant's theory, the transaction from the viewpoint of appellees was wholly benevolent. There is some evidence of conduct and claims upon the part of Smith seemingly inconsistent with the

conclusion above stated, but they all occurred after the execution of the above assignment, and refusal of Steckel to close the deal, and should not be construed too strictly against him.

The court in its decree found that plaintiff was entitled to recover \$1,625, the amount paid for the alleged assignment, with 7 per cent interest from March 12, 1914. This finding of the court was in accordance with familiar principles of equity, and does full justice between the parties.

2. TRIAL: re-  
ception of evi-  
dence: reopen-  
ing case:  
laches.

It is proper in this connection to refer to the claim of appellant that the court, upon application made therefor, should have set aside the submission of this cause and permitted them to offer oral evidence upon the question of the understanding and agreement between Steckel and Smith at the time of the execution of the assignment and the memorandum of consent. Counsel states that this evidence was not deemed material until after the court had announced its findings. It appears that appellee from the beginning of this suit claimed the benefit of this transaction, and that the \$2,000 note had been executed for the purpose of obtaining a loan, and that appellants had never advanced any money on either of the notes until the \$1,625 was paid to Morain. It would seem, therefore, that the materiality of this testimony was apparent before the cause was finally submitted. We do not think the court abused its discretion in refusing to set aside the submission and receive further evidence.

3. BILLS AND  
NOTES: con-  
sideration:  
failure.

II. The court found that the note for \$531.45 and the chattel mortgage given to secure the same had been fully paid and satisfied by the sale of the property covered thereby, and that plaintiffs were not entitled to judgment or foreclosure thereon. This finding of the court is also crit-

icised. Included in this note was an item of \$72, which represented a judgment for that amount in favor of Dr. La Force against Smith. At the time the note was given therefor, Steckel agreed to pay this judgment, but it appears from the evidence that he has not done so, and the court properly refused to enter judgment in plaintiff's favor therefor. The finding of the court upon this point was right.

III. There are some other small items about which there is some controversy, but they do not call for either a modification or a reversal of the decree and judgment of the trial court, and no good purpose would be served by discussing them in detail. The judgment of the lower court is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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F. S. WING, Appellant, v. CREDIT GUIDE COMPANY et al.,  
Appellees.

**FRAUD: Acts Constituting—Irregular Issuance of Corporate Stock.**

- 1 Principle recognized that one may not predicate fraud on facts concerning which he had the fullest knowledge prior to parting with his money. So held in a transaction involving the purchase of corporate stock.

**CORPORATIONS: Certificates of Stock—Issuance in Payment for**

- 2 **Money Advancements—Legality.** A corporation may validly issue its stock in payment of bona fide advancements of money to the corporation.

*Appeal from Marshall District Court.—J. W. WILLETT,*  
Judge.

SATURDAY, OCTOBER 20, 1917.

THE opinion sufficiently states the case.—*Affirmed*.

C. H. Van Law, for appellant.

Boardman & Lawrence, for appellees.



1. FRAUD: acts  
constituting:  
irregular issu-  
ance of corpo-  
rate stock.

WEAVER, J.—The petition is drawn in two counts. The first count is entitled in equity to compel the individual defendants A. H. E. Mathews, Helen E. Boggie and C. H. E. Boardman to return to the Credit Guide Company, a corporation, the sum of \$1,250, alleged to have been withdrawn or appropriated from the corporate funds by the said defendants. The second count is entitled as at law, and seeks recovery of said sum of \$1,250 as damages occasioned to the plaintiff by the fraud of said individual defendants in the sale to him of stock in said corporation. Defendants having denied both claims, the issues were tried to the court without a jury. The court found that neither of the two claims sued upon had been sustained by the evidence, dismissed the petition and taxed the costs to plaintiff, who appealed.

The argument for appellant is directed entirely to the proposition that fraud was practiced upon the plaintiff, and that the stock was void as being issued in disregard of the statute. The claim of fraud rests entirely upon the testimony of the plaintiff, and may be reduced to the statement that he was induced to purchase \$1,000 of the capital stock of the corporation by the representations made by defendants, to the effect that the total issue of stock (\$2,000) represented actual payments to the corporation of that amount, when in fact such alleged payments had never been made. The preponderance of the evidence fairly shows that the exact and true financial condition and history of the corporation and the manner in which the stock subscriptions had been paid were fully revealed and made known to the plaintiff before he purchased and paid for the Boggie shares. The individual defendants had been the promoters of the company, had organized its business, and had for some time been endeavoring to get it upon its feet

as a going concern. They gave their personal notes to a bank, which supplied the needed ready money, and became otherwise individually obligated, so that, at the time plaintiff appeared upon the scene, the total amount of the investments in the corporation was, in round numbers, \$2,000. The stock was not in fact issued until the transactions hereinafter mentioned. At the time Miss Boggie's interest was about to be transferred to the plaintiff, the matter of the advancements and payments made by the individual defendants did not fully appear on the books of the corporation, or at least it did not appear of record that the stock issued had thus been paid for. A corporate meeting was held, and the individual defendants delivered or deposited with the treasurer their several checks, aggregating \$2,000, and stock to that amount was issued to them, and later on the same day, the same amount was checked back to them by the treasurer. As a part of the amount charged against the company consisted of outstanding obligations on which these defendants had become individually responsible, it was arranged that they should assume and pay such indebtedness, and the evidence tends to show that this has been done. It is this transaction which the plaintiff assails, on the ground that it was a mere sham to make it appear to him that the stock had been paid for in full when such was not the truth. But it is fairly shown that he was in no manner deceived, and that he knew the stock had been fully paid for in money advanced and furnished and in the personal assumption of liability for corporate debts, and that, if defendants were held to repay to the treasury the sum of \$2,000 represented by the checks above mentioned, it would be, in effect, a double collection of the amount of their stock subscription.

The plaintiff is the party charging fraud, and the burden is upon him to establish it by a preponderance of the

evidence. In this we think he has failed, and the preponderance of the evidence is in fact with the defendants, that he was in no manner misled by any representations on their part. Repeatedly, as a witness, he reiterates the statement that the one thing he complains of is the misleading effect of the apparent payment of \$2,000 into the treasury on the day the stock was issued. Yet he concedes that, if not present at the meeting at which all this was done, he was present immediately afterwards, and was given the written minutes of the meeting, showing not only the deposit of the \$2,000, but also its immediate withdrawal. It is quite impossible that he should have been deceived, and the trial court did not err in refusing him a recovery.

This is not a case coming under the ban of the statute which prohibits the issue of stock for other than a money payment of the subscription, except upon permission given by the state executive council. The money had been paid to or for the corporation, though the stock had not yet been formally issued, and there is nothing in the language or intendment of the statute which forbids recognition by the corporation of payments and expenditures so made in its behalf, or the issuance of its stock to the amount thereof.

There is no good ground for a reversal, and the judgment below is—*Affirmed*.

GAYNOR, C. J., PRESTON AND STEVENS, JJ., concur.

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W. H. CORREY, Appellee, v. INTER-URBAN RAILWAY COMPANY,  
Appellant.

**TRIAL:** Conduct of Counsel—Persistent Offer of Rejected Testimony—New Trial. Counsel has the right to persist in the

good-faith offer of rejected testimony until he has made a fair record of the fact which he desires to prove.

**NEW TRIAL: Grounds—Newly Discovered Evidence on Noncontested Issue.** Newly discovered evidence on a noncontested issue is no ground for a new trial.

*Appeal from Perry Superior Court.*—WALTER CARDELL, Judge.

THURSDAY, OCTOBER 25, 1917.

ACTION to recover double damages for the killing of plaintiff's horse upon the defendant's track, the said horse having escaped from a pasture, as alleged, to the defendant's right of way, through a fence which it was the duty of the defendant to maintain. The principal defense was concentrated on the question that the horse did not escape upon the right of way through the alleged defective fence, but that the horse was unlawfully running at large upon the defendant's right of way at a place where the defendant had no lawful right to fence, because the same was within the town plat of the town of Perry. There was a trial to a jury and a verdict for the defendant. A new trial was granted upon motion of the plaintiff. From such order granting a new trial, the defendant has appealed.—*Reversed and remanded.*

*William H. McHenry*, for appellant.

*Dugan & Dugan, Giddings & Blake* and *Thomas M. Tiernan*, for appellee.

EVANS, J.—Two grounds were specified in the motion for a new trial. The motion was sustained generally. We have to consider whether the motion could fairly be sustained upon either ground.

1. TRIAL: conduct of counsel: persistent offer of rejected testimony: new trial.

The first ground was the alleged mis-

conduct of counsel for the defendant upon the trial, in that he made persistent offers of a certain kind of evidence after adverse rulings by the court. It appears from the record that the horse had at times been kept in a pasture adjoining the defendant's right of way on the west side. The horse was injured some time during the night of September 24, 1914. It was the contention of the plaintiff that he put the horse in this pasture in the early evening of such night, and that he was found the next morning on the defendant's right of way, lying dead within a few feet of the rails, and having a broken leg. The place on the right of way was a few hundred feet north of the pasture in question. The defendant undertook to prove by certain witnesses that the horse in question, with others, broke out of the pasture in the early evening before, and went first into the pasture of Mowrer, and afterwards left such pasture and was running at large, and that they were driven in the direction of the home of the plaintiff, which was some distance away from the pasture in question. This testimony was all rejected by the court. The complaint is that the defendant's counsel was guilty of misconduct in making repeated offers of this testimony after an adverse ruling by the court. The following examination of the witness Mullen furnishes the principal basis for this complaint.

"Q. Now on the evening before the time that you learned of his horse being found up there by Pattee Park, state what happened there in that pasture and on your lands, and what experience you had with Mr. Correy's horse? (Mr. Blake: Objected to as incompetent, irrelevant, and immaterial, not definitely bearing on any issue. Court: Sustained. Exception saved.) Q. The night before you heard of this horse being found dead up by the Pattee Park, did all of the horses that were in this pasture used by Mr. Correy leave the pasture and get into your fields? (Mr. Blake:

Objected to as incompetent, irrelevant and immaterial, not definitely bearing upon any question in issue. Witness hasn't shown himself competent to testify as to any horses that were in Mr. Correy's field on any night. Court: Objection sustained. Exception saved.) Q. The night before the morning that you learned of this horse being found near the Pattee Park, what is the fact as to whether or not there were or had been any horses in the Creek pasture known as the Correy pasture? (Mr. Blake: Objected to as incompetent, irrelevant and immaterial, not shown to refer to any horse in particular or the one claimed to have been killed. Court: State what you know about the horses in there. Exception saved.) A. I was over at the Correy pasture between 6:30 and 7:00 P. M. I was over there thirty minutes, and there was no horses in the Correy pasture at all. Q. Where were the horses? (Mr. Blake: Objected to as incompetent, irrelevant and immaterial. Court: Sustained. Exception saved.) Q. Were the horses in your field? (Mr. Blake: Same objection—not showing that there were any horses yet. Court: Sustained. Exception saved.) Q. Did you see any of Correy's horses there when you went to his pasture? Did you find any of Correy's horses in the vicinity of this pasture? A. Yes, sir. Q. Where were they? A. On the hay land owned by W. P. Mowrer. Q. Where is that hay land with reference to the Correy pasture? A. Adjoins it on the south. Q. How many head of horses belonging to Correy did you find in this pasture? (Mr. Blake: Objected to as incompetent, irrelevant and immaterial. Court: Sustained. Exception saved.) Q. You say when you visited that pasture about 6:30 or 7:00 there were no horses in the Correy pasture? (Mr. Blake: Objected to as a repetition. Court: Sustained. Exception saved.) Q. When you found these horses in the hay land that you have described, what did you do with them? (Mr.

**Blake:** Objected to as incompetent, irrelevant and immaterial. It makes no difference as to what the witness did with any of Correy's horses excepting a certain horse. **Court:** Sustained. Exception saved.) **Q.** Did you drive those horses out of your hay field? (**Mr. Blake:** Objected to as incompetent, irrelevant and immaterial. **Court:** Objection sustained. Exception saved.) **Q.** Where did you drive them? (**Mr. Blake:** Same objection as last made. **Court:** Sustained. Exception saved.) **Q.** What is the fact, Mr. Mullen, as to whether or not you or someone else, if there were someone else, drove all of those horses of Correy's that were in your hay field found there that night, if you didn't drive them down to the southwest and put them out upon the public road? (**Mr. Blake:** Same objection, and the further objection that counsel is attempting to testify and to put matters before the jury by the use of incompetent, irrelevant and immaterial questions that should not go before them. **Court:** Sustained. Exception saved.)"

Defendant's counsel was entitled to make a fair record of what he was offering to prove. It is manifest that the first few questions to which objections were sustained did not sufficiently disclose what the defendant proposed to prove. Further examination was necessary for that purpose. The court could have required the defendant to make his offer in the absence of the jury, if the making of the record in the presence of the jury was deemed prejudicial. No suggestion of this kind was made by the court or either counsel. The method adopted was quite the usual one, and we see no ground for characterizing the action of counsel as misconduct. We feel constrained to say also that the evidence offered was admissible, and ought to have been received. It clearly tended to negative the contention that the horse came from the pasture through the alleged defective fence.

This furnishes a further reason why we should be slow to hold the offer of the evidence as prejudicial to the plaintiff or as misconduct on the part of the defendant. We hold, therefore, that a new trial could not properly be granted upon this ground.

The further question remains whether

2. **NEW TRIAL:** the motion was properly sustained on the grounds: newly discovered evidence on non-contested issue. newly discovered evidence was that of the witness Fiscel, who was a passenger upon the interurban train which was supposed to have struck the plaintiff's horse. Fiscel's affidavit discloses that, while riding within the city of Perry, he felt a distinct shock; that soon thereafter, the train having been stopped, he walked back and found the horse in question within a few feet of the rails, suffering from a broken leg. The circumstance thus offered to be proved was, of course, very persuasive, as tending strongly to prove that the injury of the horse resulted from a collision with the train. The defendant contends, however, that the evidence was cumulative only, in that such fact was not contested at all upon the trial. The circumstances relied on at the trial were that the horse was found lying on the right of way, within a few feet of the defendant's rails, and having a broken leg. It is true that the defendant's answer contained a general denial. It pleaded affirmatively, however, "that the horse in question was unlawfully at large and unlawfully on the defendant's road at the time of the accident in question," and "that the said horse was a trespasser on the road of this defendant at the time of the accident in question." The defendant offered no testimony on the trial in question tending in any manner to deny the fact that the injury was caused by a collision with defendant's train. At the close of the evidence, the defendant moved for a directed



verdict upon ten specific grounds. None of these grounds indicated any claim of defendant that the injury was not shown to be caused by the defendant's train. The evidence on behalf of plaintiff that the injury was thus caused was circumstantial wholly, but very persuasive. If Fiscel's evidence had been received, it, too, was only circumstantial. The only questions which were really contested at the trial were: (1) Whether the railroad company had a right to fence at the place where it was claimed the horse escaped from the pasture; (2) whether the horse did escape from the pasture through that particular fence; (3) whether that fence was in fact defective; (4) the value of the horse.

We think it must be said that the proposed evidence of Fiscel was cumulative only, and that it went only to a formal issue, which was not actually contested at the trial. We reach the conclusion, therefore, that the motion for a new trial was erroneously sustained on either or both grounds.

The order granting a new trial must be reversed, and the cause remanded for a judgment on the verdict.—*Reversed and remanded.*

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

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SARAH C. DE ROUSSE, Appellee, v. FRANK WILLIAMS et al.,  
Appellants.

**TRUSTS: Spendthrift Trusts—When Subject to Debts of Cestui.**

- 1 One may not, under the guise of a spendthrift trust, trustee *his own property* and place it beyond the reach of his creditors. Evidence reviewed, and held sufficient to show that certain trust property had actually been acquired and in reality purchased by the *cestui que trust*, (a) by reason of a general family settlement of an estate, (b) by reason of the abandonment of a right to contest a will, and (c) by reason of the surrender

by the *cestui que trust* of certain property devised to him.

**DIVORCE: Decree—Nature—Satisfaction—Spendthrift Trusts.**

2 final decree awarding alimony, while constituting a judgment, may not be satisfied out of the property of a spendthrift trust of which the defendant in execution is the *cestui que trust*, when such trust property has not been acquired by reason of any consideration furnished by said *cestui que trust*.

**CONTRACTS: Consideration—Spendthrift Trusts.**

3 A recital in the provisions of a spendthrift trust that the *cestui que trust* accepts the provisions thereof in lieu of a devise to him in a will, clearly reveals that the *cestui que trust* himself furnished an adequate consideration for the said trust.

**WILLS: Requisites and Validity—Non-self-executing Clause Penaliz-**

4 **ing Contest.** A clause in a will providing that a devisee who contests the same shall forfeit the devise to him, is not self-executing. In other words, a violation of such clause does not, *ipso facto*, invest an heir or devisee who does not contest with title to his portion of the forfeited devise. Such favored heir or devisee is simply armed with an election to take or not to take.

**WILLS: Requisites and Validity—Penalizing Contest—Conditions**

5 **Subsequent.** Principle recognized that forfeitures for breach of conditions subsequent are in disfavor. So held with reference to a will clause penalizing a contest.

**CREDITOR'S SUIT: Property Subject—Property Forfeited to**

6 **Debtor.** Principle recognized that a debtor is under no legal obligation to accept property under a forfeiture in his favor, in order that his creditor may be able to satisfy his claim.

**CONTRACTS: Consideration—Materiality of Recitals.**

7 The recital of a clear, definite and specified consideration for a contract is very influential on the question of consideration.

**CREDITOR'S SUIT: Property Subject—Consideration Paid.**

8 A creditor, in subjecting the property of his debtor to the satisfaction of his claim, is by no means limited to the amount which the debtor paid for the property.

**CREDITOR'S SUIT: Allowable Remedy—When Creditor May Re-**

9 **sort to Equity.** A creditor is not compelled, in order to satisfy his claim, to proceed *at law* against property held by the debtor under uncertain title, when the debtor has unquestioned title to property which may be reached *in equity*. So held as to a spendthrift trust.

**CREDITOR'S SUIT: Allowable Remedy—Insolvency—How Shown.**

- 10 Proceedings in equity by a creditor to satisfy his judgment are allowable without the return of an execution *nulla bona* when it otherwise appears that the debtor is insolvent.

*Appeal from Page District Court.—A. B. THORNELL, Judge.*

THURSDAY, OCTOBER 25, 1917.

THE question is whether what is claimed to be property impressed with a spendthrift trust for defendant Frank Williams was rightly subjected to an order in a divorce decree granting plaintiff, who was then the wife of said Williams, alimony.—*Affirmed.*

*Thomas W. Keenan and Parslow & Peters, for appellants.*

*Earl R. Ferguson and C. R. Barnes, for appellee.*

1. TRUSTS:  
spendthrift  
trusts: when  
subject to  
to debts of  
cestui.

[SALINGER, J.—I. This is an action in equity to subject certain funds in the hands of the defendant Henry Read, as trustee, to the payment of a decree in alimony held by appellee against defendant Frank Williams, who, at the time of the rendition of said decree, was her husband.

The essential controversy seems to be over whether a trust fund provided for this judgment debtor was in fact purchased by him or obtained with consideration flowing from him, and whether, as to the recital in the trust agreement that it was upon a consideration, this plaintiff is in position to object to having such recital varied by oral testimony that there was in fact no consideration.

2. DIVORCE: de-  
cree: nature:  
satisfaction:  
spendthrift  
trusts.

The written agreement upon which appellants rely constitutes a spendthrift trust. If there be nothing to avoid it, plaintiff cannot subject the property impressed with that trust. Her decree awarding alimony

is a judgment for the purpose of subjecting what is the property of defendant. A final decree awarding alimony is a judgment for all purposes.] *Patton v. Patton*, 123 N. Y. Supp. 329; *Shepherd v. Shepherd*, 100 N. Y. Supp. 401 (103 N. Y. Supp. 1141); 14 Cyc. 796; *Rogers v. Rogers*, (Ind.) 89 N. E. 901; *O'Hagan v. Executor of O'Hagan*, 4 Iowa 509. It has the protection of the "full faith and credit" clause of the Constitution. *Sistare v. Sistare*, 30 Sup. Ct. Rep. 682; *Barber v. Barber*, 21 How. (U. S.) 582; *Arrington v. Arrington*, (N. C.) 37 S. E. 212; *Wagner v. Wagner*, (R. I.) 57 Atl. 1058; *Bullock v. Bullock*, (N. J.) 31 Atl. 1024; *Britton v. Chamberlain*, (Ill.) 84 N. E. 895. Conveyances in fraud of it may be set aside. *Picket v. Garrison*, 76 Iowa 347; *Walker v. Walker*, 127 Iowa 77; 14 Cyc. 798. [But it is not more than a judgment. And if the trust was not bought by the defendant Frank, a judgment could not be satisfied out of the trust property.

We have no occasion to decide whether Frank gave consideration for the trust of which he is the beneficiary, were it the fact that his father, now deceased, created the trust. His father did not create it. The most there is for so claiming is hearsay testimony to the effect that the father desired the making of such a trust, and that his widow, the stepmother of Frank, made the trust in suit out of deference to the wishes of the father. The question is what, if any, consideration Frank furnished for what he gets by the trust; whether he did not, in effect, buy this, and so place the case within the class which prohibits a debtor from trusteeing his own.]

The trust agreement was signed by the widow, by Frank, and by Read, the trustee. There is testimony given by others than the widow that she desired no consideration, and that, in the negotiations, no consideration from or surrender of property by Frank was mentioned. We gather that, on September 11, 1911, when the paper was

signed, no public steps had been taken to contest the will of the father, by which the widow was most liberally endowed, in addition to what she had received in the lifetime of her husband. Others than the widow gave testimony that, therefore, when she signed, she was not influenced by fear of a contest. It would seem that no one but she could competently say that she had no fear of a contest and no knowledge of steps looking to one, because no such steps were at that time contemplated or publicly taken.

Cleared of these various considerations, we reach inquiry into whether the trust rests, in whole or in part, upon a relinquishment on the part of Frank of a substantial right to object to the will of his father, and whether the trust is supported by being a step in a general family settlement.

II. The will contained a provision that, if any one or more of the heirs or legatees shall attempt to break the will, then bequests made therein to such legatee or legatees shall be cancelled, "and they shall have none of said bequests and no property whatever from my estate, but the distributive share alike among my other legatees under this will." The son Ed. did institute what is a contest (*Moran v. Moran*, 144 Iowa 451), alleging that the will was obtained by undue influence of the widow, and that the deceased was of unsound mind. It is true Frank was not, *eo nomine*, a party to this contest, but that is not quite decisive of the present point. Time was given to file objections to the will. The widow applied to be made special administratrix. The day before they were filed, Frank made application to have his brother Ed. made special administrator. Frank verified the application therefor before the attorney, who asked time.

Unless the contest was won, the penalty clause in the will would cancel a bequest of something like 138 acres

given Ed. In pursuance of a settlement between Ed. and the widow, made about a week before the trust agreement was made, the objections to the will were withdrawn. None but these two were consulted as to that settlement, and the contract of settlement was signed by them only. This settlement provided, or at least it was contemplated, that all the heirs should sign. It was delivered to Ed. to have it thus signed, but it was not done. This settlement provided that Ed. should have clear title to said 138 acres, which, without winning the contest, he would forfeit, and on which the will gave the widow a life estate. It was further stipulated therein that that contemplated litigation should be stopped, and all difficulties between the parties "wiped out." In pursuance thereof, the widow promptly made deed.

There was much hostility in the settlement, arising from the size of allotment that had been made to the widow. It is in testimony that Read, who, in a way, represented the family, was interested in this matter to stop litigation and to assist the heirs in getting a fair settlement; that in this settlement were discussed all the phases of what had been given the widow in the lifetime and by the will; that finally an adjustment was reached which, it is said, did not include any controversy concerning the trust fund. One item in the settlement was the furnishing of \$200 for the care and education of one of Frank's daughters. This daughter and another received \$2,500 in the will, and, in the settlement, additional property worth about \$1,500. It seems to be conceded that the settlement made no provision for Frank except as to certain promissory notes which were the property of the estate, did not belong to the widow as an individual, and which were the sole subject of the trust which she afterwards created. There is some evidence in the so-called corrected abstract filed by

appellee which, while rather confused, gives color to the claim that, while the matter was not completed when the question of settling with Frank was brought up in the general settlement, it was considered. Let it further be noted that, though it is said that Frank was not a party to the contract of settlement, it is nowhere said that this contract did not provide for a settlement with Frank, though he was not a party thereto in terms.

[We incline to agree with the opinion of the trial court that the spendthrift trust was, in effect, a turning over to the trust of property belonging to the estate of Frank's father, and turned over by the widow, who created the trust; and that a general family settlement, including the abandonment of the contest by any who had the right to institute it, was one of the considerations for the trust. And Frank was one party who had already interested himself in a contest, or was likely to do so, and who had the right to institute a contest.

*27*

Certain lots were devised to Frank by the will, absolutely. Appellee contends that, by the recital of considerations in the trust agreement, Frank relinquished title to these, and that, this being so, of course, he paid consideration for the benefit of the trust. If the recitals in the agreement are fairly susceptible of that construction, the point is well made, because the only answer is that Frank did not make a formal conveyance. The recitals are that, as consideration, Frank takes the trust "as his full share" of his father's estate. Appellants themselves say that Frank had then nothing to receive from that estate; that he had all of his share. If the recital is not to be held to mean nothing, it must mean that he took the trust provisions in lieu of what he had; that he surrendered

3. CONTRACTS :  
consideration :  
spendthrift  
trusts.

what he had. We think *Baldwin v. Hill*, 97 Iowa 586, holds that the failure to make such conveyance is not, in the circumstances, controlling.]

2-b

4. WILLS: requisites and validity: non-self-executing clause penalizing contest.

It is contended by appellees that, the moment Ed. instituted a contest, Frank, as one of the other heirs, became entitled to a part of the land devised to Ed., and that his failure to oppose, if not his consent to the reinvesting Ed. with that land, was a valuable consideration for the trust; that, while it is true that the widow, who created the trust, did not obtain any of Ed.'s land, the fact that she made a settlement through which she obtained something for being able to give Ed. clear title, operates as a consideration, because this benefit to the widow was obtained by the failure of Frank to assert his rights in Ed.'s

5. WILLS: requisites and validity: penalizing contest: conditions subsequent.

land. The appellant responds that forfeiture clauses penalizing a contest of a will are conditions subsequent, and to this appellee agrees. There is no dispute as to the general rule that forfeitures for breach of condition subsequent are not favored, and that equity will not enforce such. The real difference between the parties is this: Appellants say that such a forfeiture is not self-executing; that, at most, it gives Frank an election whether to enforce or not. Appellee says that, while creditors may not compel a debtor to exercise an election by which he would obtain property out of which they might be satisfied, here is no such case; that, the moment Ed. instituted his contest, the land willed to him ceased to be his unless he could prevail in the contest, or settled it, and thereby got the same land, or its equal in value, as his distributive share; that the institution of the contest was a declaration not to be



bound by the will; that, therefore, and at all events, the land bequeathed to Ed. as to him remained in the estate undisposed of by will; that, of necessity then, so far as Ed. is concerned, the title to all the land in the estate which might be disposed of by will became, if in fact it did not always remain, the property of the heirs, share and share alike; and that, so, this is not a case of enforcing or not enforcing a forfeiture, or of compelling a debtor to obtain property, but an attempt to make the debtor account for property which he had and is seeking to give away for the purpose of defeating his creditors.

6. CREDITOR'S  
SUIT: prop-  
erty subject:  
property for-  
feited to  
debtor.

We are of opinion that the forfeiture clause in the will was not self-executing; that it gave no more than a right to the land of Ed., which Frank was not obliged to assert to benefit his creditors; and that

a failure to claim a share in this land was not a giving away of what had vested, but an election not to acquire property, and, therefore, the forfeiture clause did not furnish a consideration for the trust. See Tiedeman on Real Property, Sec. 277; *Preston v. Bosworth*, (Ind.) 55 N. E. 224; *Nevitt v. Woodburn*, (Ill.) 60 N. E. 500; Tiffany on Real Property, Sec. 66; *Robertson v. Schard*, 142 Iowa 500; *Merchants Nat. Bank v. Crist*, 140 Iowa 308.

7. CONTRACTS:  
consideration:  
materiality of  
recitals.

III. If the widow intended a mere gift, there was no occasion to recite a consideration. Possibly it would have helped

establish intent to make a gift if the alleged donor had been, as she was not, made a witness. If it was understood that no consideration was given, it is difficult to understand why the writing said that the trust was "for the consideration hereinafter mentioned," and that, "in consideration of the foregoing," Frank accepts the benefits accruing to him under and by virtue of the trust created,

"as his full share of the estate of T. J. Williams, deceased."

8. CREDITOR'S  
SUIT: proper-  
ty subject:  
consideration  
paid.

IV. [That the settlement, the abandonment of the contest and the surrender of the lots devised to Frank constitute consideration, is hornbook law, but it is insisted that, though this be so, it does not subject the trust property; that it merely makes the trust enforceable; and that, therefore, all that can in any event be subjected is the consideration paid. We are not impressed with the argument. When a debtor purchases property, what he pays for it is gone from his creditor. That alone is a sufficient reason why such consideration may not be subjected to the debt. By the same token, the property bought is the fund the creditor may resort to. He cannot complain that the debtor did not get enough. He has the right to avail himself of the profits if the debtor did not pay enough.]

V. There is a fierce controversy, most elaborately briefed, on whether these recitals may be varied in parol. The utmost effect of these recitals is to prove consideration was furnished. As we find this to be true without these recitals, we do not deem it necessary to determine whether plaintiff is in position to object to parol variance.

VI. It is urged that appellee has no standing in equity because she has shown merely that the garnishee answered that he had no property belonging to Frank, which does not prove that remedies at law would not satisfy her claim. It is further said that the lots bequeathed to Frank could have been seized; that, if the bequest proved that Frank had something to relinquish for the sake of the trust, that same something was available also for satisfaction at law; that this is so of his right to the land bequeathed to Ed.

9. CREDITOR'S  
SUIT: allow-  
able remedy:  
when creditor  
may resort to  
equity.

In general, equity will reach a trust on consideration. 2 Pomeroy on Equitable Remedies, Sec. 879. The remedy at law is not adequate where seizure of property at law still leaves the title uncertain or under a cloud. *Miller v. Dayton*, 47 Iowa 312. Certainly a seizure of Ed.'s land comes within this class, and equally certain is it that the widow had at least enough color of title in the lots devised to Frank as that their seizure at law would not have given complete satisfaction. We incline to think, too, that the defendants are in such sense volunteers as that the burden was on them to show that Frank had sufficient property out of which satisfaction could be had at law. See *Campbell v. Campbell*, 129 Iowa 317; *Strong v. Lawrence*, 58 Iowa 55; *Elwell v. Walker*, 52 Iowa 256; *Loving v. Pairo*, 10 Iowa 282; *Gwyer v. Figgins*, 37 Iowa 517; *Gordon v. Worthley*, 48 Iowa 429; *Smalley v. Mass*, 72 Iowa 171; *Burlington P. H. Assn. v. Gerlinger*, 111 Iowa 293.

10. CREDITOR'S  
SUIT: allow-  
able remedy:  
insolvency:  
how shown.

Moreover, return *nulla bona* and the like is not required if it appears otherwise that the debtor was insolvent. The trial court finds that this was the fact, and we see no reason for interfering with that

finding.

[It follows that the decree below must be—*Affirmed*.]

GAYNOR, C. J., LADD and EVANS, JJ., concur.

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RUTH HALLER, Appellant, v. QUAKER OATS COMPANY,  
Appellee.

**MASTER AND SERVANT: Scope of Employment—Voluntary De-**  
1 parture—Custom—Effect. A servant may not voluntarily step aside from his known and understood line of employment, without the consent of the master, and do an unauthorized act, and, when injured, obtain any benefit by the plea that he

did the unauthorized act in the manner in which it was customarily done by those who were authorized to do it.

**PRINCIPLE APPLIED:** Pasteboard forms passed through a gluing machine, where they were partly glued by the operator in charge of the machine, thence along a spout to a slowly moving belt which passed over a table, and plaintiff, a girl 12 years and 6 months old, *understood* that her *only* duty was to stand at this table and "drop coupons into the moving cartons and keep the boxes going," and that no duty devolved upon her *until the boxes reached her*. The newly glued forms would at times come apart *while on the way to plaintiff's table*, and would stop in an elbow of said spout, which elbow was 76 inches from the floor and directly over plaintiff's head. In this elbow was an unguarded, triangular opening, with sides some 2 or 3 inches long. When the boxes stopped in the elbow, they were customarily loosened, by those charged with the duty, by tapping upon the spout or by inserting the fingers into said opening and touching the boxes. This loosening was no part of plaintiff's duty, and she so understood. By standing on her tip-toes, plaintiff could just touch the elbow. To get her fingers into the opening, it was necessary for her to jump. Prior to, and even on, the third day of plaintiff's employment, other employees relieved the stopping of boxes in this elbow, but on said third day, when the boxes stopped in the elbow, plaintiff, without being told by anyone to relieve the stoppage, jumped three times in an effort to get her fingers into said opening. In the third jump she succeeded, but also cut off part of her finger on the angle formed by the opening. Plaintiff was the only person who had ever been injured by putting their fingers in said opening.

*Held* that it was immaterial that plaintiff did the unauthorized act in the customary way.

*Held* that said "pipe" was not a "machine," within the meaning of the Factory Act (Section 4999-a2, Code Supplement, 1913).

*Held* that, if the pipe be conceded to be a dangerous machine, the statute had no application, because of the voluntary departure by plaintiff from her line of employment.

*Held* that there existed no duty to warn plaintiff of these dangers outside her employment.

**MASTER AND SERVANT: Factory Act—Voluntary Departure From  
2 Line of Employment—Dangerous Machinery.** The prohibition

in the Factory Act against permitting a child under 16 years of age to operate dangerous machinery has no application to a case where a child under said age, and of average intelligence, voluntarily departs from his known and understood line of duty, without the consent of the master, and is injured while operating such dangerous machinery.

**PRINCIPLE APPLIED:** See No. 1.

**MASTER AND SERVANT: Factory Act—Dangerous Machinery—**  
3 **What is Not Dangerous Machinery.** An ordinary stationary galvanized iron pipe, used for conveying pasteboard boxes, with a triangular opening in said pipe, is not a "machine" within the meaning of the Factory Act prohibiting a master from permitting children under 16 years of age to operate such machinery.

**PRINCIPLE APPLIED:** See No. 1.

**MASTER AND SERVANT: Place For Work—Dangerous Machinery**  
4 **—Proximate Cause.** The plea that plaintiff's place of work was surrounded by dangerous machinery is entirely immaterial when such machinery was in no manner the cause of plaintiff's injury.

**MASTER AND SERVANT: Warning and Instructing—Non-apprehended Dangers.** The duty of a master to warn and instruct does not exist as to dangers which the master has no reason to apprehend, or as to dangers just as obvious to the servant as to the master.

**MASTER AND SERVANT: Warning and Instructing—Voluntary**  
6,8 **Departure From Line of Employment.** A master is under no obligation to warn and instruct a child of some 12 years of age, and of average intelligence, against dangers wholly aside his employment, as known and understood by the child, on the assumption that such minor may voluntarily depart, without the master's consent, from his line of employment and encounter such dangers.

**PRINCIPLE APPLIED:** See No. 1.

**NEGLIGENCE: Evidence—Contributory Negligence as Bearing on**  
7 **Defendant's Negligence.** That plaintiff was wholly free from contributory negligence is no evidence that defendant was negligent.

**MASTER AND SERVANT:** Warning and Instructing—Voluntary 6, 8 Departure From Line of Employment.

**PRINCIPLE APPLIED:** See No. 1.

**MASTER AND SERVANT:** Factory Act—False Representation 9 as to Age—Effect. A minor, under 14 years of age and of average intelligence, who obtains employment in a manufacturing establishment by false representations as to her age, may not claim absolute liability on the part of a master who employs her in good faith and without being put on inquiry as to her age, even though Section 2477-a, Code Supplement, 1913, absolutely prohibits such employment.

*Appeal from Linn District Court.*—W. N. TREICHLER, Judge.

THURSDAY, OCTOBER 25, 1917.

THE plaintiff alleges that, when she was 12 years and 6 months of age, she was injured while in the employ of the defendant, working about dangerous machinery belonging to it. The trial court directed a verdict for the defendant, and the plaintiff appeals.—*Affirmed.*

*Rickel & Dennis*, for appellant.

*Dawley & Wheeler* and *Dawley, Jordan & Dawley*, for appellee.

SALINGER, J.—I. The plaintiff was employed by the defendant when she was something like 12 years and 6 months old. A description of her surroundings when hurt is this: There was a gluing machine, with belts, levers, pulleys, forms, etc.; a spout conducting pasteboard shells away from the this gluing machine; the table at which plaintiff worked at placing coupons into boxes which came to her table from this spout and passed on before her by means of “a slowly moving belt.” The cardboard from which the boxes are made starts out of the packing room fully cut, partly

1. **MASTER AND SERVANT:**  
scope of employment:  
voluntary departure: custom: effect.

glued, but collapsed; these collapsed tubes go to a girl who works at the gluing machine. From her they pass into a spout or pipe which the gluing machine has. This spout serves one of the tables along which the cartons or shells travel to receive coupons and rolled oats. At times, the newly glued ends of the cartons would become disengaged, through improper adhesion, and thereby were made to stop in an elbow which the pipe has, instead of descending through it to the table on which the coupons are placed. This elbow is 6 feet and 4 inches from the floor; in the angle of the elbow is a triangular hole some 2 or 3 inches each way, with its apex down. When the empty cartons leave the spout, they drop upon a table with their folded ends down and their as yet unfolded ends up. In this position, the belt upon which they have just landed carries them horizontally along the table at which plaintiff was at work. They travel some six feet from the point where they touch this belt to the point where they pass under a hopper which fills them with rolled oats. As they traveled along this table, it was the duty of plaintiff to put coupons in the open boxes, not to let any pass by without being thus filled, and to keep them going.

On the third day of plaintiff's employment, the boxes became clogged in this elbow. The aforesaid opening into the elbow was just above her head. By standing on her tiptoes, she could just reach the bottom of said pipe. She could not put her hands into the opening to loosen the boxes, without jumping. She jumped twice without being able to get her finger in. She jumped a third time, and at this time succeeded in getting her fingers into the opening and against the boxes therein, and was injured. The appellant insists that, in putting her fingers into this opening, plaintiff was only doing her duty, which required her to keep the boxes moving, and, as her injury could

easily have been prevented by guarding the said opening, her injury was due to negligence in failing to provide her a safe place wherein to work, and safe appliances to work with. It is insisted by the appellee that what she did was not in the course of her employment at all. It is not overlooked there is a claim that defendant is liable even though plaintiff did what she did outside of the course of her employment. None the less, it is an important question whether plaintiff departed from that course. Reviewing the testimony with consideration of the denial of abstract by appellee, which is controlling so far as it goes, it appears by testimony for the defendant that the duties of plaintiff were those of a "coupon girl;" that these did not include loosening boxes in the elbow when they clogged it, and that this was the duty of another employe; that the one who employed plaintiff told her that all she had to do was to put in coupons. The testimony adduced by the plaintiff discloses that her duties were to drop coupons into the boxes and to keep the boxes going. As throwing light upon what plaintiff understood her duties to be, it is found in her testimony that, at times, when the boxes fell over while going on the belt, she had to hurry and straighten them up; that she had to see to it that the boxes did not get away from her without coupons. She also states, by way of conclusion, that she had to keep the boxes from clogging, so that they might come out of the pipe.

The essential claim for appellant is that her instructions to keep these boxes going meant that she was required to keep them going before they reached her there; that she could not keep them going unless she kept them coming. She was told what her duties were before she entered upon the employment in which she was injured. Whatever understanding she had as to what was required of her, she obtained at that time. If she understood that she was required to reach into the elbow and loosen the



boxes, she would have made an attempt to do this the very first time that the clogging occurred. Yet she testifies that, when this happened on the first day on which she worked at this table, she did not attempt to relieve a clogging that occurred. She explains her failure to do this on the first day by saying that "nobody told me to," and that she did not do it because they were loosened by "the girl that was operating the (gluing) machine." Even on the third day, when she was hurt, the clog in the pipe was relieved by this same girl, and by others. We cannot avoid concluding that the direction that she should keep the boxes going did not mean, and was not understood by her to mean, that she was to keep them coming, and that, as the boxes passed through the spout only while they were coming to her, and were, so far as she was concerned, not going until after they reached the place where it was her duty to put in coupons, her duties did not begin until they reached her. Moreover, if it had been her duty to keep the pipes from clogging, it was not necessary for her to perform it by putting her hand into the pipes. The clogging could be and often was relieved by tapping on the side of the pipe.

1-a

Unless the age of the plaintiff makes a difference, then if we assume that what the plaintiff did was not done in the course of her employment, it seems to us to be immaterial, if it be true, that what plaintiff did was customary, and that she was influenced by seeing others stick their finger into this opening. Even if we pass the point that she saw this done but once, and then by a girl who was a machine operator, and who was tall enough to be able to put her hand into the opening without jumping, to give this alleged custom any importance in the case of an adult gives no importance to the departure from

the course of employment. Had it been her duty to keep the pipe clear, it might be important that she performed that duty in the manner customarily permitted by the employer. The trouble with the argument is that one may not usurp a function and justify the doing of it because he has performed it in the way the function is performed by those who are entrusted with it.

- II. Were plaintiff an adult, and departing from the work she was employed to do, it would be immaterial that she was hurt in operating dangerous machinery, and that the same was not guarded, though it might have been. Where the employment is
2. MASTER AND SERVANT: Factory Act: voluntary departure from line of employment: dangerous machinery.

specific, and an injury results from a voluntary abandonment of that employment, without the consent of the master, it cannot matter that the injury was caused by operating dangerous machinery. If an adult of average intelligence leaves an employment to operate a typewriter, and without request or permission handles a dangerous and imperfectly guarded machine which her employer has in some department of his business, it cannot be claimed that the employer is liable for what results. But

- plaintiff did not operate any such machinery. There is some testimony on part of defendant that machines were present, but, when rightly understood, this was no reference to the pipe, but to the gluing machine, from which plaintiff suffered no
3. MASTER AND SERVANT: Factory Act: dangerous machinery: what is not dangerous machinery.

injury. The suit is not bottomed upon the theory that injury came from operating a machine. Its claim is that injury resulted from an attempt to relieve a condition of inertia,—not because of operating a machine, but because boxes were at a standstill in a pipe. In her own testimony, plaintiff differentiates machine from the pipe, because she says, concerning another operator, that “this

young lady was not working on the pipe; she was working on the machine." Appellee's denial of abstract discloses that another witness said, "those pipes are called air pipes, and are not part of the machinery. I would say it was not part of the machine."

It is held, in *Gallenkamp v. Garvin Mach. Co.*, (N. Y.) 99 N. E. 718, that the word "operate" means to put in action, supervise the working of, put into or continue in operation, as to operate a machine; and that, where the operation of a hoist was relied upon, the burden was on plaintiff to show that, in addition to its being a hoist, its use was subject to some danger not usual to such appliances. Further, that a conveyor hoist in a tool factory consisting of pans on which tools were placed for transportation up and down, moving at the rate of about one foot per second, which it was perfectly safe to operate so long as the person using it did not place some portion of his body inside the conveyor shaft between the pans and keep it there for a sufficient length of time to allow the succeeding pans to strike him, is not a dangerous machine, as distinguished from an ordinary elevator or other moving machine in a factory, so as to make the master liable for injuries to a minor servant while negligently operating the conveyor.

2-a

4. MASTER AND  
SERVANT:  
place for  
work: dan-  
gerous ma-  
chinery: prox-  
imate cause.

There is the alternative argument that, even if the pipe was not machinery, plaintiff was not furnished a safe place to work, because the room in which she worked contained a number of machines, both in front and back of her; that work was done upon those in front; that, in going from the office to the place where she worked, she would have to pass along these machines in operation, and had to be careful not to get into them. In the first place, we think it clear no allegation in plead-

ing covers this negligence. Be that as it may, had plaintiff been an adult of average intelligence, it would certainly be held that, though she was exposed to dangers from other machines, that, since she suffered no injury from them, and their presence had nothing to do with her jumping up and putting her hands into this air pipe, that the presence of said other machines was immaterial.

As to some claim based upon the degree of air pressure in the pipe as a factor in moving the boxes through it, the answer is there is no evidence that plaintiff was hurt because of that pressure. Her injury came because, while in the act of jumping, she tore her finger on a sharp edge at the bottom of the pipe. This disposes, too, of objections to limitations upon cross-examination. Had it been pursued, it would have disclosed no more than that an air current helped the boxes through the pipe, and that some parts of some machinery were guarded.

III. The next contention is that de-

5. MASTER AND SERVANT: warning and instructing: non-apprehended dangers. defendant should have instructed the plaintiff how to relieve the clogging, and have warned her against doing so by the method which she adopted. To this there are at

least two answers: First, the defendant had no warrant for assuming that relieving the pipe in the manner pursued by plaintiff was dangerous, because, with the exception of the injury to plaintiff, no one had ever been injured by this method of clearing the pipe; second, defendant was not required to anticipate that plain-

6. MASTER AND SERVANT: warning and instructing: voluntary departure from line of employment. tiff would leave the work she was employed to do and undertake what she was not employed to do and others were. See *Harney v. Chicago, R. I. & P. R. Co.*, 139 Iowa 359; *Meyers v. Bennett A. S. Co.*, 169 Iowa 383;

*Haskell v. L. H. Kurtz Co.*, 181 Iowa 30. The very statute upon which appellant relies makes the last clear. All

that it inhibits is "permitting" an employe "to operate or assist in operating dangerous machinery of any kind." Code Supplement, 1913, Section 4999-a2. As said, no dangerous machine was operated,—there is no evidence that there was any permission to operate it.

Assume that, ordinarily, it must be left to a jury whether a child of very tender years, say ten, was guilty of contributory negligence, and that the care required of such an one is the ordinary and reasonable care required and expected of children of that age, knowledge, experience and capacity, rather than that of an adult. 1 Thompson, Negligence, Sections 308, 309; *Long v. Ottumwa R. & L. Co.*, 162 Iowa 11. Assume for *Long v. Ottumwa R. & L. Co.*, 162 Iowa 11, and *Hazlerigg v. Dobbins*, 145 Iowa 495, that not only is the question of whether the child contributed to its injury, for the jury, but that, where the child is under fourteen, the burden is on defendant to show, affirmatively, that the child had capacity for the exercise of care for his own protection. When all this is conceded, it is but a concession that here contributory negligence was for a jury. This concession is not in the least decisive of whether defendant was negligent in employing the plaintiff to work at a table in filling a box with coupons and passing it along, because it was bound to assume, or a jury might find it was so bound, that this work would be abandoned and the girl do what she did do. That the plaintiff was free from contributory negligence is no evidence that the defendant was guilty of negligence.

Even as to an infant, the utmost is that the master who employs in violation of statute is liable for injury sustained "in the course of such employment." *Gallenkamp v. Garvin Mach. Co.*, (N. Y.) 99 N. E. 718. Of course, the original employment

7. NEGLIGENCE:  
evidence: con-  
tributory neg-  
ligence as bear-  
ing on de-  
fendant's neg-  
ligence.

8. MASTER AND  
SERVANT:  
warning and  
instructing;  
voluntary de-  
parture from  
line of em-  
ployment.

may be changed by mutual consent. The naked fact that employment is changed creates no liability and relieves from none. *Haskell v. L. H. Kurtz Co.*, 181 Iowa 30. The difficulty lies in the major premise. The plaintiff had no permission to change her employment. Her case rests not upon the claim that she was directed or permitted to do what she did, but that the master was negligent in not anticipating that she would do it. It will not be seriously contended that this claim could be made by an adult who was not known to be below the average in intelligence. So that, in the last analysis, the plaintiff's case hinges upon whether a jury might rightfully find it was negligent not to assume or expect that plaintiff would leave the work she was hired to do and put her hand into this pipe, as she did, and, therefore, negligence in not warning her not to do this. We may concede that, if the employer knew or had reason to believe that the employe was not yet thirteen, and was far below the average standard of intelligence in those of her apparent age, there would have been such duty to warn. To the question of defendant's knowledge concerning the true age of plaintiff, we shall speak later. At this point, we shall but consider whether the plaintiff fell below that mental standard, and, if so, what knowledge of that fact the defendant possessed, or should have obtained. Could a jury find plaintiff was, to the knowledge of defendants, so lacking in intelligence as to suggest to the employer that she would leave safe work, go to this pipe and do what she did there? What we have next to say presents no more than a difference in degree. Was there anything to suggest to the employer that this girl would leave the room where she was working and go into another story of the building and operate dangerous machinery found there; or, if employed to can corn, that she would injure herself by deliberately trying to batter down

a post with her head, or by putting her finger under the wheel of a moving truck; or that, if not required to use a hammer or a paper weight, she would pick one up and strike her hand with it? It seems to us that the supposed cases do not differ in principle, and that the master might as well be implied to anticipate these as that this girl, who was under no requirement to touch the pipe, would jump three times in order to put her hand into that device, and that it might as well be required he should have warned her not to jump out of a window or to play with razors. This disposes of any objections on the exclusion and admission of testimony. It should be said, in passing, appellant misapprehends testimony in claiming the general foreman said he did instruct "employees" how to relieve the pipe when it became clogged. This was not said with reference to plaintiff, but concerning another employee.

Recurring: if there should have been such anticipation where there was reason to believe the employe lacked sufficient mentality to appreciate what she was doing, we have to say that this record presents no such case. Plaintiff testifies she belongs to a family in which the children are compelled to display commercial activity early; that she has one brother, eight years old, who sells papers. She states that she worked in a laundry before she entered the employ of defendant, and exactly what that employment was, and points out that there she worked on no dangerous machinery. She remembers in detail when this was. In explaining that she took half a term of music lessons, she says, "By half a term I mean six lessons." She testifies she went to the mill because she thought she could get more money; that she went with a cousin; that her cousin wanted her to go, though her mother did not, and that the mother did not know she went; that the cousin first saw the forewoman; that the cousin first inquired of another whether plaintiff could be employed, and on being told "no,"

she talked to the forewoman, inquired whether she needed any girls; that the forewoman said she would take plaintiff; that she inquired how old plaintiff was; that, before plaintiff could answer, the cousin said plaintiff was fourteen. Plaintiff says she kept still about her age because she knew she needed the work; that thereupon the forewoman said she would take plaintiff. She is able to say that, when she first went to work, it was on the fourth floor in the dish room, where she found the forewoman, who employed her, and another forewoman; that this was around noon and they were eating dinner; that her work in the dish room consisted of wiping dust, straw and things like that from the dishes; that she worked there only one afternoon; that then she was put to work on the third floor to take bosses off the belt; that she worked there one morning from 7 until 12; that then she was set to work putting cracked hominy in tin cans; that she continued at this until put on the machine on which she got hurt; that, in making the change, the forewoman said, "Ruth, come down here. I want you on the second floor. I need you." She found the forewoman standing by the side of plaintiff's sister, and the forewoman then holloed and said, "Keep the boxes going and don't let any go without a coupon in them." She says she is unable to tell how many times the clogging occurred on the first day; that, while it was at least a dozen times, she does not know whether it was 2 or 3 dozen times; that, on the day of her injury, she began work about 7 in the morning and was hurt about 10 in the morning; says she never told her mother she was working there until after her finger was taken off; that the forewoman never said anything about her age certificate until after she was hurt, and that then she said, "Ruth, when you bring that certificate back you can come back and go to work." She adds, "But I never brought it back nor went to work there again."



We are constrained to hold that, beyond all question, this plaintiff had capacity to understand what she was employed to do, and to appreciate, first, that she was departing from that work when she put her hand into the air pipe to loosen boxes; second, that she had as much appreciation that this might hurt her as the defendant could have, in view of the fact that only an extraordinary and unforeseen set of conditions could produce an injury there, and that, in months of use and operation, no injury had been suffered by anyone.

IV. Plaintiff was born on April 10, 1900. In obtaining employment, and for that purpose, she permitted a statement to be made that she was almost 15. She testifies that, when her cousin told the people at the mill that plaintiff was 14, she knew this was not so, but said nothing about her age; that she kept still about her age because she knew she needed the work; that she did not tell her parents because they didn't want her to work any place; they had told her she couldn't work at the mill, and she told no one at the mill that her parents didn't want her to work there. In these circumstances, we are not prepared to hold that mere employing her when she was in fact less than 14 makes defendant liable absolutely. We are not called upon to decide what the rule would be if, despite this conduct of plaintiff's, defendant was put on inquiry as to whether plaintiff was not too young to be safely employed at all, or for such work as she was employed to do. We have already dealt with her mental capacity. It may be added that, when she was hired, her dress came below her knee cap, and that there is testimony that defendant's foreman did not believe her to be less than 14. Nothing indicated she might do what led to her being injured. Even as to a minor against whom contributory negligence is no defense, it was held that it is a defense

9. MASTER AND  
SERVANT: Fac-  
tory Act: false  
representation  
as to age:  
effect.

where it can be said that the minor by his own negligence contributed to the act of employment. *Gallenkamp v. Garvin Mach. Co.*, (N. Y.) 99 N. E. 718.

But defendant was advised that plaintiff was less than 16. The statute prohibited her being *permitted* "to operate or assist in operating dangerous machinery of any kind." Code Supplement, 1913, Section 4999-a2. This statute effects nothing in this case, unless it may be held that plaintiff was permitted to operate or assist in operating dangerous machinery. We have already said that the thing that injured her was not operated as machinery, was not machinery at all, and, therefore, not dangerous machinery. If it were, that plaintiff chose to abandon the work for which she was employed, and operated dangerous machinery, is certainly not a permission to have her do so. The statute would rule only had the pipe been dangerous machinery, and it had been or should have been known that plaintiff was operating it, and been permitted to do so. That is why the citations relied upon by the appellant have no application.

*Pettit v. Atlantic C. L. R. Co.*, (N. C.) 72 S. E. 195, holds that, in the absence of statute, a recovery cannot be had for injuries to an infant under 12 merely because he is an infant; wherefore, a statute which provides that no child under 12 shall be employed in any manufacturing establishment or factory, does not prohibit his employment by a railroad company as a messenger. *Stehle v. Jaeger A. M. Co.*, (Pa.) 74 Atl. 215, is decided under an act which makes it unlawful to employ any child under 14 in any "establishment" as defined in the act. Upon this it was held that, where such child is injured in such establishment, there is never a question of risk of employment or of contributory negligence. In *Casteel v. Pittsburg V. P. & B. B. Co.*, (Kans.) 112 Pac. 145, the statute, under

penalty, prohibited employment "at any occupation nor at any place dangerous or injurious to life, limb, health, or morals." It was held that, in such action, it is not necessary for plaintiff to prove defendant knew that the occupation was dangerous; that in such case, violating the law is the proximate cause of the injury; and that, under such statute, an occupation is dangerous "whenever there is reason to anticipate injury to the person engaged in it, whether the risk arises from the inherent character of the work or the manner in which it is in fact carried on, even although the danger may be reduced or eliminated by the exercise of due care and skill on the part of the employee." *Gallenkamp v. Garvin*, (N. Y.) 99 N. E. 718, deals with a statute which prohibits employment of children under 14 in any factory; provides that no child under 15 shall be employed or permitted to have the care, custody or management of or to operate an elevator in a factory; that children under 16 shall not be permitted to operate or assist in operating dangerous machinery of any kind; that no male person under 18 shall be permitted to operate or assist in operating dangerous machinery of any kind.

It was held that employment of one under 14 in violation of the statute is evidence of negligence on part of the employer as to injury sustained "in the course of such employment," without reference to the character of the work the child is required to perform; that the question of contributory negligence is not involved "unless the minor can be said by his negligence to have contributed to the act of employment." In *Sharon v. Winnebago F. M. Co.*, (Wis.) 124 N. W. 299, the statute under consideration is one which absolutely prohibited certain work to be done by children under 16, and their being employed in certain occupations. The employment involved was the operation of a circular saw, contrary to statute. It was held as to this that the efficient proximate cause was the negligence of the master

in violating such statute. It is further held that in that case the injury should have been reasonably anticipated by the master as the natural and probable result of setting the minor to work, and that, because of such statute, the injury must be anticipated.

*Casperson v. Michaels*, (Ky.) 134 S. W. 200, does hold that, in the case present there, the proximate cause of injury to a child employed at a laundry mangle in violation of statute is, as affecting the employer's liability, the said unlawful employment, and it is held upon these premises that, when a child is thus injured while warming her hands on a revolving cylinder before commencing work, it is no defense that she was injured by a part of the mangle at which she is not expected to work, and while not at work. The Kentucky statute absolutely prohibits the employment of children under 16 to operate such machinery as was operated in the case. The distinction is, then, that here there was no dangerous machine to operate upon, and no permission was given to go elsewhere and operate such an one, and, where one employs a child to work at a mangle in disregard of a positive statute, it is not a strain to hold he might anticipate that, if such machine has a revolving cylinder at which the child can be warmed, it might warm its hands at said cylinder on coming in from the outside to assume the prohibited employment. In other words, in the Kentucky case one who had committed a tort was, under elementary laws, held to be responsible for what might reasonably, though not necessarily, follow from the tort, though it was not expected it would follow. The gap in the case before us must be bridged by assuming, and without authority, that the employment given was prohibited; next, that the conveyor was a dangerous machine; that handling it was permitted, and, if not permitted, should have been anticipated and guarded against.

In *Woods v. Kalamazoo P. B. Co.*, (Mich.) 133 N. W. 482, the declaration averred a breach of statute, in that plaintiff was employed in violation of statute at work dangerous to life and limb; that defendant did not keep a required register in which was recorded the name, birth-place, age and place of residence of plaintiff; did not have on file in its business office a permit issued by the superintendent of schools, or the person in charge of any state employment bureau, or the probate judge of the county,—and other breaches of statute duty, as well as negligence to properly instruct in the proper use of the machine, are averred. It will be noticed that here there is no question that the employe was using a machine, and yet it was held that she was negligent as matter of law and could not recover, notwithstanding said statute, because she was injured by getting her finger caught between the hammer and anvil of the machine as she was drawing certain paper forward in order to start the machine after it had been at rest; that she was in no danger unless the machine moved; that it could not move unless she set it in motion by pressing a treadle, and there was no occasion for her to place her finger in a position where it could be injured, and none to start the machine when the finger was in such position.

It follows from what we have said that the judgment and order appealed from must be—*Affirmed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

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VIOLA JACOBS, Appellee, v. CITY OF CEDAR RAPIDS, Appellant.

**WITNESSES:** Competency—Privileged Communications—Waiver.

- 1 A party who testifies, even on cross-examination, *that he had never consulted any doctor prior to his injury in question*, thereby asserts that no doctor exists against whom he might lodge the objection of incompetency to disclose privileged

and professional communications occurring prior to such injury. In other words, such testified declaration opens wide the door to any physician to testify fully to any professional treatment furnished by said physician to said party, prior to said injury in question.

**EVIDENCE: Weight and Sufficiency—Conclusiveness on Party**  
**2 Offering—Right to Deny Truthfulness.** A party to an action may not, for his own advantage, say that his *own* testimony is false and the testimony of another is true.

**PRINCIPLE APPLIED:** Plaintiff sought to recover damages for a fall upon a negligently kept sidewalk. She testified, on cross-examination, as follows: "I did not consult any doctors in regard to my health before my accident." Defendant then called a physician who testified that he had been professionally consulted by plaintiff prior to said accident. To exclude the testimony of this witness as to said consultation, on the ground that he was incompetent to disclose privileged communications, required plaintiff to declare, in effect, that what said physician said about having been consulted was *true*, and what plaintiff had said on the same subject was *false*. *Held*, plaintiff had no right to so assert.

**APPEAL AND ERROR: Harmless Error—Prejudice—Burden—**  
**3, 6 Non-sufficient Record on Excluded Question.** On the erroneous exclusion of a question, counsel must see to it that the record shows just what he has lost by the erroneous ruling. In other words, the record must substantially show what relevant or material answer the witness would have given had he been permitted to answer. Phrased differently, the court will not *imagine* the testimony that would have been given and therefrom *presume* prejudice.

**PRINCIPLE APPLIED:** Plaintiff claimed to have received a certain injury from a fall. Defendant claimed that plaintiff had this injury prior to her fall. Defendant called a physician who had treated plaintiff *prior* to the accident, and asked him "*to state the ailment for which he then treated plaintiff.*" The answer was erroneously excluded on the ground of privilege, because plaintiff had, by her testimony, waived her right to so object. As to another consultation, a physician was asked: "What was the matter with her?" and "whether there was any difference in the ailment of plaintiff when he visited her *after* the fall and when he visited her *prior* to the fall." No offer was made as to *what* answers the witness was able to make, *what* answers he would have made, or *what* answers the

offering party expected the witness to make. *Held*, no reversible error was made to appear.

**APPEAL AND ERROR: Briefs—Points and Arguments—Points**

- 4 **Noticed Sua Sponte.** The appellate court will, on its own motion, raise the point that no reversible error results from the erroneous exclusion of a question, when the record does not show *what* appellant lost by the erroneous exclusion.

**WITNESSES: Competency—Professional Communications—Waiver.**

- 5 A party who, following a particular injury, is in turn treated, professionally and separately, by two physicians, may call one of said physicians and prove by him what he discovered concerning said party's physical condition, *without in any manner removing the ban of secrecy on the other physician.*

**APPEAL AND ERROR: Harmless Error—Prejudice—Burden—**

- 3, 6 **Non-sufficient Record on Excluded Question.**

**APPEAL AND ERROR: Harmless Error—Prejudice—Burden—**

- 7 **Sufficiency of Record on Excluded Question.** A defendant who calls plaintiff's physician as a witness and seeks to show what said witness discovered while professionally treating plaintiff, and is denied the right to so show, must, on appeal, in order to establish reversible error, demonstrate two facts, to wit: (1) That plaintiff had in some manner waived the right to object to the divulging of said professional communications; and (2) that said witness, had he been permitted to answer, would have given a material or relevant answer.

*Appeal from Cedar Rapids Superior Court.—C. B. ROBBINS, Judge.*

THURSDAY, OCTOBER 25, 1917.

PLAINTIFF claims to have been injured by a fall upon a sidewalk, caused by alleged negligence of defendant in allowing snow and ice to remain on the walk. She has judgment upon verdict. The appeal presents whether testimony of a physician offered by defendant was rightly excluded for being privileged under the statute.—*Affirmed.*

*F. F. Dawley and C. F. Luberger, for appellant.*

*Rickel & Dennis and E. A. Johnson, for appellee.*

- SALINGER, J.—I. The sole point urged
1. WITNESSES:  
competency:  
privileged com-  
munications:  
waiver.
- for reversal is sustaining objection to the testimony of a physician on the ground that it was incompetent, for being a breach of privilege. The argument is, in effect, that the necessary relation did not exist, or, if it did, that testimony given by the objecting party and her witnesses waived the privilege. Plaintiff testified that, before her injury, she was in good health and able to do all kinds of work. A medical witness for her said that, after the injury, he found an infection which must have existed before the injury; that it might or might not have ultimately required operation upon plaintiff if she had not suffered the injury she complains of; but that said injury aggravated the infection and precipitated the operation. Thereupon, a doctor witness for defendant testified that he had in the past attended upon the plaintiff as her physician on several occasions, and on each had given her medical treatment. The first contention is that, as against the objection that same was privileged, he should have been allowed to say for what he gave her such treatment. If it were not for one thing, presently to be discussed, the case of *McConnell v. City of Osage*, 80 Iowa 293, at 298 to 301, is squarely against this claim made by appellant. There the testimony of plaintiff was substantially what it is here, and we held that its giving did not waive the privilege. But the *McConnell* case may not be applied without noting a distinction which is created by the fact that plaintiff here testifies, "I did not consult any doctors in regard to my health before my accident." Had this been said in her examination in chief, we should be constrained to hold that the relation which creates the privilege did not exist, and this though the doctor testifies it did exist. While a party
2. EVIDENCE:  
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sufficiency:  
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ing: right to  
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fulness.



is at liberty to show by one witness what is opposed to the testimony given by another, this will not permit such party for his own advantage to say that the testimony given by himself shall be treated as false and that of an opposing witness as true (*Stearns v. Chicago, R. I. & P. R. Co.*, 166 Iowa 566); but she said this on cross-examination, and we inquire whether that fact obviates the effect of the statement that plaintiff had no relations with any doctor. So far as testimony on cross-examination reveals the state of plaintiff's health, its giving does not waive privilege. *Burgess v. Sims Drug Co.*, 114 Iowa 275, at 279 to 281; *McConnell v. City of Osage*, 80 Iowa 293. And see *Lauer v. Banning*, 140 Iowa 319, at 328. But that does not meet the situation here. We are of opinion that, when plaintiff testified, though on cross-examination, that no relation existed upon which the claim of privilege could rest, she settled, at least for that trial, that her objection was not well taken.

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3. APPEAL AND  
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tion.

But does the exclusion constitute reversible error? There was no statement of what it was believed or expected would be said if the witness were permitted to answer. We may assume it was the expectation of defendant to elicit something with-

in the range of the paper issue which, *in its opinion*, would tend to show that whatsoever plaintiff had suffered was not caused by an act or omission for which defendant was answerable. If the record advised what was expected, we might agree with the opinion we have assumed appellant to entertain. As matters stand, we cannot find that appellant was prejudiced, unless we assume that, if permitted to answer, the witness would have said he treated plaintiff for something the existence of which tends to show that the fall of plaintiff did not cause the injuries of which she complains. He might have done so, or he might

have said he did not remember, or said that the treatment was for diphtheria. He might have made answer not open to the objection made, and he might not. *State v. Row*, 81 Iowa 138. It is said in *Mosier v. Vincent*, 34 Iowa 478, "They may have severally answered that they had no opinion," or that they did not remember, were not able to answer; the answer might have been unfavorable to the interrogator. Wherefore, as error is presumed against, and prejudice must be shown (*Mosier v. Vincent*, 34 Iowa 478, *Bradley v. Kavanagh*, 12 Iowa 273, *Iowa & Minn. R. Co. v. Perkins*, 28 Iowa 281, *Lawson v. Campbell*, 4 G. Greene 413, *Jenks v. Knott's M. S. M. Co.*, 58 Iowa 549, at 552, *Shellito v. Sampson*, 61 Iowa 40, 41), it must be made to appear that the witness was able to answer, and that what was proposed to be elicited was material and of benefit to the appellant. *Paddleford v. Cook*, 74 Iowa 433, 435; *Arnold v. Livingstone*, 155 Iowa 601, 604; *Willey v. Hall*, 8 Iowa 62, at 64; *Klaman v. Malvin*, 61 Iowa 752; *Mays v. Deaver*, 1 Iowa 216, 225; *Speers v. Fortner*, 6 Iowa 553; *Bradley v. Kavanagh*, 12 Iowa 273. Even where it is a party who is being questioned, it will not be presumed he would give testimony beneficial to him if allowed to testify. *Barr v. City of Omaha*, (Neb.) 60 N. W. 591, 592; *Masters v. Marsh*, (Neb.) 27 N. W. 438; *Klaman v. Malvin*, 61 Iowa 752; *Kelleher v. City of Keokuk*, 60 Iowa 473; *Arnold v. Livingstone*, 155 Iowa 601; *Porter v. Moles*, 151 Iowa 279; *Yates v. Kinney*, (Neb.) 41 N. W. 128, 129. On this head, support from authority is not needed. It would be a judicial scandal to promulgate as a judicial declaration that a witness is under a species of implied contract to furnish a memory adequate to the needs of the party calling him, and to answer questions only in such way as will benefit that party. The only presumption that may be indulged in is that the witness will tell the truth as he understands it.

Where the question is answered, the answer or its effect must appear in the record. *Mosier v. Vincent*, 34 Iowa 478; *Bradley v. Kavanagh*, 12 Iowa 273; *Jenks v. Knott's M. S. M. Co.*, 58 Iowa 549, at 552; *Lawson v. Campbell*, 4 G. Greene 413; *Thurston v. Cavenor*, 8 Iowa 155. If answer is not made, and nothing discloses what was excluded, we must presume the court ruled correctly in excluding it. *Iowa & Minn. R. Co. v. Perkins*, 28 Iowa 281; *Emerick v. Sloan*, 18 Iowa 139; *Hanan v. Hale*, 7 Iowa 153.

Even if an *answered* question is complained of, if the answer is not shown, it will be presumed that all improper questions were so answered as that the question did no harm (*Thurston v. Cavenor*, 8 Iowa 155), and that a witness who might be incompetent answered only as he might competently speak (*Lawson v. Campbell*, 4 G. Greene 413). It would follow that, when no answer is made, it should not be assumed that if made it would be of such character as to make its exclusion prejudicial error. In the words of *Shellito's* case, 61 Iowa 40, 41, we should not "imagine the testimony that would have been given, and thus presume prejudice." We say, in *Arnold's* case, 155 Iowa 601, at 607:

"If we were to reverse this case upon this ground and remand it for the purpose of permitting these questions to be answered, the answers might prove to be wholly negative." This is illustrated in this record by the fact that one question which was allowed to be answered proved to be a pure negation. "If the trial court had sustained an objection to such question, and if we were to reverse upon such ruling, such reversal would be based upon an imaginary error and not a real one. The reversal would be rendered farcical by a subsequent negative answer. And it would be none the less so though the answer were affirmative, if such answer \* \* \* could not change the final result."

And say in the same case that "We have repeatedly held that we will not reverse a case \* \* \* unless it be made

to appear in some manner what the answer of the witness would have been." (606) It is incumbent on appellant "to make it appear in some proper way what the proposed testimony was or would be." (607)

To obtain a reversal on the ground that excluded testimony would have tended to establish some particular fact, it is necessary that the trial court should have been advised that the testimony excluded by it would so tend. *Gustafson v. Rustemeyer*, (Conn.) 39 Atl. 104; *Maxwell Land-Grant Co. v. Dawson*, (N. M.) 34 Pac. 191; *Fearey v. O'Neill*, (Mo.) 50 S. W. 918. There must be a statement which tells the trial court, "clearly and explicitly, what the evidence was which he offered and expected to elicit by the answer of the witness to the question propounded." *Whitehead v. Mathaway*, 85 Ind. 85, at 86. And see *Votaw & Hartshorn v. Diehl*, 62 Iowa 676, 678.

The most we may do is to assume defendant expected an answer within range of the issue to which the question was advised, i. e., *something* that dealt with the health of plaintiff before she was injured. In situations which did more than this as to suggesting the answer sought, it has been held fatal that no profert or statement was made. In *Porter's* case, 151 Iowa 279, 280, a suit on an oral guarantee, a witness was not allowed to say what passed between him and defendant respecting future liability on the note. *Jordan v. D'Heur*, 71 Ind. 199, 200, involves the extension of a promissory note, and objection was sustained to a question whether consent was given at the time a written consent bears date. In *Shellito's* case, 61 Iowa 40, 41, the question was whether witness had not at a stated time talked with a named witness and then said that plaintiff had consented to the cancellation of the contract with defendant. In *Klaman's* case, 61 Iowa 752, the defendant was bound to suffer judgment if other signatures on a note signed by him were genuine, and made the defense that they were forgeries.

He was not allowed to say whether he heard the others impleaded say their signatures were put on by authority. In *Sellars v. Foster*, (Neb.) 42 N. W. 907, 909, a witness whose testimony that one Houston's reputation for truth was bad had been stricken out, was afterwards asked and not allowed to answer a question proper in form as to that reputation. In *Cutler v. Skeels*, (Vt.) 37 Atl. 228, 230, a witness was not allowed to answer whether he did not know better than to approach a judge and try to influence him. In *Masters v. Marsh*, (Neb.) 27 N. W. 438, a bastardy suit, testimony that complainant was seen going with someone other than defendant into a house in the nighttime, was excluded. In *Yates v. Kinney*, (Neb.) 41 N. W. 128, 129, counsel for defendant in a malicious prosecution was not allowed to say whether his client acted on advice of counsel. In *Gronan v. Kukkuck*, 59 Iowa 18, 20, a suit for damages for assault, the question was whether it was in any way understood by the witness and his father that plaintiff should be assaulted. In *Mordhorst v. Nebraska Tel. Co.*, (Neb.) 44 N. W. 469, 470, there was an attempt to recover for telephone instrument rental, and a defense that the instrument put in was worthless. The question disallowed was what kind of an instrument it was, as to being good or poor. And in *Kelleher v. City of Keokuk*, 60 Iowa 473, 475, a suit for injury from a defective sidewalk, a carpenter who had built it, and who had shown he knew how long stringers put there would remain in condition to hold nails, was not allowed to answer at what time those very stringers would become rotten and incapable of holding nails. In *Greenough, Cook & Co. v. Shelden*, 9 Iowa 503, 506, a written memorandum excluded may much more readily be presumed to have contained matter beneficial to the one desiring its introduction than we can presume here the witness would have stated. In *Perkins' case*, 28 Iowa 281, 284, it was much more clear that

an answer was sought as to who had affixed a stamp than it can possibly be what answer would have been made to the interrogatories involved on this appeal. And see *Votaw's* case, 62 Iowa 676, 680; *Kuhn v. Gustafson*, 73 Iowa 633, 637; *Whitehead's* case, 85 Ind. 85, at 86; *Arnold's* case, 155 Iowa 601, 604; *State v. Row*, 81 Iowa 138, 141.

We are not overlooking the approval given by *American Express Co. v. Des Moines Nat. Bank*, 177 Iowa 478, to the holding of *Mitchell v. Harcourt*, 62 Iowa 349, that, where it appears on the face of the question what the evidence sought to be introduced is, and that it is material, that suffices. The writer dissented because he believed, as he still does, that the face of the question cannot possibly settle what the answer will be. He gave other reasons for not following the *Mitchell* case which he still thinks are sound. But no individual criticism of the *Express Company's* case need be considered in determining what weight that case shall have on this appeal. The court has recently held that said decision does not change the rule but "distinguishes this rule." And we have enforced it as of old, and reaffirmed *Arnold v. Livingstone*, 155 Iowa 601, since deciding the *Express Company's* case. See *Biggs v. Carter*, 179 Iowa 284; *State v. Sayles*, 173 Iowa 374; *Whitney v. City of Sioux City*, 172 Iowa 336. In other words, the *Express Company's* case is an exception, to be applied only upon its peculiar facts. As no such facts exist in this case now before us, that disposes of the point for this case—as much so as if the decision had been overruled. We do not question that the rule puts some labor upon counsel, and that its enforcement may cause some delay of and some embarrassment in trial. The objection comes too late. That possibility was evident when each of the legion of decisions was made which establish the rule, and it was established notwithstanding. Evidently, the appellate courts have been of opinion that the advantages greatly outweigh the disadvantages.

Appellee has not urged that the record fails to present a reversible error because it does not show what was lost to appellant. But that does not relieve us from noting the state of the record. The law raises the point that no reversible error is shown. *Heiman v. Felder*, 178 Iowa 740, at 747, Point 2-a. If, for illustration, appellant complained of the reception of testimony and the record showed there was no objection made, we could not reverse, though appellee made no argument.

II. A doctor offered by defendant testified that he was called and visited plaintiff professionally about February 25, 1914. He was then asked: "Now, you may state what, if anything, you found the matter with her."

He was not allowed to answer, on the objection that to permit it would violate the statute creating the privilege. He then testified that he again visited the plaintiff on the 26th of February, and had an idea what was the matter with her. He was then asked: "What was the matter with her?" To this, objection was sustained as before. Thereupon, he was asked: "Now, state whether or not there was any difference in the ailment of plaintiff, at the last time you visited her on the 25th and 26th of February, from that which you found in her at the previous visits before those days." To this, the same objection was made and sustained.

What we have already said seems to rule this. We cannot know what he would have said, had he been allowed to answer, as to what he did find was the matter with plaintiff. He might have said nothing was the matter. He might have said something was the matter that was utterly immaterial and irrelevant. We cannot know whether he would have said he found any

4. APPEAL AND  
ERROR: briefs:  
points and  
arguments:  
points noticed  
*sua sponte*.

5. WITNESSES:  
competency:  
professional  
communications:  
waiver.

6. APPEAL AND  
ERROR: harm-  
less error:  
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difference, or, if he had said there was one, that it was a material one.

7. APPEAL AND  
ERROR: harm-  
less error:  
prejudice: bur-  
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That aside, there is an additional and special difficulty. In this case it would not be enough if it appeared that a relevant or material answer would have been given. On the face of the record, the witness was asked to testify upon what he found while attending the plaintiff in his professional capacity. Any answer he might give, no matter how relevant or material, would still be incompetent unless the patient's privilege was shown to have been waived. In this case, then, the appellant has the further burden of showing that the answer, if given, would not have constituted a breach of privilege. It is as essential that it be made to appear the answer would have been competent as to show it was admissible in other respects. *Emerick v. Sloan*, 18 Iowa 139; *Thurston v. Cavenor*, 8 Iowa 155; *Jenks v. Knott's M. S. M. Co.*, 58 Iowa 549. In fewer words, before appellant may ask reversal, the record must in some manner advise us that, if answer had been given, it was one that might rightly be given by a doctor who spoke to something which he had obtained in his professional capacity. In effect, the appellant does claim that this is the situation, and that, when the doctor was interrogated, it appeared of record that, as to his testimony, the plaintiff had waived her privilege. It but remains for us to determine whether this claim is well made.

The injury is alleged to have been sustained about the 26th day of February, 1914. The plaintiff testified concerning it, in effect, that it injured her left leg and left hip and made her arm sore; that it caused a numb feeling all through the lower part of the bowels and about the hips; that it made her feel sick; that she had hard work to get home and was sick and weak after she reached home, and remained in that condition for several days. A medical



witness for her testified, in effect, that his books show he first treated plaintiff on February 26th and continued to treat her for a day or two; that no other doctor was with him; that he discovered a tenderness in the region of the pelvis which could be ascertained only by feeling; that the muscles were on tension and comparatively hard; that he found some swelling and a tenderness between the navel and the pelvic bone, and some fever.

Did this testimony open the door to letting a doctor whom plaintiff did not call as a witness disclose what he obtained professionally during the period covered by the testimony adduced for plaintiff, to the extent of telling any and all things he then found the matter with her, and all differences in ailment then existing? In resolving this, one may not leave out of consideration the policy of the statute. That statute should have a liberal construction, because its purpose is to make it possible for every person to fully and fairly consult with a physician or submit himself to his examination without anticipation or fear that the confidence reposed may be broken in upon by a subsequent examination of the physician as a witness. *Battis v. Chicago, R. I. & P. R. Co.*, 124 Iowa 623, 626. The keeping in mind of the policy and object of the statute, and that it should be liberally construed to effectuate and attain these, have developed what will *not* waive the privilege. Eliminating what will not operate as a waiver will narrow what we have to decide.

As has been seen, it was the legislative intent that the patient might confide freely, and was not to be deterred therefrom by fear that this confidence would create opposing testimony. There is no punishment provided for the physician who reveals what has been confided to him. About all, then, that the statute could have aimed to do was to prevent revealing on the witness stand. It must have been understood by the legislature that those who made confidential revelations to physicians might enter into and

produce testimony in litigation wherein it would be very material, either as impeachment or otherwise, to have the physician disclose what he had been told, and it must have intended, therefore, that the occurrence of these conditions should not operate to waive the privilege. It has, therefore, been held that such testimony is not made admissible because it will impeach (*Battis v. Chicago, R. I. & P. R. Co.*, 124 Iowa 623, at 627), nor because it will operate to defeat falsehood (*Battis v. Chicago, R. I. & P. R. Co.*, supra, *McConnell v. City of Osage*, 80 Iowa 293). And that the naked fact that plaintiff makes a witness of one of her doctors does not give consent that defendant may make one of any or all other of plaintiff's doctors and have them testify on the same general subject to which the witness of plaintiff spoke. The plaintiff may be willing to waive the objection as to a witness in whom he reposes special confidence, yet insist on it as to another. *Mellor v. Missouri Pac. R. Co.*, (Mo.) 16 S. W. 849; *Hoy v. Morris*, 13 Gray (Mass.) 519; *Hope v. Troy & L. R. Co.*, (N. Y.) 17 N. E. 873; *Burgess v. Sims Drug Co.*, 114 Iowa 275, 281; *Baxter v. City*, 103 Iowa 599; *Dotton v. Village of Albion*, (Mich.) 24 N. W. 786; *McConnell v. City of Osage*, 80 Iowa 293, 301. These are not inconsistent with the rule established by cases like *Woods v. Incorporated Town of Lisbon*, 150 Iowa 433, at 435, which has attention elsewhere herein. In them. the waiver arises from the nature of the lifting of the veil, not from what sort of witness the plaintiff lifts it with. Upon this, some narrow exceptions have been grafted, as where a doctor is sued for malpractice and the plaintiff gives her version of the treatment received; or where exclusion would operate as a shield to crime (*State v. Grimmell*, 116 Iowa 596); or where a client goes upon the stand in an attempt to secure some advantage by reason of transactions between him and counsel, in which case he waives the right to object that the other side call the same

attorney to obtain his account of the same matter. *Kelly v. Cummins*, 143 Iowa 148, at 151. These exceptions do not govern here, and the rule stands. It follows as a corollary that a waiver of the privilege as to one transaction will not operate to waive it as to other and independent transactions. In *Nolan v. Glynn*, 163 Iowa 146, at 150, plaintiff testified that, in April, 1907, a Dr. Sherman gave her medicine to produce an abortion; the doctor denied this, but said he had given her similar medicine in 1905. He was not allowed to say for what purpose, nor whether it was to be used following an abortion, and we said:

"Undoubtedly in testifying to receiving the tablets in April, 1907, and their purpose, she waived the right to insist on the protection of the statute excluding the physician's testimony concerning the same (*Woods v. Incorporated Town of Lisbon*), but only as to matters concerning which she spoke. What the doctor may have done two years previous she did not allude to, and as to that his lips were sealed."

We said further:

"What their purpose was then [in 1905] would throw no light on the transaction in 1907, and would tend to open up professional matters on which plaintiff had the right to have him remain silent."

We approved *Tréanor v. Manhattan R. Co.*, 16 N. Y. Supp. 536, which holds testimony of a physician admissible when related "to the precise matters concerning which the complainant had testified," and that, therefore, the implied waiver related thereto, and not to an independent transaction. We know what the plaintiff and her medical witness disclosed as to some physical conditions at or about the time to which it was attempted to have the doctor for defendant speak. We have no way of knowing that, if the other had spoken, the answers would have been confined to what the plaintiff and her witness had revealed. In *State v. Ben-*

nett, 137 Iowa 427, at 430, 431, the physician was allowed to testify because he spoke only to the "very suggestion" made by him to which his patient had already testified. In *Reed v. Rex Fuel Co.*, 160 Iowa 510, at 518, 519, the plaintiff had testified in chief that he made certain complaints to his attending physician, and he showed those very complaints by other witnesses; and we held that the physician might say what complaints, if any, were made to him on that precise occasion. Neither of these help the appellant. On the other hand, in *Battis v. Chicago, R. I. & P. R. Co.*, 124 Iowa 623, at 627, the plaintiff testified he was unconscious at a stated time, and it was held his attending physician might not be interrogated as to whether he then found plaintiff conscious or unconscious. And in *McConnell v. City of Osage*, 80 Iowa 293, at 298, 299, the plaintiff gave evidence as to her ailments in the past, and that Dr. Chase was her attending physician during the period covered by this testimony; but it was held that this did not permit the physician to speak to confidential communications necessary to the treatment of the plaintiff. If, then, the privilege was waived in this case, it must be because of cases like *Woods v. Incorporated Town of Lisbon*, 150 Iowa 433, 435, 436. In their essence, these proceed upon the ground that, if the patient fully reveals her condition when treated by stated physicians, and what that treatment was, and the revelation is of a character which exposes matters which it would ordinarily be desired to keep private, that then these very physicians may testify concerning this same subject matter. Whether this be an exception to or an application of the rule is immaterial, because the facts upon which it is applied are utterly absent here.

These cases are within the statement of 4 Wigmore, Evidence, Sec. 2388, approved in *Nolan v. Glynn*, 163 Iowa 146, at 150, that:

"A waiver is to be predicated, not only when the conduct indicates a plain intention to abandon the privilege, but also when the conduct (though not evincing that intention) places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege. It is not to be both a sword and a shield."

What is ruled by cases like that of *Woods v. Lisbon* is made quite plain by the nature of what plaintiff revealed, and by our statements in the opinion, such as:

"Manifestly, if the patient himself breaks the seal of secrecy and gives publicity to the whole matter, there is a waiver, and this is true whether publicity is given by the testimony of the physician, by the testimony of the patient himself, or by the testimony of his other witnesses. \* \* \* It would be a reproach to the administration of justice, even in the absence of the statute, if the patient himself might detail all that occurred with his physician and yet compel the physician to remain silent.

"\* \* \* The plaintiff and her husband testified as to what was done when she was first taken to the hospital and thus opened the door for the testimony of her physicians on the same subject. \* \* \* Where two or more physicians are engaged in the same operation, a waiver of the prohibition of the statute by making public the otherwise privileged matter makes them all competent witnesses."

We find no applicability in *Nugent v. Cudahy Packing Co.*, 126 Iowa 517, at 523, which merely holds that, where defendant brings out that a physician found plaintiff unconscious, whereupon plaintiff brings out the same fact in a preliminary examination addressed to whether the witness was accepted as plaintiff's doctor, there is no waiver, and such examination brought out no affirmative evidence of a material fact on plaintiff's behalf, and would not make ad-

missible further testimony as to plaintiff's condition.

We find no reversible error, and the judgment appealed from must be—*Affirmed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

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A. J. NELSON et al., Appellees, v. CONSOLIDATED INDEPENDENT SCHOOL DISTRICT OF TROY MILLS et al., Appellants.

**QUO WARRANTO: Nature and Grounds—Illegality in Corporate**

1 **Organization—Schools and School Districts.** An information in the nature of *quo warranto* is the *exclusive* remedy to test the legality of the organization of a corporation. So held as to a public school corporation. (Sec. 4313, Code, 1897.)

EVANS and SALINGER, JJ., dissent.

**QUO WARRANTO: Proceedings, Etc.—Parties—Pleading.** In an

2 action against a corporation by information in the nature of *quo warranto* to test the legality of its organization, the act of making the so-called corporation a party defendant is not an admission of its corporate existence, in the face of a definite allegation to the contrary.

**INJUNCTION: Nature and Grounds—Illegality of Corporate Or-**

3 **ganization.** An action in equity to test the legality of the organization of a school corporation, with prayer for injunctive relief, is not the *allowable* remedy, even though such action be transferred to the law side of the calendar.

*Appeal from Linn District Court.*—F. O. ELLISON, Judge.

THURSDAY, OCTOBER 25, 1917.

THIS is a proceeding in equity to test the legality of an acting school corporation. The plaintiffs are taxpayers, and have sought their remedy by injunction. There was a decree in their favor, holding the organization of the defendant school district to be illegal and void. The defendants have appealed.—*Reversed*.

*Ring & Hann and Treichler & Treichler*, for appellants.

*F. L. Anderson*, for appellees.

1. QUO WARRANTO: nature and grounds: illegality in corporate organization: schools and school districts.

LADD, J.—The defendant Consolidated Independent School District of Troy Mills was organized, if at all, under the provisions of Section 2794-a, Code Supplement, 1913. The other defendants in the case are the acting directors who were elected as such following the alleged organization. The defendants question the right of the plaintiffs to challenge by an injunction suit the legality of the defendants' existence as a corporation, and urge that *quo warranto* is the only remedy available for that purpose.

That *quo warranto* is an appropriate remedy appears from Chapter 9 of Title XXI of the Code. A complete and adequate remedy at law is there provided for testing the validity of corporate organizations, and this remedy is quite generally held to be exclusive. It was applied in *State v. Independent School Dist.*, 29 Iowa 264. In *Cochran v. McCleary*, 22 Iowa 75, the right of a mayor to preside at meetings of a city council in cities of the second class was involved. The court held such right to preside, a franchise, and that the right to exercise the same might not be tested in equity; that the exclusive remedy was that of *quo warranto*, saying:

"In England and in the different states in this country, the law, solicitous to furnish a remedy for every invasion of legal right, has provided that of *quo warranto*, or an information in the nature of a *quo warranto*, to determine the title of an officer to his office and to determine the right of any person or corporation to exercise a public franchise."

In *State v. Alexander*, 129 Iowa 538, *quo warranto* was held to be the proper remedy to test the validity of the organization of an independent school district, and it was intimated that certiorari proceedings were inappropriate,

inasmuch as complaint was not of the exercise of any judicial function.

In *State v. Independent School Dist.*,  
 2. QUO WARRANT- 44 Iowa 227, the action was against the dis-  
 to: proceed-  
 ings, etc.:  
 parties:  
 pleading. trict, and, though recognizing the remedy  
 by *quo warranto* as appropriate, the court  
 held that the action must be brought against the persons  
 acting as a corporation alleged not to exist, saying that  
 to sue it would admit that it had been organized. This  
 conclusion is based on the language of Paragraph 3 of Sec-  
 tion 4313 of the Code, providing that a civil action by or-  
 dinary proceedings may be brought in the name of the  
 state "against any person acting as a corporation within  
 the state without being authorized by law."

Though this would seem the better practice, in several  
 states the so-called corporation is held to be a necessary  
 party. See *State v. Tracy*, (Minn.) 51 N. W. 613, and  
 cases cited. Contra, *State v. Uridil*, (Neb.) 55 N. W. 1072.  
 Whether making the so-called corporation a defendant  
 would amount to an admission of its corporate existence  
 depends upon the allegations of the petition; for the mere  
 inclusion of a name as a defendant could not operate as an  
 admission against an express averment in that pleading to  
 the contrary.

In *State v. Gaston*, 79 Iowa 457, an action in *quo war-  
 ranto* was held to be at law, and not triable *de novo*. In  
*Wallace v. Independent School Dist.*, 150 Iowa 711, as in  
 several other cases, the suit was in equity, but the pro-  
 priety of the procedure was not questioned. Here the  
 right to challenge the organization of a corporation other-  
 wise than by information in the nature of *quo warranto*  
 was raised in the trial court and is pressed here. In no  
 case since *Cochran v. McCleary*, supra, declaring this rem-  
 edy exclusive, has that decision been questioned, nor has  
 other remedy, when challenged, been held to be available.



The cases in equity in which the issue was determined are recent, relating to the organization of consolidated school districts, and furnish no sufficient foundation for the assertion that the bench and bar of this state have acquiesced in repudiating the statutes prescribing the procedure for testing the legality of corporate organizations, or ignored the universal holding that such procedure is exclusive. Acquiescence in the few equity cases in which the issue was decided finds explanation in the fact that dismissal because of error in procedure in such a case is in the nature of an abatement, and furnishes no obstacle to the institution of another action, and counsel with a good defense, as was found to exist in these cases, might well prefer to carry them to conclusions, rather than insist on dismissal and thereby merely delay the final determination of the issues raised. It should be added that acquiescence as a reason for holding that corporate existence may be tested in equity is not suggested by counsel nor in the record before us. Such suggestion originated with our disagreeing brothers, and, without challenging their veracity, we are constrained to doubt the correctness of their deductions from the facts, and to intimate that vivid imaginations have been active in assuming a condition not known to exist. Even were conditions as imagined, little inconvenience would be experienced in returning to a rational and statutory method of testing the validity of corporate organizations; for the dismissal of suits pending, if any there are, owing to error in selecting the wrong procedure, might delay but would not prevent resort to the procedure prescribed by statute.

Concession that this court may be held to have acquiesced in anything not presented to it for decision is not to be inferred from anything said. It is quite enough to say that we are quite unaware of acquiescence of bench or bar in the repudiation of the remedy through *quo warranto* proceedings, recognized by all courts, as well as text books,

as exclusive in cases like this. In no case other than *School Dist. Township of Franklin v. Wiggins*, 122 Iowa 602, is an intimation to be found that corporate existence may be tested otherwise than by *quo warranto* proceedings, as exacted in *Cochran v. McCleary*, *supra*. Nor is it clear from the record in that case that the writer of the opinion intended to hold more than that a suit in equity might be maintained even though it were necessary, as a circumstance or incident in the case, that the incorporation be shown to be merely colorable, and effected secretly and fraudulently, with the wrongful purpose of attaining results not authorized by law. In such a case, the alleged organization would be but a circumstance or incident in carrying out the unlawful designs of the perpetrators of the fraud, and undoubtedly might be the subject of investigation as an emergent issue, at the instance of a private litigant. Though some of the language of the opinion is broader, the allegations of the petition are in harmony with this interpretation. This view is confirmed by a later opinion of this court, filed upon a third appeal (142 Iowa 377), where it appears that final decree was entered against defendants as directors of this independent school district, assailed on the emergent issues with reference to an accounting.

A school district is, under our statutes, a public corporation, and as all parties, in undertaking to organize the district in controversy and in selecting officers thereof, acted in good faith, the Consolidated Independent District of Troy Mills is a *de facto* corporation. To constitute a corporation *de facto*, three things are necessary: (1) Some law under which a corporation with powers assumed may lawfully have been created; (2) a colorable and bona fide attempt to perfect an organization under such a law; and (3) user of the rights claimed to have been conferred by the law,—that is, of the corporate franchise. *Tulare Irrigation*

*Dist. v. Shepard*, 185 U. S. 1 (46 L. Ed. 773); *Pierce v. Inhabitants of Town of Lutesville*, 25 Mo. App. 317; *Evens v. Anderson*, (Minn.) 155 N. W. 1040.

Whether this district has the qualities of a corporation *de jure* is the sole issue in this case, and this can be raised by the state only. This is sometimes put on the ground that "corporate franchises are grants of sovereignty only, and if the state acquiesces in their usurpation, individuals will not be heard to complain" (*Miller v. Perris Irrigation Dist.*, 85 Fed. 693 [C. C.]), but oftener upon considerations of public policy, such as the importance of stability and certainty in such matters, and the consequences likely to, or which might, follow if the existence of a municipal corporation should be called in question and perhaps denied in actions between the corporation and private parties. See *State v. Honerud*, 66 Minn. 32 (68 N. W. 323).

In *Brennan v. City of Weatherford*, 53 Tex. 330, 336, the court remarked that:

"The creation of a corporate franchise is an attribute of sovereignty to be exercised solely by the supreme power of the state. Such franchise being amenable only to the power of its creation, it follows that this power alone can question the legality of its existence, by such proceedings as in its wisdom it may adopt."

To permit the existence of public corporations to depend on private litigation would be inimical to the welfare of the community. Experience has demonstrated that irregularities of more or less importance are to be found in the organization of nearly every incorporated body. Technical accuracy is not to be expected. The legal existence of a public corporation cannot be questioned without causing disturbance, more or less serious, and if the regularity of its organization can be kept open to inquiry indefinitely, no one can ever be sure that any of the taxes levied to meet its expenses, or the contracts necessarily entered into by it,

would be valid and enforceable. The transaction of public business might be blocked by private litigation commenced at the will or whim of any citizen. Where there has been an honest effort to comply with the law in the organization of a corporation, as a school district, and the officers selected proceed to execute the powers thereof, every presumption should be and is in favor of the regularity of such organization, and it is to be regarded as valid save when assailed by the state on information in the nature of *quo warranto*.

The convenience and security of vicinage ought not to be left exposed to disturbance by anyone who chooses to begin a law suit. To watch over and prevent the development of political growths which are likely to be prejudicial to the public interests is peculiarly the province and duty of the state, and in the procedure for testing the legality of corporations, the lawmakers have provided adequate protection of private interests, and at the same time guarded against the confusion which would be likely were others than the state permitted to raise such an issue. Section 4315 of the Code authorizes the county attorney to institute suit in the name of the state, and requires him so to do if so directed by the governor, general assembly or a court of record; and Code Section 4316 provides that if, on demand, the county attorney neglects or refuses to commence suit, "any citizen \* \* \* having an interest in the question may apply to the court in which the action is to be commenced, or to the judge thereof, for leave to do so, and, upon obtaining such leave, may bring and prosecute the action to final judgment." This affords ample protection for all private interest, for it must be assumed that the court or judge having jurisdiction will safeguard all private interests in ruling on applications of the character mentioned. This obviates most that was said in *School District Twp. of Franklin v. Wiggins*, *supra*, when applied to

a case not involving incidentally the perpetration of a fraud and praying for an accounting as the remedy, and, as said, obviates all objection to the exclusive remedy of *quo warranto* proceedings. But for this statute, it would be doubtful whether such an action might be prosecuted by other than the attorney general in the name of the state. See *State v. Olson*, (Minn.) 21 L. R. A. (N. S.) 685, and note. The decisions are uniform in holding that, in the matter of testing the legality of the organization or the existence of a public corporation, remedy by information in the nature of *quo warranto* is exclusive. The rule is accurately stated in 1 Abbott on Municipal Corporations, Section 32:

"The proposition may present itself, In what manner, by whom, and at what time can the question of legal right be raised? The rule of law invariably is that the state alone can question the right of the public corporation to exist and perform its duties and exercise its rights, and then in a proceeding brought for that purpose. And also that the question of legal corporate existence cannot be raised in a case or proceeding as collateral to the main issue, or through collateral attack."

See, also, 1 McQuillin on Municipal Corporations, Sections 158, 159 and note.

In *School Dist. No. 21 v. Board of County Commissioners*, 15 Wyo. 73 (11 Am. & Eng. Ann. Cas. 1058), the suit was by the board of county commissioners to enjoin the county treasurer from paying to the school district certain taxes theretofore levied, on the ground that the district had not been legally organized. It was allowed to defend, and it demurred to the petition, and the court held that the question could only be raised in *quo warranto* proceedings. In *Burnham v. Rogers*, 167 Mo. 17 (66 S. W. 970), the court, in reaching the same conclusion, said:

"Their right to exist and act as such corporations can-

not be impeached collaterally in the manner attempted in this petition. Confusion amounting to chaos would result if the life of every municipal or other public corporation in the state could be assailed in this manner."

The Supreme Court of Michigan, speaking through Cooley, J., in *Stuart v. School Dist. No. 1*, 30 Mich. 69, in declaring *quo warranto* the exclusive remedy, stated that:

"If every municipality must be subject to be called into court at any time to defend its original organization and its franchises at the will of any dissatisfied citizen who may feel disposed to question them, and be subjected to dissolution, perhaps, or to be crippled in authority and powers if defects appear, however complete and formal may have been the recognition of its rights and privileges, on the part alike of the state and of its citizens, it may very justly be said that few of our municipalities can be entirely certain of the ground they stand upon, and that any single person, however honestly inclined, if disposed to be litigious or over-technical and precise, may have it in his power in many cases to cause infinite trouble, embarrassment and mischief."

And in *Clement v. Everest*, 29 Mich. 19, 23:

"In such matters as concern the public, and do not interfere with private property or liberty, such action as creates municipal bodies and gives them corporate existence cannot be questioned without creating serious disturbance. If the regularity of their organization can be kept open to question indefinitely, no one could ever be sure that any of the taxes or other matters concerning his town were valid, and the whole public business might be blocked by litigation. There are some matters affecting private rights which are scrutinized strictly, because no one can be deprived of private rights without conformity to law. Where one man's property is taken for public purposes without his consent, the taking must be justified by regular action. But

where the organization of a local corporation, as a town or district, is left to the will of any particular body of electors or officers, and they proceed to execute their powers and complete the organization, their executed will ought to stand, if there has been a substantial compliance with the policy of the law giving them jurisdiction. Every presumption is to be made in favor of the regularity of such action, and where there is a valid law, and an organization under it which proceeds from the lawful agencies, it should be regarded as entitled to legal standing, unless measures are speedily taken to assail such action by some competent authority. \* \* \* The same rule which recognizes the rights of officers *de facto* recognizes corporations *de facto*, and this is necessary for public and private security."

On the same question, the court in *Trumbo v. People*, 75 Ill. 561, an action to recover the tax levied on school lands belonging to plaintiff, observed that:

"Notwithstanding the school district was thus illegally formed in violation of this statutory condition, a majority of the court are of the opinion that, in this collateral proceeding, the legality of the formation of the district cannot be inquired into, but that it must be taken as having been rightfully formed; and that the only mode in which the illegality can be inquired into and taken advantage of is by information in the nature of a *quo warranto*."

*Evens v. Anderson*, (Minn.) 155 N. W. 1040, is directly in point. The suit was in equity, to enjoin defendants therein, as officers of a so-called consolidated school district, from transacting any business as such, for that it had not been organized as provided by law, and the question raised was whether the individual plaintiff in such a case may draw in question the capacity of the district to act as a corporation. In answering in the negative, the court, speaking through Hallam, J., said:

"The rule is fixed by unanimity of authority that, where  
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a municipal body has assumed, under color of authority, to exercise the power of a public corporation of a kind recognized by the organic law, the validity of its organization can be challenged only by the state, and neither the corporation nor any private party can, in private litigation, question the legality of its existence. \* \* \* It is claimed that this is a direct, as distinguished from a collateral, attack. We shall not spend time in discussion of that question, for we conceive that it is not important. In some decisions, we find the language that the existence of a public corporation cannot be drawn into question in a collateral action between private parties. We think the rule equally well settled and sound that private citizens cannot raise such question by any form of direct attack. *Quo warranto* is the proper and, in the absence of statute, the exclusive proceeding to determine the question of the legal existence or validity of the organization of a public corporation. \* \* \* The essential point is that the right to draw in question the legality of an existent body of the character mentioned is the prerogative of the state, and not of private litigants. A private citizen having no interest distinct from that of the public may not invoke the writ of *quo warranto* to test the organization of a public corporation. It may be invoked only by the attorney general of the state. The reason is not a technical one. It is an application of the principle that public rights are to be vindicated by public authority. *State ex rel. v. McDonald*, 101 Minn. 349 (112 N. W. 278); *State ex rel. v. Olson*, 107 Minn. 136 (119 N. W. 799, 21 L. R. A. [N. S.] 685). The private litigant should not be permitted to reach the same result by a change of form of action."

The decisions holding that the legality of the organization of a municipal corporation cannot be tested save on suit in the name of the state, on information in the nature



of *quo warranto*, and that the validity of such corporation may not be questioned collaterally, are too numerous for citation; but see, in addition to those cited, *People v. Pederson*, 220 Ill. 554 (77 N. E. 251), *State v. Several Parcels of Land*, (Neb.) 113 N. W. 810, *City of Topeka v. Dwyer*, 70 Kans. 244 (3 Am. & Eng. Ann. Cas. 239 and note).

We are of opinion that plaintiff chose the wrong remedy, and that this error may not be obviated by a transfer to the law side of the calendar, as this could not substitute the state as the party instituting the proceeding. The petition should have been dismissed.  
—*Reversed.*

GAYNOR, C. J., WEAVER, PRESTON and STEVENS, JJ., concur.

EVANS, J., dissenting.—I raise no question as to the probable correctness of the majority opinion as an original proposition. My objection to it is that it ignores the fact that for many years the injunctive remedy has, by common acquiescence of bar and bench, been prayed and granted in this class of cases. Numerous cases of this character appear in our Reports which have been tried and decided on the merits in injunction proceedings. It is true that, in such cases, the propriety of the procedure was not challenged by counsel; and I freely concede that it is ordinarily no part of our duty, as between the litigants in a case, to raise a question which they have chosen to ignore. But these decisions have all been promulgated as law, and each of them has, to some extent at least, become a precedent. Granting that, ordinarily, they become precedents only for what they actually decide, the fact remains that the practice referred to has become so general as fairly to amount to precedent. Indeed, it is a fair contention, even though a debatable one, that, in the *Wiggins case*, 122 Iowa 602,

we gave our affirmative approval to the remedy by injunction.

We may fairly presume that many cases have been begun and are pending in this form, through the reliance of counsel upon the practice thus impliedly approved. The effect of our present holding will be disastrous to such pending cases; and the fatal blow will be as stealthy as that of a modern submarine.

The remedy by injunction is flexible and practical, and is not easily subject to abuse. The practical result will be the same by either remedy.

I feel sure that the majority holding will inflict a general surprise upon the bar and upon the trial courts of the state. If this be correct, the holding carries something of an adverse presumption against itself. If it be deemed desirable to terminate the long-time practice above referred to, it were clearly better that it be done by legislation, which would operate prospectively only; whereas a change by judicial decision is necessarily retroactive.

SALINGER, J., concurs in this dissent.

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STATE OF IOWA, Appellee, v. CLARENCE BARTLETT, Appellant.

**CRIMINAL LAW: Jurisdiction—Judgment in Absence of Formal**  
1 **Information.** A judgment of conviction for crime entered by a justice of the peace without formal written information, as commanded by Section 5576, Code, 1897, is a nullity.

**CRIMINAL LAW: Former Jeopardy—Bad-Faith Prosecution.** A  
2 collusive judgment of conviction, obtained by the accused himself in order to prevent a prosecution on the merits by the State, is no obstacle to a prosecution.

*Appeal from Mahaska District Court.*—K. E. WILLCOCKSON,  
Judge.

THURSDAY, OCTOBER 25, 1917.

THE defendant was convicted of assault and battery, and appeals.—*Affirmed.*

*L. T. Shangle, L. E. Corlett, and D. W. Hamilton, for appellant.*

*John McCutcheon and J. A. Devitt, for appellee.*

1. CRIMINAL  
LAW: juris-  
diction:  
judgment in  
absence of  
formal in-  
formation.

LADD, J.—The defendant was indicted for the offense of assault with intent to inflict great bodily injury. He pleaded not guilty, and also a former conviction of the same offense. The court withdrew the latter from the consideration of the jury, and the sole complaint is of this ruling.

It appears that prosecuting witness, Ella Young, and her brother, the defendant, had been having some trouble over the settlement of their deceased father's estate, and upon their meeting at the home of their mother, then 84 years of age, in the afternoon of August 30, 1916, the offense charged was committed. Mrs. Young had taken some food over to her mother, and as she took some chicken soup from the basket, her uncle, who was present, remarked that it "looked good enough to eat," and proposed to eat it; whereupon Mrs. Young said, in substance, that there was no poison in it, and either that defendant had insinuated that she would poison her mother, or that she was accused of poisoning people, and looked toward her brother, who, as she said this or repeated it, struck her with his clenched fist below the eye. She testified that she fell unconscious, and that, as she undertook to telephone to her husband, he knocked her down a second time, and later went after an ax, with a threat to split her head. Others present say that

she fell or sat in the cob box, and immediately sprang to her feet; that he made no such threat; and that but one blow was struck. The defendant, who is 6 feet 3½ inches tall and weighs about 200 pounds, admits that he hit his sister with the intention of blackening her eye, but claims that she said "Damn you," when he did so; that he grabbed the telephone holder from her hands and told her she could not telephone to the officers; and that he went and got an ax, but explained that he was merely preparing to meet her husband. Shortly after 9 o'clock in the evening, he called on George Thompson, a justice of the peace, and told him that Mrs. Young had gotten too smart, and he had slapped her and knocked her down; and he pleaded guilty to assault and battery. Thereupon, the squire ascertained from the Code that the fine might be anything not exceeding \$100, and, noticing that a predecessor had imposed a fine of \$3 for like offense, he assessed that amount against defendant, together with 50 cents costs. Payment followed immediately. All this was without information's being filed or evidence adduced other than defendant's statement of what he had done. The justice thereupon made the following entry in his docket:

"State of Iowa vs. C. W. Bartlett, Comes now C. W. Bartlett and on oath states that, on the 30th day of August, 1916, committed the crime of assault and battery on the person of Mrs. Ella Young, by striking her with his bare fist at the home of Mrs. Jane Bartlett, said C. W. Bartlett pleads guilty to the above charge and is assessed a fine of \$3 and costs, total \$3.50, which was paid in full on this 30th day of August, 1916. George Thompson, Justice of the Peace."

2. CRIMINAL  
LAW: former  
jeopardy: bad-  
faith prosecu-  
tion.

The mere recital of the record stamps the entire proceeding before the justice of the peace as the merest farce. The law has long been settled that, if one procures him-

self to be prosecuted for an offense in order to get off with slight punishment, and thereby bar a prosecution in good faith by the state for the same offense, and such prosecution is really by himself, either directly or indirectly through the agency of another, and the state, though a party in name to the proceedings, is not so in fact and has no actual agency in the matter, the judgment entered is void, and affords the accused no protection. *State v. Maxwell*, 51 Iowa 314; *State v. Green*, 16 Iowa 239. While the ground for so holding is usually stated to be the fraud practiced by the accused, a better reason for such decisions is that the state has never become a party to the action. The state can no more be bound by a judgment to which it is not a party than can a citizen of the state. As said by Bishop in 1 Bishop on Criminal Law, Section 1010:

"He (the defendant) is, while thus holding his fate in his own hands, in no jeopardy. The plaintiff state is no party in fact, but only such in name. The judge indeed is imposed upon, yet in point of law adjudicates nothing; 'all was a mere puppet-show, and every wire moved by the defendant himself.'"

See *Shideler v. State*, (Ind.) 16 L. R. A. 225. Section 5576 of the Code requires that:

"Criminal actions for the commission of a public offense must be commenced before a justice of the peace by an information, subscribed and sworn to, and filed with the justice."

The two sections following prescribe what an information must contain, and its form, and Code Section 5579 exacts that:

"The justice must file such information and mark thereon the time of filing the same."

At the common law, a written complaint was required before a defendant could be put on trial, except when ac-

cused of contempt. And there is no reason for thinking that the legislature intended otherwise in enacting these statutes. Though an accused may be arrested, under circumstances defined by the statute, without warrant, the accusation must be in writing, and duly filed as above required. Unless this is done, the justice is without jurisdiction, and any judgment he may enter is utterly void, and no obstacle to a subsequent prosecution by the state. *Bigham v. State*, 59 Miss. 529; *Wilson v. State*, 16 Tex. 246; *State v. Goetz*, (Kan.) 69 Pac. 187. As defendant failed to sustain his plea of former jeopardy, the court rightly refused to submit that issue. *State v. Jamison*, 104 Iowa 343.—*Affirmed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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STATE OF IOWA, Appellee, v. IDA E. MEYER, Appellant.

**CRIMINAL LAW:** Trial—Change of Venue—Erroneous Exercise  
1 of Discretion. The trial court possesses no unbridled discretion to refuse a change of venue.

**PRINCIPLE APPLIED:** A mother and son were jointly indicted for the murder of the son's wife. The son was tried and convicted. The mother, at a subsequent term of court, moved for a change of venue, and supported the same with a showing substantially as follows, to wit:

That the son's trial was sensational, and therein the facts relied upon by the State were gone into in great and minute detail before a great concourse of people; that such details were industriously disseminated among practically all the people of the county by long-continued and biased accounts in newspapers of large influence and circulation; that throughout the county the mother's chastity was strongly questioned, and she was, quite largely, deemed criminally responsible for the death, some years before, of her own husband; that it was practically impossible to secure affidavits of the existence of

prejudice, though many responsible people admitted such to be the fact, but declined to sign affidavits for fear of incurring the displeasure of other citizens; that talk was quite largely indulged in over the county that a change of venue would be expensive to the county; that the attorneys for defendant were severely criticised by many people for defending one so guilty; that it was currently reported throughout the county that the judge who presided at the son's trial had stated that he regarded the son as less guilty than the mother.

The counter showing by the State did not deny the foregoing state of facts, but the record revealed the fact that the State readily secured 487 separate affidavits that no prejudice existed.

*Held*, the court abused its sound legal discretion by refusing the requested change of venue.

**HOMICIDE:** Trial—Instructions—Applicability—Aiding or Abetting. *Instructions must be applicable to the evidence.* Held error to instruct that defendant might be convicted if she "aided or abetted" another in the commission of a homicide when the record revealed the fact that there was no evidence of aiding or abetting.

**CRIMINAL LAW:** Evidence—Self-Incrimination—Coroner's Inquiry. *Testimony obtained before a coroner's jury from one suspected of a criminal homicide, but unrepresented by counsel and not informed of his right of non-self-incrimination, is not voluntary, and therefore not admissible on the trial of such person for said homicide.*

**CONSPIRACY:** Evidence—Declarations. A prima-facie showing of conspiracy is a condition precedent to the admissibility of declarations of one alleged conspirator against the other.

*Appeal from Madison District Court.*—J. H. APPLGATE, Judge.

THURSDAY, OCTOBER 25, 1917.

DEFENDANT was indicted jointly with her son on a charge of murder in the first degree. Trial was had to a jury. The jury returned a verdict of guilty of murder in the second degree. Defendant appeals. For reasons point-

ed out in this opinion, the cause is reversed.—*Reversed and remanded.*

*John A. Guiher* and *W. S. Cooper*, for appellant.

*H. M. Havner*, Attorney General, *H. H. Carter*, Assistant Attorney General, and *Phil R. Wilkinson*, County Attorney, for appellee.

- GAYNOR, C. J.—The defendant is
- |  |   |
|--|---|
| 1. CRIMINAL<br>LAW: trial:<br>change of<br>venue: er-<br>roneous exer-<br>cise of dis-<br>cretion. | charged with the crime of murder in the first degree. She was indicted jointly with her son, Fred Meyer, and charged with the killing of Ethel Meyer, the wife of Fred. |
|--|---|

The crime is alleged to have been committed on the 25th day of July, 1915, and by means of a revolver held in the hands of said Ida E. Meyer, defendant herein, and her son, Fred Meyer. The indictment was returned on the last of October of that year. At the December term of court, she appeared and pleaded not guilty, and filed a motion for a continuance. This motion was sustained. On the 4th day of February, 1916, she again appeared and filed a petition for change of venue, supporting the same by affidavits.

From these affidavits it appears: That her codefendant, Fred Meyer, was tried at Winterset, in Madison County, at the December term, 1915, and a verdict of guilty of murder in the second degree returned against him; that, on this verdict, he was sentenced to the penitentiary for a term of 15 years; that this trial was attended by a large concourse of people and lasted for several days; that there were a large number of jurors summoned and examined, most of whom were present during the trial; that this trial gave great publicity to the affair, and to the facts upon which the State relied for a conviction; that the newspapers of the county, while assuming to publish reports of the trial as it progressed, gave coloring to the facts by comment and innuendo unfavorable to this defendant, thereby producing



in the minds of the people a settled conviction that this defendant is guilty of the offense charged against her; that these newspapers began the publication of their accounts of the tragedy soon after its occurrence, and continued comment upon the facts developed as the investigation proceeded, greatly to the prejudice of this defendant; that these newspapers have a large circulation, and are influential in the county, and are taken and read by most of the citizens of said county; that the public mind is no longer in a condition to receive patiently, and weigh impartially and dispassionately, the evidence which may be adduced in said cause for and in behalf of the defendant; that the public mind has been poisoned against the defendant in said county by the circulation of untrue rumors touching the chastity of this defendant, and in the circulation of false stories as to the cause of the death of her husband; that it has been persistently and generally circulated through said county that the defendant's husband came to his death by foul means; that it has been falsely circulated that this defendant was instrumental in causing his death; that it has been falsely circulated throughout the county that the defendant is a woman of bad character. It appears from the affidavits of the attorneys who represented her in this cause that, when they approached citizens with a request for signatures to the application for a change of venue, they were refused, on purely prudential grounds; that citizens asserted and claimed that to do so would be prejudicial to their private interests. The same attorneys assert in their affidavits that, during the trial of the son, it was frequently said to them by residents of the county that there was no doubt of the *mother's* guilt; that there would be no trouble in showing *her* guilty; that she had murdered her husband and should have been sent to the penitentiary for that, and that now she must go; that it was said by many citizens of the county that they could not believe that reputable at-

torneys would allow themselves to be employed in the defense of such a guilty person as Mrs. Meyer; and that many friends had said to them that people were surprised that a reputable attorney would be employed in the defense of one so guilty as Mrs. Meyer, and that it would hurt these attorneys in the estimation of good people to be so employed. These attorneys stated that the publicity given to the trial of Fred Meyer, and the rumors and gossip circulated touching Mrs. Meyer's character and her connection with the death of her husband, had so prejudiced the people of the county against her that, in their judgment, she could not obtain a fair trial in the county. It further appears that it was currently reported throughout the county that the judge who tried Fred Meyer and sentenced him to 15 years in the penitentiary stated that he would have sentenced him to a longer term if he had not believed that Fred Meyer had little to do with the crime; that Ida E. Meyer, this defendant, was the one who really committed the murder. The affidavits of these attorneys show that they had spoken with many people touching her claim for a change of venue, and that the people spoken to admitted that the prejudice against her was so strong that she could not have a fair trial, but declined to sign affidavits because they did not want to incur the ill will of persons interested in the prosecution.

It appears from a reading of the newspaper reports of the tragedy and of the trial of Fred Meyer, as the same have been submitted to us, that every detail touching the tragedy and the manner in which it is claimed to have occurred was fully published and circulated through the county; that detailed accounts of the testimony of witnesses on the trial of Fred Meyer were published, with comment, and with suggestion as to discrepancies that appeared in the testimony, and, though perhaps not intentionally so, they received the coloring which is naturally given by those

who have the conscious feeling that the defendant is guilty of the offense charged. For instance, in one publication made on January 13th, in one of the leading newspapers of the county, it was said:

"Mrs Ethel Meyer, bride of only a few months, was found dying in the Meyer home, northwest of here, on July 25th, with bullet wounds in her head, and a revolver lying by her side. Meyer and his mother assert the young bride committed suicide, using the revolver that lay beside her to commit the act. The State proved, however, that this revolver had been long unused, and could scarcely have been discharged by one of Mrs. Meyer's strength (meaning the younger Mrs. Meyer)."

In another publication it was said:

"It was developed at the inquest that the bullet found in the cavity, practically intact, weighed but 74 grains, while the bullet from the cartridge in the revolver which Meyer said was found in his wife's hand weighed 154 grains."

Further, it was said:

"There was evidence before the grand jury that Meyer and his mother did not tell the same stories; that they tried to cover up some of their actions, and destroyed some of the bed clothing which was blood-soaked."

It further appeared in said paper as follows:

"The fact that Fritz Meyer had been found dead in the fields years ago was recalled. Young Meyer is declared by a neighbor to have said, 'I suppose I will have to pound stone for this.' "

It appears that the Des Moines Tribune, a paper circulated in said county, on December 9th contained a partial report of the trial. The report began:

"The Revolver Was Not Close to the Dying Woman. The revolver with which Fred Meyer and his mother in-

sist Mrs. Ethel Meyer killed herself was not lying beside the dying woman when he arrived at the Meyer home a few minutes after the shooting, so testified Albert Kneuper, neighbor of the Meyers, today in the trial of Fred Meyer."

It was further published in some of the papers that Fred and his mother had said that, when they discovered the wife dying with a gunshot wound, she spoke, and said to them that she wanted to die ("Folks, I wish to die"); but that it was shown that the wound was of such nature that this could not be true.

It would be profitless to set out all the comments. They are numerous, and many of the headlines inflammatory. To this showing, the State filed its resistance. Certain witnesses made specific denials of matters to which we have not referred in this opinion. The resistance was supported by an affidavit to the effect that they, the affiants, believed that the people of the county were not only without prejudice against the defendant, but they were without any special knowledge of the case, and that they have no bias or prejudice against the defendant, and that there was no excitement or feeling against her in the county, and that, in their judgment, she could and would receive a fair and impartial trial. This affidavit was signed by 487 residents of the county. The county auditor testifies in addition as follows:

"Was out yesterday securing signatures to affidavit in resistance to petition for change of venue. Secured 110 or 115 signatures all on one affidavit. Left about 8 o'clock and got back about half past 5. No prejudice against defendant."

The deputy sheriff testified that he was out securing signatures to affidavit in resistance to petition for change of venue. "Got 114 signatures. Left a little after 9:00 and got back a little after 4:00. Heard talk while I was out that change of venue would be very costly to the

county, but they did not sign a resistance on that account. No prejudice."

We have not set out all the evidence pro and con on this question, but sufficient to show the general trend of the testimony on this point. The fact that it was generally circulated through the county, after this tragedy, that this defendant had been instrumental in doing away with her husband, and that it had been generally circulated through the county that she was a woman of bad character, is not denied. The number of affidavits in resistance secured by the State is very suggestive of the condition of the public mind, and, we think, tends to support rather than contradict the defendant's claim. No fact herein set out by the defendant upon which prejudice might be predicated is denied by the State. Under this showing, can it be said that the defendant could, in that county, receive a fair and impartial trial? We recognize that there is discretion in the district judge in passing upon all these matters, but it is a sound judicial discretion, one that has in it a recognition of the fact that, in all well regulated governments, the citizen is entitled to life, liberty and the pursuit of happiness; that these he is entitled to enjoy unless forfeited by crime against the law; that one of the guaranties given the citizen, found in the Constitution of the state, is the right to a public trial by an impartial jury when accused of crime. This is the right of the citizen under the law, and it cannot be denied him. If the judicial system is to sustain itself in the confidence and respect of all right-thinking people, there must be no suspicion of unfairness in the administration of public justice. It is fundamental, under our system of government, that one charged with the commission of a public offense is presumed to be innocent until the contrary appears. He is entitled to a fair and impartial trial before a jury of his

peers, uninfluenced by any bias, prejudice or preconceived notions of his guilt. To this end, the trial should be removed from these influences, so far as it lies within the power of the court to do so.

We recognize the fact that it is sometimes difficult to draw a line of demarcation between a state of popular feeling that prevents a fair and impartial trial and that which, though existing, may not reach to that point. Four hundred eighty-seven men have voluntarily signed affidavits that this plaintiff, in their judgment, can receive a fair and impartial trial. Her son had been tried for this same offense and convicted,—tried before a jury of that county. The record shows that many citizens were summoned to that trial, both as witnesses and jurors; that the grand jury of the county found the indictment. Though it might be possible to select twelve men who had no feeling or bias against the defendant on entering the jury box, yet the trial was to be had in the same community in which the other jurors found her son guilty, under practically the same showing that the State intended to urge against her. During the time of that trial, the courthouse was crowded. Influences from without the jury would, under the showing made, be strong and prejudicial to any fair trial of this defendant. We can reach no other conclusion under this record than that the defendant is entitled to the change prayed for. The court, however, overruled the motion, and this is the first ground of error assigned. This ground must be sustained.

Thereafter, a jury was impaneled, and the defendant tried and convicted of murder in the second degree. Upon the trial, the court told the jury that they could convict the defendant though they did not find that she actually fired the shot that took the life of Ethel Meyer, and said to them that, if they found from the evi-

2. HOMICIDE:  
trial: in-  
structions: ap-  
plicability:  
aiding or  
abetting.

dence, beyond a reasonable doubt, that she aided, assisted, or abetted Fred Meyer in taking the life of Ethel Meyer, they should convict her. These instructions were objected to, and complaint of them is made here. A careful reading of the record discloses that there was no basis, in the facts proven, for submitting to the jury the guilt of the defendant on the theory that she aided or abetted her son in the commission of the crime. Verdicts cannot be allowed to rest on mere suspicion, or upon a state of facts not shown to exist. There is no evidence that she aided or abetted or assisted her son in the commission of the crime. That this was error, and prejudicial, see *State v. Fuller*, 125 Iowa 212; *State v. Myer*, 69 Iowa 148; *State v. Meyer*, 180 Iowa 210.

It is next contended that the court erred in permitting the State to introduce testimony given by the defendant at the coroner's inquest. It is claimed that, after the occurrence of the tragedy, the matter came before the coroner of the county for investigation, and a jury was impaneled to inquire into the cause of the death of Ethel Meyer. It is claimed that this defendant was subpoenaed before the coroner and sworn to give evidence at said hearing; that she was unrepresented by counsel, and in no way admonished of her rights; that her testimony was not voluntary, but was given under compulsion, and therefore was not admissible against her when charged with the crime. The voluntary admission of crime or of facts tending to connect one with the commission of a crime are all receivable against him when on trial for the crime, but it is fundamental that no one can be compelled to give testimony against himself involving him in criminality. To be voluntary, it must be spontaneous. It must be the free-will offering of his own mind. Clearly, if one is called into a judicial proceeding in which his guilt or innocence is

3. CRIMINAL  
LAW: evi-  
dence: self-  
incrimina-  
tion: coro-  
ner's inquest.

involved, he cannot be required to testify as to any matter which would tend to incriminate him. If he is compelled to answer, under oath, questions put to him by a judicial officer having charge of an investigation touching his connection with the crime then being investigated, statements then made are not admissible in any future proceedings involving the same offense, when he is put on trial for that offense. One who voluntarily appears, takes an oath and submits to an examination before a coroner's jury, sitting to investigate and determine the cause of the death of another, cannot have his evidence so given considered privileged. But if it appears that a coroner's jury is sitting to investigate the cause of the death of one whose death is suspected to have been the result of foul play, and the one who is suspected of being implicated in the crime is summoned or subpoenaed to appear before the jury and give testimony, and is sworn to tell the truth, and is not informed of his right to refuse to testify, and is not provided with counsel, and is compelled, or believes he is compelled, to answer questions propounded to him by the coroner or by those assisting in the investigation, his answers so given cannot be said to be voluntary, and cannot be used against him thereafter, in the event he should be ultimately formally charged with the commission of the crime investigated.

It is apparent in this record that, at the time the coroner's jury was sitting, this defendant was suspected of the commission of this crime, subpoenaed, and examined for the purpose of verifying this suspicion. The whole trend of the examination shows this suspicion and this purpose. She was examined and cross-examined. Other testimony was given, contradicting what she said. She was again called to explain, examined and re-examined. The examination shows, we think, that it was the thought of the in-



quisition that her hands were red with blood, and that by her own mouth her guilt could be shown. We think evidence obtained in this way would not be admitted against her. To allow it would be violative of well established rules recognized by this court. The same power that punishes makes also the law that protects. See *State v. Storms*, 113 Iowa 385, 387; *State v. Clifford*, 86 Iowa 550; *Tuttle v. People*, 33 Colo. 243; *Cicero v. State*, 54 Ga. 156; *State v. O'Brien*, 18 Mont. 1; *State v. Young*, 119 Mo. 495; *Farkas v. State*, 60 Miss. 847; *State v. Senn*, 32 S. C. 392.

Inasmuch as this case must be reversed,  
4. CONSPIRACY : we refrain from any discussion of the  
evidence : dec- weight or sufficiency of the evidence, but  
larations. have to say that, in absence of proof of any  
conspiracy, declarations made by one jointly indicted with  
another in the commission of a crime are not admissible  
against the other. To render competent evidence of acts  
or declarations of a person other than the defendant, there  
must be proof of conspiracy, and even then the acts or de-  
clarations must be in furtherance of the conspiracy. There  
is no proof of conspiracy in this case between the son and  
the defendant, and the statements themselves are not suf-  
ficient to prove the conspiracy. *State v. Crofford*, 121  
Iowa 395.

Other matters are discussed which we do not think will  
arise on another trial of this cause, and they are not, there-  
fore, considered in this opinion.

For the errors pointed out, the cause is — *Reversed and  
remanded.*

LADD, EVANS and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. E. F. POWERS, Appellant.

**GRAND JURY: Number—Deficiency—Failure to Object—Effect.**

- 1 The acts of a grand jury of 7, drawn from a panel of 11 instead of 12 names, are not wholly void, and are unimpeachable *by one duly held to answer*, unless objected to at the time of impaneling. (See Sections 339, 5321, Code, 1897.)

**CRIMINAL LAW: Preliminary Information—"Holding to Answer"**

- 2 —**Sufficiency.** A sufficient "holding to answer" is shown by the entry by a committing magistrate of the following order, to wit: "I have ordered that he (accused) be held to answer the same." (See Section 5230, Code, 1897.)

**INDICTMENT AND INFORMATION: Requisites and Sufficiency**

- 3 —**Venue.** Venue is sufficiently laid if the court, irrespective of punctuation or paragraphing, can determine that such venue is laid in a specified county.

**INDICTMENT AND INFORMATION: Requisites and Sufficiency—**

- 4 **Duplicity.** An indictment charging an assault with intent to rape *and carnally abuse* is not subject to the vice of duplicity. (See Section 4756, Code, 1897.)

**JURY: Competency—Disregard of Interpreter.** One who posi-

- 5 tively says on oath that he understands a foreign language and will be controlled by his understanding of what he hears the witness say in such foreign language, irrespective of what the official interpreter of the language may say, is a wholly incompetent juror.

**JURY: Competency—Doubtfulness—Duty of Court.** When the

- 6 competency of a proposed juror is manifestly doubtful, it is the duty of the court—at least the safer course—to sustain the challenge.

So held where a juror who understood a foreign language stated that he would be "*inclined*" to follow his own understanding of what the witness said in said language, irrespective of what the official interpreter might say.

So held also where a witness stated he could not write the English language, but later, under pressure, stated he could not write it very well, and had never learned to read the English language much.

**CRIMINAL LAW: Trial—Indorsement of Witnesses on Indictment—Interpreters.** The name of one who is used as an interpreter of witnesses who testify in a foreign tongue need not be indorsed on an indictment. (Section 5373, Code Supplement, 1913.)

**EVIDENCE: Hearsay—Interpreters.** On who interprets, for 8 court and jury, the testimony of a witness who speaks in a foreign tongue, does not give hearsay testimony.

**APPEAL AND ERROR: Assignment of Error—Sufficiency.** An 9 assignment "that the court erred in not excluding the question 'What did she say?'" or "that the court erred in not granting a new trial because the whole record discloses that defendant was deprived of a fair trial," raises no reviewable question.

**WITNESSES: Competency—Refreshing Memory—Absence of In-**  
10 **dependent Recollection.** A witness may not be permitted to refer to a writing, even though made by himself, and read therefrom, when at said time he has no past or present independent recollection of the accuracy thereof.

**RAPE: Assault With Intent—Evidence—Subsequent Acts.** Acts 11 by defendant with reference to the same prosecutrix, though subsequent to the occurrence charged in the indictment, are admissible when tending to prove that the defendant's mental attitude was such as to make it probable that the offense charged was committed at an earlier time.

**RAPE: Evidence—Complaints by Prosecutrix—Details.** Evidence 12 of a complaint by prosecutrix to the effect "that she said to him (the witness) that defendant threw her down at the cob pile and tried to have sexual intercourse with her" is not objectionable as going into nonallowable detail, but the rule allowing the showing of complaints by prosecutrix cannot by any possibility be so stretched as to permit a long, detailed, and minute recital of the facts leading up to and culminating in the commission of the offense.

**RAPE: Evidence—Nonvoluntary Complaint by Prosecutrix.** Non- 13 voluntary complaints by prosecutrix of a sexual outrage upon her—those extracted from her by a process of cross-examination—are wholly inadmissible as *complaints*. Evidence reviewed, and held to show that the alleged complaints in question were nonvoluntary.

**RAPE: Evidence—Corroboration—Total Failure.** Evidence re-  
14 viewed, and held to disclose a total failure of corroborative  
testimony.

**RAPE: Evidence—Corroboration—Complaints by Prosecutrix.** Prin-  
15 ciple recognized that complaints by a prosecutrix of a sexual  
outrage upon her are not corroborative of her testimony, as  
required by statute. (Section 5488, Code, 1897.)

**RAPE: Evidence—Corroboration—Sufficiency.** Evidence that de-  
16 fendant, in a prosecution for assault with intent to rape, had  
mere "opportunity" to commit the offense, and had stated that  
he "kidded" or "joshed" the girl, constitutes no corroboration  
as required by the statute. (Section 5488, Code, 1897.)

**RAPE: Assault With Intent—Instructions—Included Offenses—**  
17 **Assault and Battery.** Under a charge of assault with intent  
to rape "by force," etc., the included offense of assault and  
battery should always be submitted when the evidence is such  
as will sustain a verdict for such included offense.

**RAPE: Assault With Intent—Included Offenses—Great Bodily**  
18 **Harm.** An assault with intent to inflict great bodily injury is  
not necessarily included in an assault with intent to ravish.

**RAPE: Assault With Intent—Included Offenses—Felonies Gener-**  
19 **ally.** An assault with intent to commit rape is one with intent  
to commit a felony, but it does not follow that, therefore, it  
was error not to submit an assault with intent to commit  
felony generally.

*Appeal from Carroll District Court.—E. G. ALBERT, Judge.*

THURSDAY, OCTOBER 25, 1917.

INDICTMENT charging assault with intent to commit  
rape. Defendant was found guilty as charged, and appeals.  
—*Reversed and remanded.*

*Brown McCrary and Ralph Maclean, for appellant.*

*H. M. Havner, Attorney General, and H. H. Carter,  
Assistant Attorney General, for appellee.*

SALINGER, J.—I. The grand jury im-

1. GRAND JURY:  
number: paneled for the year 1915 consisted of 12 per-  
deficiency: sons, until the February term of that year,  
failure to ob- when one of the members of that body was  
ject: effect,

dismissed by the court for the rest of the year. No one had been drawn to fill the vacancy thus created. The panel which indicted this defendant had its 7 members drawn from this 11, and it is urged that drawing from the 12 is essential to a legal grand jury. While we think that a jury thus drawn is subject to challenge, we do not agree with the appellant that it is in law no grand jury at all, and that its acts are void though not challenged. The State relies upon Section 5321 of the Code, which is that, where one has been held to answer, if he does not appear and object to the impaneling of the grand jury at the time, he will be held to

2. CRIMINAL  
LAW: pre- have waived objections thereto. In effect,  
liminary in- the appellant concedes that this avoids his  
formation: point, if he has been held to answer within  
"holding to the meaning of the law, and he insists that  
answer:"  
sufficiency. this has not been done. As we gather the

argument, this is said to be so because the committing magistrate concluded his record merely with the statement: "I have ordered that he be held to answer the same." That is substantially in the language of the statute, which is: "I order that he be held to answer the same." Code Section 5230. Upon the making of this order, the defendant gave bond that he would appear "at the district court of Carroll County, Iowa, at the next term thereof, and answer said charge and abide the orders and judgment of said court." The terms of court are fixed by law, and persons held to appear must take notice thereof. Code Section 232. We think he was bound to appear and answer at the term during which he was indicted. This being so, by failing to appear and challenge the panel, he waived the point he now makes.

## II. The indictment is in this form:

3. INDICTMENT  
AND INFORMATION:  
requisites and sufficiency:  
venue.

"That said E. F. Powers on or about the 3d day of September, A. D. 1915, in the county of Carroll, in the state of Iowa.

"The said E. F. Powers on the 3d day of September, A. D. 1915, did," etc.

By objections to testimony, requests to charge, and by motion to direct, it was asserted that this indictment does not lay the venue in Carroll County, it being urged in support that there is no compliance with Code Section 5289, which requires the venue to be alleged in the charging part of the indictment, and that the indictment is insufficient under the rule that the venue must be expressly averred, as distinguished from inference or suggestion (*State v. Daily*, 113 Iowa 362), and that indictments may not be aided by intendment. *State v. Ashpole*, 127 Iowa 680.

Despite the paragraphing and punctuation as above shown, and which are what appellant relies upon, we think venue was clearly laid in Carroll County.

## 2-a

4. INDICTMENT  
AND INFORMATION:  
requisites and sufficiency:  
duplicity.

We do not think that the indictment is open to the objection of duplicity for charging as distinct offenses assault with intent to rape, and also an assault with intent to carnally abuse.

## III. Six who became members of the

## 5. JURY: competency: disregard of interpreter.

jury against challenge said in the most positive way that they would fully understand what a witness testifying in the German language said; that they would proceed according to that understanding without regard to its translation by the interpreter. Four upon whom appellant was compelled to use peremptory challenges testified to the same effect. As we understand it, the State attempts to sustain the rulings

holding that this state of mind did not disqualify, as follows: (1) It is neither claimed nor shown that anything was incorrectly interpreted. On the contrary, as the interpreter is an officer of the court, it is presumed he translated correctly. This being so, the jurors but heard told in German what the translator presented in English—wherefore, that their state of mind led them to follow the witness rather than the interpreter was without prejudice. (2) It is presumed the jury followed the interpreter, because the court charged them to do so.

Each of these men had said positively upon his oath that he would be controlled by what he heard the witness say in the foreign tongue, no matter what the interpreter said. To indulge a presumption that they followed the charge of the court is to presume that they did that which they swore they would not do. It gets nowhere to admit that the translation was correct, so long as, though correct, the jurors did not follow it, if, perchance, they thought it was incorrect. As the business of our courts is to be done in English, there can be no presumption that either defendant or his counsel or the court understood German. If it be presumed that they did, there is no machinery for making that understanding of use. What if defendant knows that the translation be in fact a true rendition of what the witness has said, how can defendant know that such is the opinion of the jurymen who had said they would do their own interpreting? Suppose, as translated, nothing is developed that calls for counter proof, but the understanding these jurors had does—what opportunity has the defendant to even know that he requires testimony which he could obtain and which might change the result if produced? Though there be a presumption that the interpreter translated aright, is there also one that all other men agree to that translation? We have indicated there is no machinery

to meet the situation other than rejecting men in such frame of mind. When and how is the defendant to ascertain whether the jurors were agreeing with the interpreter, disagreeing with him, and, if so, in what way? How may he accomplish that the jury shall consider only what is in fact the testimony given in the German language? The situation was greatly aggravated by refusing to compel an examination by question instead of lengthy statement in narrative form, which practically reduced objecting to motions to strike. The whole of it is fairly within *Smith v. State*, 42 Tex. 444, wherein, on trial of one charged with theft of an animal, the jury was permitted to leave the court room and inspect for themselves the animal alleged to have been stolen, with a view of thus solving in connection with the evidence detailed by witnesses the question of identity and ownership, and no evidence was detailed by any of them on their return into court as to what they discovered—and it was held that a verdict upon facts thus ascertained would be a finding on facts known only to the jury—not publicly developed on the trial—concerning which defendant had no opportunity to cross-examine them as witnesses, upon which defendant or his counsel had not been heard, and of which the judge had no information. We think that, clearly, these six should not have been permitted to serve.

One juror who was permitted to serve

6. JURY: competency: doubtfulness: duty of court. did not go so far as this. He simply said he needed no interpreter for a German witness because he would know without one what was testified to; that he would notice whether the interpreter gave the right interpretation and would be inclined to proceed on the testimony of the witness regardless of the interpreter. As said, this is not so flagrant. But even he was a manifest threat to fair trial, and material for jury is not so scarce as to require retaining him. At the least,



there was a manifest doubt as to his qualification, and it certainly was the safe and better course to have resolved the manifest doubt in favor of exclusion. See *State v. Teale*, 154 Iowa 677; *State v. John*, 124 Iowa 230; *State v. Crofford*, 121 Iowa 395.

One of the jurors who was permitted to serve, and one who said he would be controlled by the witness, said at first that he could not write English. Under some pressure, he modified it by saying that he could, but not very well, and that he never learned to read the English language much. What we have said just preceding this applies here. Nothing cited runs counter to our conclusions. *State v. Smith*, 124 Iowa 334, affirms sustaining a challenge interposed by the State as being no abuse of discretion. *State v. Brown*, 130 Iowa 57, holds merely that, if a juror is not shown to have formed or expressed such an opinion of guilt or innocence as to prevent rendering a true verdict on the evidence, the discretion of the court in overruling a challenge will not be interfered with.

IV. It is said the court erred in ruling that the interpreter was not in such sense a witness as that he might not testify without having his name endorsed upon the indictment. As to the only objection we find, ruling was reserved, and none ever made. Be that as it may, we are of opinion that the interpreter is not in such sense a witness. See Standard Dictionary, definitions of "interpreter" and "witness."

V. It is contended that taking testimony through an interpreter is receiving hearsay testimony. We think the great weight of authority is against this claim. See 1 Wharton, Evidence (1877), Sec. 224; *Fabrigas v. Mostyn*, 20 Howell's State Trials 82; *McCormicks v. Fuller & Williams*, 56 Iowa 43; *Camerlin v. Palmer Co.*, 92 Mass. 539; *People v. Ramirez*,

7. CRIMINAL  
LAW: trial:  
indorsement  
of witnesses  
on indictment:  
interpreters.

8. EVIDENCE:  
hearsay: in-  
terpreters.

56 Calif. 533; *Commonwealth v. Sanson*, 67 Pa. St. 322; *Swift v. Applebone*, 23 Mich. 252, 253. The only case we can find even leaning to the contrary is *Diener v. Schley*, 5 Wis. 483, to the effect that, while the interpreter may be made an agent, so that what he says on behalf of his principal is not hearsay, that he is not necessarily such agent, and is not made so merely by the fact that his alleged principal is dealing through an interpreter with a party whose language he does not understand; that this naked fact will not constitute such an agency as that it will bind by false translation.

9. **APPEAL AND ERROR: assignment of error: sufficiency.** VI. Many errors are assigned, of which a statement that the court erred in not sustaining objection to the question to Barney Korwes, "What did she say, if any-thing," is a sample—and by no means the worst. We cannot review upon such a complaint; and so of one that it was error not to grant a new trial because the whole record discloses defendant was deprived of a fair and impartial trial.

10. **WITNESSES: competency: refreshing memory: absence of independent recollection.** VII. Objections were made to the testimony of May Thompson, which are clearly not well taken, unless it be one now to be noted. The witness had taken in shorthand everything that was said on the preliminary hearing of the defendant. On this trial, she testified she has no independent recollection of what was then said, but that she extended the shorthand notes of what was said for the use of the grand jury. At this point, the court held that the transcript of these notes might not be introduced in evidence because it was not attached to the indictment, but that the witness could testify from the original shorthand notes, after refreshing her memory therewith. Being further examined, the witness said: "I do not remember the evidence of the shorthand notes. It is the paper I am reading that I am testifying to." We think it was error to permit her thus to testify, to virtually put in evidence the paper which

the court said might not be used. We said in *Eaton Chemical Co. v. Doherty*, (N. D.) 153 N. W., at 969:

"The entries made upon the books of the plaintiff in this case furnished the best evidence of such charges. The testimony of Collins as to the contents of such entries was therefore inadmissible. \* \* \* it is said in *Elliott on Evidence*: 'It is essential, however, that, upon referring to it, his recollection should be so refreshed that he can speak to the facts from memory; that is, after referring to it he should be able to testify from his own recollection.'"

VIII. Certain testimony was offered

11. **RAPE: assault with intent: evidence: subsequent acts.** tending to show that, at a time later than the one at which it is charged the offense

was committed, defendant again came upon the place, and conducted himself in such manner as to evince an intent to repeat the offense. Objections that this is too remote and is subsequent to the time covered by the indictment, and the like, were overruled, the court saying: "[I presume this is in the nature of a preliminary." If believed by the jury, this had a tendency to prove properly that the mental attitude of the defendant was such as to make it probable the offense charged was earlier committed. While it adds nothing to corroboration, it did add to the testimony given by the prosecutrix. Moreover, the court instructed that this was admitted solely on "whether or not it tends to identify the defendant as having been on the Korwes place on the 3d day of September, 1915."

IX. In *State v. Richards*, 33 Iowa 420,

12. **RAPE: evidence: complaints by prosecutrix: details.** 421, an uncle of prosecutrix's testified she told him that defendant had committed rape on her; "that, in trying to get away from Richards, in the struggle she fell down; that she then managed to get away from him and went into another room; that there he threw her on the floor," etc. We hold it is a

well settled rule that, where the prosecutrix is examined as a witness, "the *fact* of her making complaint is evidence, but the *particulars* of such complaint are not." We say that the rule as laid down by Greenleaf is as follows:

"The particular facts which she stated are not admissible in evidence, except when elicited in cross-examination, or by way of confirming her testimony after it has been impeached. On the direct examination, the practice has been merely to ask her whether she made complaint that such an outrage had been perpetrated upon her, and to receive only a simple yes or no."

In *State v. Egbert*, 125 Iowa 443, we say:

"Of course, the fact of complaint by prosecutrix may be shown, and no doubt as a witness she may testify that she recognized the defendant as the person who committed the crime, but what she said is not in itself competent evidence on the question of identity."

But we have departed from these close limitations. We say, in *State v. Bebb*, 125 Iowa 494, 497, that complaint is not inadmissible because it discloses pain, grief, humiliation, indignation, mortification or resentment, directly occasioned by the outrage. And so of a statement that prosecutrix had pain in the stomach, across her back and in her throat. *State v. Baker*, 106 Iowa 99. In *State v. Mitchell*, 68 Iowa 116, at 118, we sustain receiving that prosecutrix told her that she had been abused and ravished. We said, in *State v. Peterson*, 110 Iowa 647, at 650, that complaint to the effect that defendant did assault or ravish complainant is admissible. It is admissible that defendant had ravished or had intercourse (*State v. Watson*, 81 Iowa 380); that defendant abused her without her consent (*State v. Cook*, 92 Iowa 483, at 486). In *McMurrin v. Rigby*, 80 Iowa 322, at 325, the complaint that prosecutrix "was hurt in the most brutal way anyone could be hurt," was held to amount to no

more than a statement that plaintiff had been ravished, and, therefore, admissible. The general rule has been relaxed on expressed ground that prosecutrix was of very tender years, and on that account, held proper to receive that defendant had intercourse against the will of complainant (*State v. Symens*, 138 Iowa 113); that she complained of "that nasty, bad man (speaking of defendant), and that she complained of this man putting his bean up against hers" (*State v. Hutchinson*, 95 Iowa 566); and statements immediately after the assault—one to her father, that defendant "threw her down and raised her clothing," and to the mother, that defendant "threw her down, unbuttoned her panties, and hurt her" (*State v. Andrews*, 130 Iowa 609, at 610). In *State v. Barkley*, 129 Iowa 484, at 486, testimony was received that (1) prosecutrix said defendant "had torn her clothes open;" (2) that he entered her private parts with his against her will. We said the last was properly received, but that the first should have been excluded "as a detail of the occurrence."

The court permitted much testimony, which, under the most liberal of these, should clearly have been excluded. Sturm was permitted to say prosecutrix told him that two fellows whom she did not know came upon the place while the door was open and the screen closed; that the smaller of the two came to the screen door and asked if Korwes was at home, and was answered he had gone to town; that he asked for a drink of water; that she turned and went into another room, and they followed her; that then he returned to the car and the two men spoke together; that the men were very insolent, one went up to her and asked her to come into the granary; that she retreated, and he went up to her closer, and, all at once, he jumped against her and got her against the cob pile and got her by the legs and pulled her down and had his trousers open and exposed his private

part, raised her skirts, touched her, and tried to accomplish his purpose to get his privates in her, and she was fighting all the time. She told him there was a hired man at the barn, and he said he didn't believe it, and he shook his head that there was no hired man at the barn, and she kicked and took corn and kept hitting him, and she kicked the buttons off her shoes, and the buttons flew away from her buttoned shoes by kicking him, and she was trying to keep him away and moving and fighting with him all the time, and he tried to insert his privates in her, and then he said to keep still a little, but she would move all the time and fought all the time, and he had a discharge right on her side, and she was fighting all the time to keep the thing out of her so it would not enter into her, and finally he got up and let her go.

But the question is not whether this should have been received, but whether its reception was cured. At the end of it, the court struck out all except "that she said to him that he did throw her down at the cob pile and tried to have sexual intercourse with her." We incline to think that this much was not vulnerable to the objection that it improperly went into detail. Korwes was permitted to testify, over apt objection, prosecutrix told him that a fellow was there who asked for water; that she turned around to give him a glass of water; that he got pretty saucy and grabbed her; that she went into another room; that he followed her and grabbed her again; that she got away from him and then she walked out doors; that, at a time about a month later, defendant tried to get her into the barn. We are of opinion that this should have been excluded.

But whether or not what Sturm says is an improper entry into detail, we have the question whether the complaint involved therein was voluntarily made. He testifies she said "they were insolent;" that then he

18. **RAPED: evidence: non-voluntary complaint by prosecutrix.**

asked her two questions, in response to which she said that defendant was very insolent. She told him this fellow was there, "so I questioned her, began to question." In response to the questions, she said they wanted a drink of water and she turned around; that she went into the other room and they followed her "and were very insolent." Sturm then said to prosecutrix, "Did they lay hands on you; did they insult you?" and that she answered, "Yes," and that what she then said further brings him back to the house where it happened, and then what happened on the cob pile, "She told me everything." This is followed by a narration of what is already set out, beginning with the asking her to come into the granary. The matter testified to was inadmissible because it was not the voluntary statement of prosecutrix. See *State v. Bebb*, 125 Iowa 494, at 497; *State v. McGhuey*, 153 Iowa 308, at 313.

X. The law prescribes no standard for the strength of corroborating evidence, and there is a failure to corroborate only if there be no evidence legitimately having that effect. Does this case have anything that the law deems corroborative?

No chain can be stronger than its weakest link; therefore, corroboration is essential to conviction. It is a distinct part of the evidence required to establish the crime.

*State v. Cohen*, 108 Iowa 208; *State v. McCracken*, 66 Iowa 569. The very words of the statute preclude corroboration coming from the mouth of the complainant. Code Section 5488. And see *State v. Carpenter*, 124 Iowa 5, at 15; *State v. Watson*, 81 Iowa 380, at 387. This seems to have been overlooked in *State v. Peterson*, 110 Iowa 647, at 649, for that it is there indicated that the making

of complaint is a corroborative circumstance. The citations relied on there do not sustain any such rule, and we have held,

14. **RAPN:** evidence: corroboration: total failure.

15. **RAPN:** evidence: corroboration: complaints by prosecutrix.

both before and since the decision of the *Peterson* case, that complaint and still other things afford no corroboration. We said, in *State v. Baker*, 106 Iowa 99, that, where it is admitted someone committed the assault, complaints of pain admitted or received were not prejudicial, since such testimony does *not* connect accused with the assault. To like effect is *State v. McGhuey*, 153 Iowa 308, and it is there said that neither complaints nor evidence that the person of prosecutrix exhibits injuries constitutes corroboration. The fact that such complaint is made removes a suspicion, and the fact of making complaint and so of proving injuries to the person sustains proof of the *corpus delicti*. And evidence of complaints can only be considered as confirming or disparaging the accuracy and veracity of the witness. In *State v. Wolf*, 112 Iowa 458, at 461, and in *State v. Bebb*, 125 Iowa 494, we hold that proving complaint merely affects the credibility of the prosecutrix as a witness on whether the assault was made at all. In *People v. Page*, (N. Y.) 56 N. E. 750, it is expressly held that while disclosures made by the female within a reasonable time after the outrage are admissible as part of the *People's* case, they do not constitute corroboration tending to establish connection of the accused with the crime.

Moreover, it is the law of the case, by means of charge to the jury, that what the prosecutrix told others as to having been assaulted, and the testimony of these that she did so tell them, merely show the making of a complaint the failure to make which would weaken the weight of prosecutrix's testimony; but that such evidence may not be considered "as the corroboration called for in the foregoing instructions."

There is testimony that defendant informed Tigges, while defendant was away from the car, and at the house where the girl was, and told others, that he was "kidding

16. RAPH: evidence: corroboration: sufficiency.



the girl;" that he "kidded her a little bit and talked to her, but couldn't understand her;" that she smiled all the while, while he was kidding her; that when Tigges inquired why he had not returned sooner, he said he was "joshing the girl." Unless the saying this can be strained out of all its accepted meaning, it in no manner connects the defendant with the offense charged. According to the International Dictionary, "to kid" means to humbug or deceive in joke. "To josh" means to ridicule or tease, or make fun of in a joke, to lure or tease by misrepresenting the facts. In *People v. Page*, (N. Y.) 56 N. E. 750, at 751, it is ruled that it was not corroboration that defendant had said he had "insulted the girl."

## 10-b

In *State v. Herrington*, 147 Iowa 636, at 640:

"Defendant was a witness in his own behalf, and his own testimony was such as to leave no doubt of his guilt in the light of the other testimony in the case."

In *State v. Hogan*, 145 Iowa 352, at 355, we find corroboration in the testimony given by defendant. In *State v. Mitchell*, 68 Iowa 116, 118, there were marks of violence upon prosecutrix, and defendant undertook to account for these injuries by a statement which was false.

So far as this defendant is concerned, his testimony corroborates nothing said by the prosecutrix, except that he did get a pail of water to put into his car, and that, while getting the water, he talked to her just once. Tigges says that going back with the pail to get water, getting the water and returning with it, did not take defendant away from him over 10 to 15 minutes. The testimony of Thompson we have held not to be admissible, but, waiving that, it is no more than that the defendant said on his preliminary examination that prosecutrix went to the door and into the house, and that he went up to the door and rapped on it. It may

not be denied that it was not an impossibility for defendant to commit the offense as charged. It may be conceded there was opportunity to commit it. Unquestionably, it is established that the defendant was present where he could make this assault. Beyond doubt, opportunity, coupled with some other things, may send corroboration to the jury. See *State v. Egbert*, 125 Iowa 443, at 448; *State v. Stevens*, 133 Iowa 684. But we know of no decision that has gone to the length of holding that the naked opportunity to commit a crime constitutes sufficient corroboration. If, for instance, there were evidence that the opportunity was manufactured under suggestive circumstances, a different case would be present. Here, it is without dispute that the defendant was at the place merely because, hours before, Tigges asked him to take a ride in his car, into the country generally; that Tigges had business with the owner of the place where defendant was; that he went there on that business and found the owner away. There is not a scintilla that, when the trip began, the defendant knew he was going upon this place, or that either knew the owner was away from home. It would be a different case, too, if, in addition to showing that defendant had opportunity to commit the offense, it was of such nature as that, if committed at all, it could not have been committed by anyone other than defendant. *State v. Stevens*, 133 Iowa 684, 686, is such a case. It declares "it affirmatively appeared" from the testimony of others that accused was the only person in the house at the time the assault was committed who was capable of committing it, and it is very properly said that this is more than proof of mere opportunity. Moreover, there were certain "immediate circumstances corroborating her testimony that the crime was committed at that time." Now, there can be no claim of that kind made here. It was *possible* for Tigges to assault the prosecutrix. It was *not impossible* that the two men to whom she spoke at a time

which she claims was immediately after the assault might commit the assault. The prosecutrix herself told Korwes that she wouldn't stay home any more, "as there always came fellows around there." She told Korwes that three automobiles had been at the house that day; says it may be possible she told Korwes that two or three automobiles came there in September with men looking for Korwes; that possibly two were there on that day in September; and that they may have been men from Templeton whom she didn't know.

We have found no case wherein what here is shown makes corroboration a jury question. In *State v. Herrington*, 147 Iowa 636, at 639, we say:

"The corroborating evidence in the case is unusually prominent. \* \* \* \* the defendant's own testimony was abundant corroboration tending to connect him with the offense. In addition to that, was the testimony of his landlady who discovered the presence of the prosecutrix, and forbade the defendant from keeping her. There was considerable other testimony of greater or less weight, all of which confirmed the testimony already referred to."

In *State v. Hogan*, 145 Iowa 352, at 355, we find corroboration in the testimony of the defendant himself, and added testimony of another, who testifies seeing defendant in such position with the prosecutrix that he reported the matter at once to the public officers. We find further corroboration in the testimony of the sheriff who made the arrest, and in a conversation of defendant detailed by another witness, and we conclude the corroboration "was practically conclusive." In *State v. Dudley*, 147 Iowa 645, the father saw defendant in a room with prosecutrix shortly after the alleged offense, the latter sitting on the bed with clothes "ruffled up" and her hair down over her face and eyes. In *State v. McCausland*, 137 Iowa 354, at 357, we said

that the corroborating evidence "was of such clear and pointed character that a verdict of acquittal could not have been reasonably expected." One of the items is that defendant was seen piloting a young girl, from a place where they were first seen, through a street, up on a flight of stairs from which they entered a darkened room, which was the scene of the crime; and we add that "other circumstances significantly pointing in the same direction might be mentioned." In *State v. Comstock*, 46 Iowa 265, 268, it was found that, the morning after the crime was perpetrated, at a time when the injured woman had revealed it to but two persons, to whose house she had fled for safety after the outrage, bearing marks upon her person and declaring the crime, and its atrocious character,—when no other persons were informed thereof,—defendant made inquiries of a son of the persons of whom she had sought protection in regard to her declarations about the matter, and declared that, if he belonged "to the Masons or Elder Davis clique, he would get clear." In *State v. Ralston*, 139 Iowa 44, at 47, one item of corroboration as to an assault in which prosecutrix was stripped, was that she reached the house of a neighbor naked and screaming, defendant admitting that she left the house in that condition. In *State v. Watson*, 81 Iowa 380, at 388, the defendant had been in the habit of sending away a little sister of prosecutrix when she would attempt to play in a seed house where the crime is said to have been committed, and to send her away because the seed house was small and had no room to play in. At the time in question, the little girl heard a cry, and went out to go to the place where she heard it. She had not reached the seed house, and was not going there, but was running past it to the barn, when defendant left his work in the seed house, and, though she did not offer to come in, threatened to whip her if she did not go back. And *State v. Bartlett*, 127 Iowa 689, at 691, holds corroboration sufficient

to make a jury question where it amounted practically to testimony of an eyewitness to the actual commission of the offense.

There was a total failure of corroboration. See *State v. Wheeler*, 116 Iowa 212.

XI. We do not agree with the contention that there should be a reversal because the evidence is insufficient to sustain the verdict as to the *corpus delicti*. But we have to consider the evidence in another connection, not to determine what it proves or disproves, or to weigh it, but to determine whether it is so conclusive of guilt as to make errors in the trial nonprejudicial,—more concretely, whether the evidence of the major offense charged is so strong as that the court was justified in not submitting assault and battery. If this should have been submitted, the error is not cured by the fact that simple assault was submitted. *State v. Barkley*, 129 Iowa 484, at 486.

It is settled in this jurisdiction that, where the charge is assault with intent to rape, assault and battery need not be submitted unless the indictment charges force. But the indictment in this case is that defendant made the assault with intent to ravish "by force and against her will." We think that included offenses must be submitted unless there is such failure of evidence to sustain them as that, if the prosecution were for the included offense, a verdict must be directed for the defendant. The question that remains is, therefore, whether the evidence so fails to prove force as that a verdict could be directed for defendant were he charged with assault and battery. It certainly is not in that condition. The prosecutrix testifies in the plainest terms to the use of force, such as grasping her by the arms, throwing her down on a cob pile, holding her down there by force, proceeding at all times against her fighting and

17. RAPE: assault with intent: instructions: included offenses: assault and battery.

utmost resistance; that he held her upon the cob pile with his hands; that he tore her dress down on top, and caught her on top with his hand after he had her clothes open; that he raised her skirts and exposed his sexual organs; that her hair was much torn and disheveled by being held upon the cob pile and assaulted there. It is idle to go further into detail. It is beyond all question that, since the jury believed the prosecutrix, there was enough evidence here to sustain a verdict for assault and battery, if one had been returned.

11-a

As to the related question, whether the evidence was so conclusive of the major offense as that it was no error to stop with it, we have to say that enough appears to have left it fairly for the jury to find a lower degree of offense upon the evidence if so minded. She made no outcry, though Tigges was in easy reach of her voice while she was being assaulted, as she claims. After, according to her testimony, the evil intent of the defendant had been made plain, she, knowing that she could go into the house and lock the doors, did not do so, but remained where she could be assaulted. She could have called help by telephone and did not. When the defendant left, he bade her good-bye, and she, according to her own story, answered: "Yes, good-bye, you hog." In speaking of the assault to various persons, she showed no feeling and did not cry. She was seen immediately after the alleged assault, and, according to some of the testimony at least, was not breathing fast and showed no signs of excitement; did not appear to be scared; no disarrangement of her hair or flushing of her face was perceived, and she seemed perfectly calm. According to prosecutrix, both her outer clothing and that of defendant must have been badly stained with blood, yet all who saw them both, before the clothing was changed, saw no such stains.

## 11-b

18. RAPE: AS-  
sault with in-  
tent: included  
offenses: great  
bodily harm.

That assault with intent to inflict great bodily injury was not submitted, we think was no error. We have held repeatedly that this offense is not necessarily involved in the charge of assault with intent to rape, and, at least once, it should not be submitted at all on such an indictment.

To be sure, an assault with intent to commit rape is one with intent to commit a felony, but it does not follow that, therefore, it was error not to submit an assault with intent to commit felony generally. In the very nature of things, since an assault is charged which constitutes a felony, it excludes all other assaults to commit one.

For the error in ruling on challenges to jurors, receiving the testimony as to complaint made, that of the witness Thompson, holding there was corroboration, and failure to submit assault and battery, the cause must be—*Reversed and remanded.*

GAYNOR, C. J., LADD AND EVANS, JJ., concur.

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ELIZABETH TILTON, Appellee, v. JOHN BADER et al.,  
Appellants.

**LIMITATION OF ACTIONS: Real Property—Recovery—Fraud—**

- 1 **Five- or Ten-Year Period.** An action to quiet title against a *fraudulent* deed is essentially an action "to *recover* real property," even though the prayer is silent as to possession, and is not barred until the lapse of ten years after plaintiff has legal notice of such deed.

**LIMITATION OF ACTIONS: Computation of Period—Object of**

- 2 **Action Contrasted With Evidence to Support Action.** Whether an action is one brought "to *recover* real property," and therefore barred in ten years, or one "for relief on the ground of fraud," etc., and therefore barred in five years, depends on the *object and purposes* of the action, and not on the *kind or character* of the evidence adduced.

**PLEADING: Prayer—Action to Quiet Title—Prayer For Posses-**

3 sion—**Limitation of Actions** A prayer for *possession* is not necessary, in an action to quiet title, in order to render such action one "to recover real property," within the meaning of the statute of limitation.

*Appeal from Cherokee District Court.*—WILLIAM HUTCHINSON, Judge.

THURSDAY, OCTOBER 25, 1917.

THE plaintiff is the sister of defendants, John, Henry William and Louis Bader. She alleged in her petition, filed June 29, 1916, that she acquired the two lots in controversy by deed from her mother, Amelia Bader, March 28, 1908, the same being recorded April 29, 1910; that said Amelia departed this life in April, 1910; and that said defendants claim some interest in the lots. She prayed that her title be quieted. The defendants interposed a general denial, and adopted the allegations of the petition of intervention. Therein Minnie H. Bader, wife of Louis Bader, alleged that said Amelia died as above stated, seized of the said lots, leaving plaintiff and defendants as her heirs; that her estate has been fully settled; that, about the year 1894, deceased came into possession of \$1,600 as her dower interest in land in Cherokee County, partitioned among her children; that the court ordered her share of the proceeds derived from the sale of the land to be retained by the clerk of court, and that \$500 thereof be invested in the lots in controversy as a home for said Amelia; and thereafter, in 1894, Daniel Melter was appointed guardian of her person and property; that from that time until her death she was feeble, infirm and old, and incapable of caring for her estate or making contracts; that, in March, 1908, her personal property had been used up in her care, and the guardian made his final report and was duly discharged, whereupon Amelia Bader went to the home of plaintiff in Minnesota; that, about March 28, 1908, plaintiff, knowing the weak and infirm mental condition of the said Amelia Bader, and that the



said Amelia Bader was of weak and unsound mind, and not capable of contracting with reference to her property rights, fraudulently, and with the intent to then and there cheat, wrong and defraud the said Amelia Bader out of her real estate, and for the purpose of cheating, wronging and defrauding the defendants herein out of any estate which the said Amelia Bader might leave in case of her death, procured from the said Amelia Bader the deed referred to in plaintiff's petition, copy thereof being attached thereto; that intervener cared for, boarded and nursed said Amelia many years, and had an account for so doing greatly in excess of the value of said lots; that she did not file her claim against the estate for the reason that all the defendants herein named have orally agreed to deed to this intervener all their right, title and interest in and to said real estate herein described, and have deeded their interest in said property to the intervener herein, in payment for her services for so caring for the said Amelia Bader during her lifetime.

Intervener further alleged that plaintiff fraudulently kept from the records, until Amelia Bader was dead, the deed she had procured by fraud, and that this intervener is the absolute and unqualified owner of a four-fifths interest in said lots, and plaintiff, of one fifth; and she prays that the petition be dismissed, that the deed of deceased to plaintiff be cancelled and decreed to be of no force or effect, and that plaintiff and intervener be decreed to be the owners of the respective parts of the lots as stated. The deed recited a consideration of one dollar, relationship and affection, and "other valuable consideration," as the consideration for its execution. By way of amendment, intervener alleged that Henry Bader had been in occupancy of the lots long prior to and ever since the death of Amelia Bader, under color of right and claim of ownership in the same in the parties of this action, as above alleged, said occupancy

and claim having been "acquiesced in by all the parties hereto," and having "been adverse to the claims of right and title therein in the plaintiff herein." Another paragraph alleged adverse possession as to plaintiff, without fixing the time. To the petition of intervention, plaintiff demurred on three grounds:

"1. The allegations of the petition do not entitle the plaintiff to the relief demanded, or to any relief whatever.

"2. The petition shows upon its face that the intervenor's cause of action, as therein set forth, is barred by the statute of limitations.

"3. That the relief demanded is based upon the claim of fraud in procuring and filing the deed for record, and the petition shows upon its face that said deed was procured and filed for record, and notice thereof given by filing for record on the 29th day of April, 1910, more than five years before the commencement of this action, and that therefore any claim on the part of the intervenor or any other person that the said deed is fraudulent is now barred by the statute of limitations of the state of Iowa."

This demurrer was sustained and, as the intervenor declined to plead further, decree was entered quieting title in plaintiff. The defendants and intervenor appeal.—*Reversed.*

*C. M. Smith*, for appellants.

*Molyneux & Maher*, for appellee.

LADD, J.—The sole issue is whether the cause of action pleaded in the petition of intervention is barred by the statute of limitations. Amelia Bader signed a deed, conveying the lots in controversy, March 28, 1908, and it was duly recorded April 29, 1910, she having died on the 17th of that month. The petition of intervention discloses that, but for the execution of

1. LIMITATION  
OF ACTIONS:  
real property:  
recovery:  
fraud: five-  
or ten-year  
period.

such deed, the intervener would have been owner of an undivided four fifths of said lots. To defeat the deed, intervener further alleges: (1) That at the time said deed was made, the grantor was feeble-minded and incapable of executing said deed, and the grantee so knew; (2) that the deed was procured by fraud; and (3) that there was no consideration. The prayer is that it be set aside and cancelled, and that intervener be decreed owner of an undivided four fifths and plaintiff an undivided one fifth of said lots. Suit was begun June 29, 1916, and the petition of intervention filed September 5th following; so that more than 5 years had elapsed since the filing of the deed for record, and less than 10 years.

"Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared: \* \* \*

"6. Those founded on written contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years;

"7. Those founded on written contracts, or on judgments of any courts except those provided for in the next subdivision, and those brought for the recovery of real property, within ten years;" Section 3447, Code, 1897.

The trial court sustained a demurrer to the petition of intervention on the ground that intervener's action brought for relief on the ground of fraud was barred; and unless the action is for the recovery of real property, the ruling must be approved. Had the deed been filed for record prior to the grantor's death, all parties must have been held to have then been informed of its execution. *Bishop v. Knowles*, 53 Iowa 268; *Laird v. Kilbourne*, 70 Iowa 83; *McDonald v. Bayard Savings Bank*, 123 Iowa 413.

Whether knowledge thereof is to be inferred from the

recording after death, is a somewhat different question, and need not now be considered; for, conceding that all parties connected with the case were aware of the making of the deed the day it was signed, more than five and less than ten years had elapsed when the action was begun.

The sole issue, then, is one at law, and

2. LIMITATION OF ACTIONS: computation of period: object of action contrasted with evidence to support action. exacts a decision as to whether the action is one brought to recover real property, or for relief on the ground of fraud in a case heretofore solely cognizable in a court of chancery. This depends on the nature of the cause of action, and is to be determined rather from the object and purpose of the suit than from the kind or character of the evidence adduced. Mere forms of action have been abolished, so that the mere phraseology of the pleading is not often controlling, and yet for some purposes causes of action are distinguished as formerly. Legal and equitable remedies may be brought in the same case where they relate to the same subject matter. It is the policy of the law, in equitable actions, to allow a litigant to obtain all the relief to which he may be entitled, although such relief may be of the kind that would require several suits under the strict rules relating to the forms of common-law actions. The owner of an equitable title is the owner of the property, and may maintain an action not only to establish his equitable right, but in the same suit obtain a writ letting him in possession (*Lees v. Wetmore*, 58 Iowa 170); or obtain the partition of the realty; or have a mistake in the deed corrected, and have the decree entered that he is owner and entitled to the possession of the property. The mere fact that a litigant alleges and must prove fraud in order to establish his title, does not render the action other than one for the recovery of real property. The gravamen of the cause of action in such a case is that the complainant claims the property and prays that his title thereto be

established in him, and the allegation and evidence of fraud are merely incidental to the relief granted.

In *Murphy v. Crowley*, (Cal.) 73 Pac. 820, the court, after reviewing the decisions of that state, concluded that:

"It seems to be established, therefore, by these cases, that, although the main ground of action is fraud or mistake whereby the defendant has obtained the legal title to the land in controversy, and the chief contention between the parties is with respect to the fraud or mistake alleged, yet, if the plaintiff alleges facts which show, as matter of law, that he is entitled to possession of the property; and a part of the relief asked is that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property, and is not barred except by the five-year limitation contained in Section 318. The same rule has been followed in the states of Iowa, Kansas, Missouri, and Texas. *Williams v. Allison*, 33 Iowa 278; \* \* \* *Dunn v. Miller*, 96 Mo. 338 (9 S. W. 640); *Shepard v. Heirs of Cummings*, 44 Tex. 502." See, also, *Goodnow v. Parker*, (Calif.) 44 Pac. 738.

It appears from the last case cited, and *Dunn v. Miller*, (Mo.) 9 S. W. 640, that the statutes of California and Missouri fix the period of limitation "for the recovery of real estate or for possession thereof," and in the last case it is said that the nature of the cause of action is to be determined rather from the object and purpose of the suit than from the character of the evidence which is necessary to maintain it, and in this respect the decision is like that of the California court from which we have quoted.

*Names v. Names*, (Neb.) 67 N. W. 751, is in harmony with these decisions, and sustains the principle laid down in 25 Cyc. 1026, that:

"In those cases where the main ground of action is fraud or mistake, whereby defendant has attained the legal title to the land in controversy, and the chief con-

tention between the parties is with respect to the fraud or mistake alleged, yet if plaintiff alleges facts which show, as matter of law, that he is entitled to the possession of the property, and a part of the relief asked is that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property, and is not barred except by the statutory limitation barring such actions."

See also *Washington v. Norwood*, (Ala.) 30 So. 405.

The earlier cases in this state appear to have so held. In *Stanley v. Morse*, 26 Iowa 454, the suit was to compel a conveyance by the defendant, who had taken title in his own name for 40 acres of land paid for by plaintiff and her husband, and the court ruled that the action was for the recovery of real property.

In *Williams v. Allison*, 33 Iowa 278, the relief sought was that a sheriff's deed be set aside, and that title in certain lots be quieted in plaintiff, and the court held that the suit, "in effect and directly, is an action for the recovery of real property," though fraud was alleged to have been perpetrated, the right to set the sheriff's deed aside being "one of the matters to be established in order to maintain plaintiff's right to recover." This decision was followed in *Empire Real Estate & Mortgage Co. v. Beechley*, 137 Iowa 7; and *Baker v. Baker*, 169 Iowa 473, is in harmony therewith. See also *Dwight v. City of Des Moines*, 174 Iowa 178.

In *Burch v. Nicholson*, 157 Iowa 502, it seems to have been thought that the ground for relief, rather than the object and purpose of the action, was controlling. As the court had already held that there was no constructive trust, the observations with reference to the statute of limitations may well be disregarded as inconsistent with the interpretation of the paragraphs of the statute quoted. If the purpose and object of the action is the recovery of real property, it is entirely immaterial on what ground the relief is

sought. If other relief with respect to realty on the ground of fraud heretofore solely cognizable in a chancery court were sought, Paragraph 6 of Section 3447 undoubtedly would be applicable. But the petition of intervention did not rest on the allegation of fraud alone. Therein the deed was alleged to have been made when the grantor was incapable of transacting business of which the grantee was aware, and that there was no consideration, and therefore relief was sought on a ground other than fraud; and *Burch v. Nicholson*, supra, could not have been responsible for the ruling.

3. PLEADING:  
prayer: action  
to quiet title:  
prayer for  
possession:  
limitation of  
actions.

It is suggested that, inasmuch as possession of real property was not prayed, this was not for its recovery. The word "recovery," in common parlance, signifies the regaining that which has been lost or missing or taken away; but in a legal sense it means no more than obtaining by course of law or judicial proceedings. *Hoover v. Clark's Admr.*, 7 N. C. 169; *Friend v. Oggshaw*, 3 Wyo. 60 (31 Pac. 1047); *Monterey County v. Cushing*, 83 Cal. 507 (23 Pac. 700). As observed in the last case cited, the word "recovery," as found in the statute quoted, does not imply that the party instituting the action had previously owned the land or been in possession thereof. In this state, possession is not essential to the bringing of an action to quiet title or to obtain other equitable relief. Possession is incident to ownership and, in the absence of evidence, is presumed to be in the owner. If, then, the right to or title in land in controversy be adjudicated in favor of a litigant, he may be said to have recovered said land, even though a writ of possession be not issued. It is the right thereto which is ascertained and decreed, and that definitely determines who shall have possession. Neither the intervener nor plaintiff was in possession, but the latter prayed that she be decreed to be the absolute owner of the lots; and, on the other hand,

intervener asked that the deed to plaintiff be set aside, and she be adjudged the owner of an undivided four fifths, and the plaintiff, one fifth. Each sought to obtain an adjudication declaring her to have title to and, therefore, ownership of the lots, or part thereof, and, in that way, sought to recover real property.

Our conclusion is that, while more might have been sought in the respective pleadings, enough was alleged to constitute the suit one "brought for the recovery of real property." In other words, such recovery is had whenever the right to or title in or possession of the realty in controversy is adjudicated in favor of a litigant, and the test to be applied in determining whether an action is brought for that purpose lies in ascertaining whether relief as above described is sought in the petition. It follows that the trial court erred in sustaining the demurrer to the petition of intervention.—*Reversed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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J. W. CHUMBLEY, Administrator, Appellee, v. FRED COURTNEY et al., Appellants.

**VENUE: Change of Venue—Residence—Nonresidence of Codefendants.** Defendant, in an action on a promissory note, may not have the venue changed to the county of his residence unless he shows that his codefendants are nonresidents of the county where the action is brought. (Sec. 3501, Code, 1897.)

**VENUE: Change of Venue—Fraud in Inception of Contract.** "Fraud in the inception of a contract" is ground for change of venue to the county of defendant's residence only when the contract is specifically performable in the county where action is brought. (Sec. 3505, Code Supp., 1913.)

**PARTNERSHIP: Representation of Firm—Non-Trading Corporations.** Circumstances attending the carrying on of a non-trading partnership may show authority in one partner to sign notes in the firm name.

**TRIAL: Instructions—Applicability to Evidence.** Instructions non-applicable to the evidence are properly refused.

**NEW TRIAL: Grounds—Erroneous Instructions—Failure to Dis-**



5 **cover—Necessary Showing.** Objections to instructions, urged for the first time in a motion for a new trial, must be accompanied by something more persuasive than a mere *assertion* that they were not discovered by the objecting party at the time of trial. There must be a "*showing*" by means of some evidentiary matter. (Sec. 3705-a, Code Supp., 1913.)

**WORDS AND PHRASES:** "*Show*" and "*State*" Contrasted. "To  
6 *show*" means to demonstrate by satisfactory proof.

*Appeal from Warren District Court.*—LORIN N. HAYS,  
Judge.

SATURDAY, OCTOBER 27, 1917.

ACTION on a promissory note resulted in a judgment as prayed. The defendant Daniel O'Donnell appeals.—*Affirmed.*

*Neiman & Neiman*, for appellant.

*Berry & Watson*, for appellee.

LADD, J.—I. This is an action on a  
1. **VENUE:**  
change of  
venue: resi-  
dence: non-  
residence of  
codefendants.  
promissory note dated May 9, 1914, for \$400,  
payable with interest March 1, 1915, and  
purports to have been signed by "Courtney  
& O'Donnell, per Courtney. I. C. Walker." The purported  
partnership, as well as the individual members, and Walker  
were defendants. After answering, O'Donnell filed a mo-  
tion for change of venue to Polk County, on the ground that  
that was the county of his residence, and that his sworn  
answer alleged fraud in the inception of the note sued on,  
and constituted a complete defense, as appears from said  
answer. As the other defendants are not shown to have  
been nonresidents of Warren County, the motion could not  
well prevail on the sole ground of defendant's residence in  
Polk County. Section 3501, Code, 1897. Nor is the other  
ground tenable. The note on which the ac-  
tion was brought, contained no stipulation  
that it be performed in Warren County.  
2. **VENUE:**  
change of  
venue: fraud  
in inception  
of contract.  
Without this, the circumstance that fraud in  
the inception of the note was alleged, furnished no ground

for a change of venue under Paragraph 6 of Section 3505, Code Supplement, 1913, providing that a change of venue may be had in any case where the action is "brought on a written contract in the county where the contract by its express terms is to be performed, in which a defendant to said action, residing in a different county in the state, has filed a sworn answer alleging fraud in the inception of the contract constituting a complete defense thereto." The motion for change of venue was rightly overruled.

II. The defendant complains of the court's refusal to give four instructions requested. The first and second of these, in so far as correct, were given. The error in each was in assuming that a partner in a non-trading partnership could only be bound by the act of the other in executing a promissory note by attaching the firm name thereto where he has an express order of the other partner so to do. On the contrary, such authority may be implied from the circumstances proven, and in this case the jury might have found from the circumstances proven that, in signing the note, Courtney was authorized by O'Donnell to use the firm name. For this reason, the instructions were rightly refused. See *Schumacher v. Sumner Telephone Co.*, 161 Iowa 326.

There was no evidence whatever that the payee of the note had any information as to whether the transaction was a partnership one, of Courtney & O'Donnell's, or an individual deal of Courtney's, and for this reason the refusal of the third instruction is approved. The fourth instruction was, in substance, that, if a partnership existed, and its principal business was earning commissions by dealing in land, there could be no recovery. This was rightly refused, for that this eliminated the possibility of a finding that O'Donnell consented to or authorized the use of the

3. PARTNERSHIP:  
representa-  
tion of firm:  
non-trading  
corporations.

4. TRIAL: in-  
structions:  
applicability  
to evidence.

firm name in the signing of the note. There was no error in the refusal to give instructions requested.

III. Several of the instructions given are assailed in argument, but the errors relied on may not be considered. Section 3705-a of the Code Supplement, 1913, requires that:

5. NEW TRIAL:  
grounds: erroneous in-  
structions:  
failure to dis-  
cover: neces-  
sary showing.

"All objections or exceptions thereto must be made before the instructions are read to the jury and must point out the grounds thereof specifically and with reasonable exactness; but upon a showing in a motion for a new trial that an error in such instructions was not discovered by the party claiming the error at the time of trial, such objections or exceptions may be made in the same manner in such motion for a new trial and no other objection or exception to the instructions shall be considered by the Supreme Court on appeal."

See *Hanson v. City of Anamosa*, 177 Iowa 101. The only showing attempted was in the motion for new trial, wherein defendant recited:

"That said instruction was objected and excepted to by this defendant at the time it was given, and is objected to and excepted to now for the above reason, that counsel failed to note these errors at the time said instructions were submitted to him; and further, that same is prejudicial to the substantial rights of this defendant."

This statement follows the particular exceptions to or criticisms of each of the instructions complained of, and is found only in the motion for new trial. We infer that the objection and exception referred to as having been taken at the time the instructions were given are those noted by the shorthand reporter under Section 3707 of the Code, for none are endorsed on the instructions given or filed with the clerk. They are to be found in the motion for new trial only. But the statute from which

we have quoted exacts that, if objections or exceptions to instructions are to be interposed for the first time in a motion for new trial, there must be "a showing \* \* \* that an error in such instructions was not discovered by the party claiming the error at the time of trial." "To show" means "to make clear or apparent, as by evidence or testimony or reason; to prove." *Coyle v. Commonwealth*, 104 Pa. 117, at 133.

6. WORDS AND  
PHRASES:  
"show" and  
"state" con-  
trasted.

In *Cox v. United States*, 5 Okla. 701 (50 Pac. 175), the court held that the expression "shown to the court" is equivalent to "make to appear," and "shown" is defined by the lexicographers as meaning "to make plain or clear, as by evidence, testimony or reasoning; to prove." "Show" is held not to be synonymous with "state." In *Spalding v. Spalding*, 3 How. Prac. (N. Y.) 297, and also in *Meadow Valley Mining Co. v. Dodd*, 7 Nev. 143 (8 Am. R. 709), it was observed that:

"There is an obvious and material distinction between *showing* a fact and *stating* it. In the one case, satisfactory proof may be required; in the other, the mere recital of the fact is sufficient."

In order that an objection or exception to the instruction urged for the first time in the motion for new trial may be considered, the assertion that the error was not discovered at the time of the trial by the party claiming it, is not enough. There must be some showing that the assertion is true,—some proof thereof. This may be by affidavit, testimony in open court, or any other mode which will make it satisfactorily appear to the court that the error was overlooked at the trial of the cause to the jury. No attempt at any such showing was made, and for this reason alleged errors in the instructions may not be considered. The evidence was sufficient to carry to the jury the issue as to whether a partnership between Courtney and

O'Donnell existed at the time the note was given, and also as to whether O'Donnell authorized the execution of the note by the partnership. The fault found with the form of the verdict requires no attention, and nothing will be gained by a review of the evidence.

As no reversible error is discovered, the judgment is—*Affirmed.*

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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B. G. CLARK, Appellant, v. ALPHONSO HADLEY, Appellee.

**EVIDENCE:** Judicial Notice—Laws of Foreign State. Laws of a foreign state must be duly introduced in evidence before they can be given any recognition. So held where alleged fraudulent representations pertained to water rights, etc., which were governed by foreign statutes.

*Appeal from Warren District Court.*—W. H. FAHEY, Judge.

SATURDAY, OCTOBER 27, 1917.

ACTION for false representations in the exchange of lands. Trial to a jury, verdict for the defendant, and plaintiff appeals.—*Affirmed.*

O. C. Brown, for appellant.

A. V. Proudfoot, for appellee.

**EVIDENCE:** defendant was an agent for the sale of a certain section of land in Wyoming, belonging to one Thompson. An exchange was effected with the plaintiff for one quarter section of such land, for which the plaintiff conveyed a certain town lot in Iowa. The alleged false representations were made by the defendant in the course of such negotiations. The petition was in two counts. The first count charged false and fraudulent representations. The second count charged a guaranty by the defendant substantially to the same effect as the false representations. The verdict of the

judicial notice: laws of foreign state.

jury was adverse to the plaintiff on both counts. No complaint is made here as to the result of the verdict on the second count.

The Wyoming land was desert land, and was dependent upon irrigation for its value. Certain water rights were appurtenant thereto. The plaintiff went to Wyoming for the purpose of seeing the land, and he did see the section as a whole. He afterwards selected the southeast quarter of the section. He claims, however, that he was never actually on that quarter, but saw it only from a distance. The material representations alleged to be false all bear upon the question of water rights and priorities. These rights and priorities were all dependent for their ascertainment upon the irrigation statutes of the state of Wyoming.

The appellant has specified no errors relied on for reversal, but has discussed the general merits of the case. He does complain that the trial court ought to have explained to the jury in the instruction the Wyoming laws on the subject of irrigation and priorities. The difficulty with his position is that he did not offer in evidence any of the Wyoming statutes nor any Wyoming decision on the subject. There was nothing, therefore, before the court concerning these Wyoming laws which the court could properly take notice of for the purpose of instructions or otherwise. This omission goes very deeply, also, into plaintiff's case in other respects. It is very doubtful whether, upon this record, a verdict for the plaintiff could have stood if one had been rendered. So far as the general merits of the case are concerned, the verdict of the jury has abundant support in the evidence. No useful purpose can be subserved by a detailed discussion thereof. We reach the conclusion that the judgment appealed from must be—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

F. H. KENT, Appellant, v. E. C. BAILEY et al., Appellees.

**SUBROGATION: Discharge of Obligations—Essential and Non-**  
1 **essential Elements.** One may be entitled to the benefits of subrogation even though he did not advance his money (a) under any *compulsion*, or (b) in order to *protect some interest* of his own, or (c) with entire *freedom from negligence*. The important considerations are that the money be advanced under an agreement, express or implied, that the payer shall have the same rights as possessed by the holder of the discharged obligation, and that no intervening paramount equities have attached.

**PRINCIPLE APPLIED:** Reaves obtained a judgment against Bailey. A few days later, Bailey purchased a lot and gave the grantor a *purchase-money* first mortgage thereon. This mortgage fell due. Bailey, through his agent, sought a new loan with which to pay said mortgage. The agent explained the exact conditions to Kent and asked Kent to make the new loan, and in good faith promised him a *first mortgage* as security. Kent relied on this and advanced the money. Neither Kent nor the agent had any knowledge of the Reaves judgment, though, of course, a search of the records would have revealed it. The agent had even been informed, and honestly believed, that there were no liens on the property except the original mortgage. The money advanced by Kent was placed in a bank, and the mortgagee was told to go and get his money, which he did, and thereafter fully discharged the mortgage of record. Bailey then gave Kent a mortgage as agreed. Kent, the agent, and the bank officials all supposed that Kent's mortgage would be the first lien on the property. The value of the lot was much less than the Reaves judgment. After the deal was all closed, Kent discovered the Reaves judgment.

*Held*, Kent was entitled to be subrogated to all the rights of the first mortgagee, even though Kent did not advance the money under any *compulsion* to do so, did not advance it in order to *protect any interest* of his own, and even though, in so advancing, he was guilty, in some measure, of negligence in not discovering the Reaves judgment.

**MORTGAGES: Lien and Priority—Purchase-Money Mortgage—**  
2 **Antedating Judgment.** Principle recognized that a purchase-money mortgage is prior in right to an antedating judgment.

**PRINCIPLE APPLIED:** See No. 1.

**EQUITY: Jurisdiction, Etc.—Grounds—Mistake—Inexcusable Neg-**  
 3 lect. Principle recognized that equity will not grant relief from a mistake due to inexcusable neglect, but principle also recognized that the court will be slow to deny relief when the mistake flows from a negligent act which injures no one but the one guilty thereof, and when no intervening equities have attached.

PRINCIPLE APPLIED: See No. 1.

**SUBROGATION: Negligence—Mortgagee's Failure to Examine Rec-**  
 4 ords—Excusable Negligence. A mortgagee is not guilty of negligence *per se* by relying solely on the assurance of a mortgagor that no prior liens exist on the property.

PRINCIPLE APPLIED: See No. 1.

**PRINCIPAL AND AGENT: The Relation—Creation and Existence**  
 5 —Implied Agency. Principle recognized that an agent to procure a loan may, in the performance of one act, be impliedly the agent of the borrower, and, in the performance of another act, be impliedly the agent of the lender.

*Appeal from Madison District Court.—J. H. APPLEGATE,*  
 Judge.

SATURDAY, OCTOBER 27, 1917.

THE petition alleged that, about October 11, 1913, Theodore Hartwell sold and conveyed to E. C. Bailey Lot 8 in Block 16 in Pitzer and Knight's Addition to Winterset for \$300, said Bailey and wife executing, as part consideration, two notes of \$100 each, one payable October 5, 1914, and the other a year later; that, about the time the first note became due, Bailey employed Roy to procure an extension of time or a new loan to take up the said notes; that Roy advised plaintiff of the situation, and that \$250 would be required to take up the mortgage and pay the taxes, and proposed that, if plaintiff would loan that amount, Bailey would execute a first mortgage on said lot as security for the payment thereof which should be a first lien thereon; that plaintiff, relying on the representations of Roy, gave him his check for \$250 to be surrendered to Bailey or to



whom he might direct, upon the execution of the note of \$250, secured by the first mortgage on said lot; that Roy, in pursuance of plaintiff's instructions, had Hartwell leave his notes and mortgage at the Winterset Savings Bank; that Bailey executed the note and mortgage to plaintiff, as proposed, and deposited the same at said bank; that Roy, "being informed and believing there to have been no other liens or incumbrances on said lot," through mistake and error, directed the Winterset Savings Bank to pay Hartwell the amount due on his notes and mortgage, which the bank did in the sum of \$212.50, and filed a release of said mortgage for record, "believing that the mortgage executed to plaintiff was the first lien on the property," and thereupon said bank delivered to plaintiff the said note and mortgage of Bailey; that, about October 1, 1913, Reaves & Co. recovered a judgment against Bailey for the sum of \$600 in the district court of Madison County, on an indebtedness in no way connected with said lot or the purchase thereof or the removal of any liens thereon; that plaintiff was without actual notice of said judgment; that Roy disobeyed the instructions of plaintiff in permitting the mortgage to Hartwell to be surrendered without ascertaining that plaintiff's mortgage was a first lien of record; that the money so furnished was used to take up Hartwell's mortgage, and plaintiff is entitled to be subrogated to the rights of Hartwell under his mortgage; that the lot was at no time worth to exceed \$450; and plaintiff prayed that he be subrogated to the rights of Hartwell, and that his mortgage be established as a lien on the premises as of date October 15, 1913, to the amount of \$212.50, with interest paramount to the lien of Reaves & Co. A demurrer to the petition on the ground that plaintiff was not entitled to the relief demanded was sustained. From this ruling, plaintiff appeals.—*Reversed.*

*W. S. Cooper*, for appellant.

*J. P. Steele*, for appellees.

LADD, J.—Hartwell sold the lot to

1. SUBROGATION: discharge of obligations: essential and non-essential elements. Bailey on October 11, 1913, for \$300. To secure two deferred payments of \$100 each, Bailey executed a mortgage on the lot. Upon the maturity of the first payment, Bailey employed Roy to obtain a new loan out of which to take up Hartwell's mortgage and pay the taxes. Thereupon, Roy negotiated with plaintiff, disclosing to him the facts as stated, and proposing that, if he would make the loan, he should be secured by a first mortgage and lien on the lot, and, relying thereon, plaintiff deposited his check for \$250 with Roy, and Bailey executed a note and mortgage to plaintiff as proposed, and left it with said bank. Thereupon, Roy directed the bank to pay Hartwell from plaintiff's check, which it did, and Hartwell released his mortgage. Roy, in so directing the bank, was informed and believed that the property was then clear, with the exception of said mortgage, and that plaintiff's mortgage would become a first lien thereon; but on October 1, 1913, Reaves & Co. had obtained in the district court of Madison County a judgment against Bailey for the sum of \$600, exceeding the value of the property by \$150. The plaintiff sought to be subrogated to the rights of Hartwell, and prayed that his mortgage be declared a first lien to the extent of \$212.50, the amount paid Hartwell to satisfy his mortgage. The court, in sustaining the demurrer to the petition, held that plaintiff was not entitled to such relief.

2. MORTGAGES: lien and priority: purchase-money mortgage: antedating judgment. Though the judgment antedated the first mortgage, the latter was executed as a part of the purchase price, and therefore its lien was prior to that of the judgment.

*Kaiser v. Lembeck*, 55 Iowa 244; *Laidley*

v. *Aikin*, 80 Iowa 112, 114. Priority to this judgment is what plaintiff seeks in order to avoid loss, as the value of the property does not exceed the amount of the judgment.

"Subrogation is the substitution of one person in place of another, whether as a creditor or as the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies or securities." *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508 (52 Am. R. 728). See *Heuser v. Sharman*, 89 Iowa 355.

It has been styled a legal fiction whereby an obligation which has been discharged by a third person is treated as still subsisting for his benefit, so that, by means thereof, one creditor is substituted to the rights, remedies and securities of another. *Aetna Life Ins. Co. v. Middleport*, 124 U. S. 534. The law recognizes two kinds of subrogation, legal and conventional. By the former is meant the right of substitution which springs as a matter of course from the mere fact of the payment of a debt, without an agreement so to do between the parties. Conventional subrogation arises by virtue of an agreement, express or implied, that a third person, or one having no previous interest in the matter involved, shall, upon discharging an obligation or paying a debt, be substituted in the place of the creditor in respect to such rights, remedies or securities as he may have against the debtor. See *Wilkins v. Gibson*, 113 Ga. 31 (84 Am. St. 204); *Home Savings Bank v. Bierstadt*, 168 Ill. 618 (61 Am. St. 146).

The books agree that subrogation is not founded on contract or privity or strict suretyship, but is born of equity, and results from the natural justice of placing the burden where it ought to rest. The remedy depends upon the principles of justice, equity and benevolence to be applied to the facts of the particular case. It is of equitable origin, adopted to compel the ultimate discharge of a debt

or obligation by him who in good conscience ought to pay it. These principles will be found well stated in the text books on the subject, and repeated in the almost innumerable decisions. See valuable note to *American Bonding Co. v. National Mech. Bank*, 97 Md. 598 (99 Am. St. 466), in which the cases are collected. The authorities are also agreed that the doctrine, since first recognized, has been steadily expanding, and growing in importance and extent in its application to various subjects and classes of persons. *Home Sav. Bank v. Bierstadt*, supra; *Heuser v. Sharman*, supra. The remedy is to be administered according to the established rules of equity jurisprudence. *Sheppard v. Messenger*, 107 Iowa 717; *Seieroe v. Homan*, 50 Neb. 601 (70 N. W. 244); *Blodgett v. Hitt*, 29 Wis. 169, 183.

Reverting to the case at bar, it is to be said that the ruling of the trial court finds support in the earlier decisions and text books. Thus, in *Sheldon on Subrogation*, Sec. 3, it is said:

"There will be no subrogation unless the payment was made either under compulsion or for the protection of some interest of the party making the payment, and in discharge of an existing liability. The demand of a creditor which is paid with the money of a third person, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished; but the doctrine of subrogation will be applied to reimburse one who has been compelled to pay the debt of a third person in order to protect his own rights or to save his own property."

The citations in the note in the margin sustain this view. But the more recent decisions have adopted a more liberal view, and, in harmony with business experience, have, in the interest of justice, decreed subrogation in many cases where the courts had previously denied it.

Here the plaintiff was in no sense a volunteer, for no

one can be such who discharges a debt at the instance and request of the debtor. Roy represented Bailey, the debtor, as his agent, and the check for the amount loaned was handed to him as such upon Bailey's application through him for the loan, and on the express understanding that the mortgage of Bailey securing payment thereof should be a first lien. The situation was such as to preclude the possibility of inferring that payment was voluntary. And we are of opinion that the agreement that the mortgage to plaintiff should be a first lien was tantamount to an undertaking that whatever necessary to accomplish this would be done, even though this might require the taking of an assignment of the existing mortgage. In *Gore v. Brian*, (N. J.) 35 Atl. 897, one McCann owned four lots, on two of which there was a mortgage, one for \$2,500 to Schangle, and the other a mortgage of a like amount to Buckman. McCann conveyed the four lots to Steward, who took title at the request of Caminade in order to dispose of them for him. The latter had \$1,100 belonging to his mother-in-law, Mrs. Gore, to loan on first mortgage security, and instead of doing so, he took Steward's mortgage for \$1,100 on the four lots, subject to the two mortgages mentioned, and thereafter, Steward conveyed the four lots to Caminade. The latter then applied to the agent of Mrs. Brian for a loan of \$5,000 on the lots, but later proposed that mortgages of \$625 be placed on each of the eight parcels into which the four lots had been subdivided. This was done, under the understanding that these mortgages should be first liens. The eight mortgages were executed, and out of the proceeds derived from Mrs. Brian, the two mortgages of \$2,500 each were paid and canceled of record. Subsequently, upon a search of the record, the \$1,100 mortgage was discovered, and in suit to foreclose the same by Mrs. Gore, Mrs. Brian, by way of the cross-bill, prayed for subrogation to security afforded by the two \$2,500 mort-

gages canceled, and that her mortgages be established to that extent as prior and superior to Mrs. Gore's mortgage. After referring to some authorities, the court, in awarding relief, said:

"The doctrine of these cases is that the mere payment of a debt by one not bound to see that it is paid, or by one who is not affected in his property rights by its nonpayment, will not entitle the payer to subrogation; nor will an understanding existing in the mind of the payer that he will be entitled to subrogation so entitle him, unless this mental condition is produced by some conventional arrangement between the payer and either the creditor or debtor that this will be the consequence of the payment. If, therefore, Mrs. Brian had advanced this money to pay off the two \$2,500 mortgages, with no express or implied agreement with Caminade concerning the security for her loan, she would stand in the attitude of a stranger or volunteer, with no right to be substituted in the place of the first two mortgagees. But she did not occupy this position. On the contrary, instead of being a volunteer in the transaction, she was requested by Caminade, both directly and through her agent, to advance the money to pay off the first mortgages. More than this, it was proved beyond doubt that it was understood clearly, between Caminade on the one hand and Turford and Mrs. Brian on the other hand, that the new mortgages should take the place of the old mortgages in respect to priority of lien upon the mortgaged premises. I cannot conceive a clearer case for conventional subrogation, unless Mrs. Brian has lost the advantage of her agreement by such neglect, in permitting the cancellation of the old and in receiving the new mortgage, as shuts her off from any equitable relief against the intervening \$1,100 mortgage."

In *Home Sav. Bank v. Bierstadt*, supra, a like situation was presented and a like conclusion was reached, the

court, speaking through Phillips, J., saying:

"It is the agreement that the security shall be kept alive for the benefit of the person making the payment which gives the right of subrogation, because it takes away the character of a mere volunteer. Here the agreement between the debtor and the appellee, who advanced the money, was to the effect that appellee was to advance sufficient money to discharge the seven Goudy deeds of trust, and should receive from the debtor, by way of security for the money so advanced, a first mortgage upon the seven lots. In equity, that was an agreement that the Goudy deeds of trust should become security for her loan. That was the substance of the transaction, and equity will effectuate the real intention of the parties, where no injury is done to an innocent party, by applying the principle of conventional subrogation. *Draper v. Ashley*, 104 Mich. 527 (62 N. W. 707); *Tyrrell v. Ward*, supra; *Union Mortgage Co. v. Peters*, 72 Miss. 1058 (18 So. 497); *Levy v. Martin*, 48 Wis. 198 (4 N. W. 35); *Wilton v. Mayberry*, 75 Wis. 191 (43 N. W. 901); *Dillon v. Kauffman*, 58 Tex. 696. This principle will be applied even where the record shows a release of the satisfied incumbrance, as the lien so satisfied will be removed for the benefit of the party satisfying the same, where there has not been gross negligence, and where justice requires it should be done; and this will be done as against a subsequent incumbrancer whose incumbrance has not been taken or his position changed because of the record showing the discharge of the senior incumbrance."

In *Emmert v. Thompson*, 49 Minn. 386 (32 Am. St. 566), one Marr owned 240 acres of land, on 160 acres of which was a mortgage to Ormsby, and on the 80 acres, a mortgage to Hayes. He obtained a loan from Cornwell, out of which the above mortgages were satisfied, and executed a mortgage on the premises to secure the payment of Cornwell, which Cornwell believed, and Marr impliedly repre-

sented, would be the first lien on the land. A large amount of taxes were also paid out of this loan, and both the mortgages and taxes so paid were satisfied of record. Subsequently, it was ascertained that Marr had executed a mortgage to Emmert to secure the payment of \$1,800, and that this mortgage was dated and recorded after the Ormsby and Hayes mortgages had become liens on the land, and prior to the execution of the mortgage to Cornwell. In an action by Emmert, praying that his mortgage be foreclosed, Cornwell intervened, and prayed that he be subrogated to the securities which had been discharged out of the proceeds of the loan made by him. The court, in holding that he was entitled to the relief prayed, remarked that:

"There are a very respectable number of cases, several having been cited, in which relief has been refused under circumstances precisely like those now before us, where one who has loaned and used his money in good faith, and for the express purpose of relieving a debtor from a pressing obligation, and his real property from a specific lien for the amount of the same, under a genuine but excusable misapprehension as to the rank and position of security taken by him on the same property, has been treated and characterized as a volunteer, a stranger, and an officious intermeddler, and denied the rights of an equitable assignee. But of late years, with the development of the principles on which the doctrine is founded, the courts have been taking a broader and more commendable view of the situation of such a party, and at this time, very little is left of the views expressed in the earlier cases. The better opinion now is that one who loans his money upon real estate security for the express purpose of taking up and discharging liens or incumbrances on the same property, has thus paid the debt at the instance, request and solicitation of the debtor, expecting and believing in good



faith that his security will of record be substituted in fact in place of that which he discharges, is neither a volunteer, stranger nor intermeddler, nor is the debt, lien or incumbrance regarded as extinguished if justice requires that it should be kept alive for the benefit of the person advancing the money, who thereby becomes the creditor. Of the many authorities on this, we cite *Tradesmen's Building and Loan Assn. v. Thompson*, 32 N. J. Eq. 133; *Gans v. Thieme*, 93 N. Y. 225; *Sidener v. Pavey*, 77 Ind. 241; *McKenzie v. McKenzie*, 52 Vt. 271; *Cobb v. Dyer*, 69 Me. 494; *Levy v. Martin*, 48 Wis. 198; *Detroit, etc., Ins. Co. v. Aspinall*, 48 Mich. 238; *Crippen v. Chappel*, 35 Kans. 495 (57 Am. Rep. 187); 3 Pomeroy's Eq. Jur., Sec. 1212; Harris on Subrogation, Secs. 811, 816; Dixon on Subrogation, 165."

We are in full accord with the rule laid down by these decisions, and, as there is nothing to be found in prior decisions of this court, neither their review nor the citation of other cases seems necessary. There are no intervening equities, the result being merely to establish a lien prior to defendant's judgment in the precise amount of Hartwell's mortgage, and at the same time accord plaintiff's mortgage the position agreed upon, in so far as possible, in restoring the *status quo*. But it may be argued that plaintiff was negligent in not searching the record, inasmuch as such search would have disclosed the prior rendition of the judgment. That a court will reinstate a mortgage canceled through mistake of facts is well settled. Had the mortgage to Hartwell been satisfied with full knowledge of the facts, plaintiff would have been without standing to ask for its reinstatement as a lien. Inasmuch as this happened through misunderstanding, was the mistake such as should be rectified by a court of equity? That the satisfaction of that mortgage was induced by the supposition that no subsequent incumbrance existed was alleged, and, on demurrer, must be taken as true.

- But equity will not rectify a mistake due to inexcusable negligence. *Fort Dodge B. & L. Assn. v. Scott*, 86 Iowa 431. There, reliance on an abstract not brought up to date was adjudged negligence. The degree of diligence exacted necessarily depends upon the facts of each case. Where the act done by mistake is one calculated to induce others to pursue a line of conduct which will put them to loss if the mistake be corrected, it should be clear that the party asking for relief has been led into the mistake in spite of the exercise of that high degree of care exacted under such circumstances. But where no one is injured by the mistake other than the party himself, and no one has changed his position, in consequence of what has been done and of the mistake, no tenable reason appears for denying a correction of such mistake, even though a high degree of care has not been exercised. It is alleged that Roy was informed and believed that the premises were clear of incumbrance save Hartwell's mortgage, and he so assured the bank and directed payment in reliance thereon, and, though he may have received the check from plaintiff as his agent, he ceased to be such after leaving the proceeds thereof in the bank, and his direction to the bank to satisfy the mortgage was an assurance that the property was otherwise clear. Therein he represented the mortgagor, and we are of opinion that neither the bank nor plaintiff, acting through it, should be denounced as negligent in relying on such assurance of the debtor. Possibly cases may be found to the contrary, but, in the absence of the appearance of something else, we are not inclined to denounce a mortgagee as negligent as a matter of law, on the sole ground that, instead of searching the records, he relied
3. EQUITY: jurisdiction, etc.: grounds: mistake: inexcusable neglect.
  4. SUBROGATION: negligence: mortgagee's failure to examine records: excusable negligence.
  5. PRINCIPAL AND AGENT: the relation: creation and existence: implied agency.

on the solemn assurance of his mortgagor's agent, though the mortgagor himself must have known otherwise. Such was the holding in *McKenzie v. McKenzie*, 52 Vt. 271, and *Seeley v. Bacon*, (N. J.) 34 Atl. 139. See *Emmert v. Thompson*, supra; *Gore v. Brian*, supra; and *Bruse v. Nelson*, 35 Iowa 157.

The court erred in sustaining the demurrer, and its order so doing is — *Reversed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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WARD McCUTCHEON, Appellant, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellee.

**MASTER AND SERVANT: Place for Work—Railway Right of Way**  
1 —**Presence of Noxious Weeds.** The mere presence of weeds upon a right of way is not, of itself, a breach of duty to a section hand whose duty involves the care and maintenance of such right of way.

**MASTER AND SERVANT: Federal Employers' Liability Act—Ex-**  
2 **clusiveness of Act.** A servant who has right to recovery under the Federal Employers' Liability Act must stand or fall thereon, unaided and unimpeded by any state statute.

*Appeal from Washington District Court.*—HENRY SILWOLD, Judge.

SATURDAY, OCTOBER 27, 1917.

**ACTION** for damages for alleged negligence of the defendant in permitting noxious weeds to grow upon its roadbed, including sand burs and thistles. The petition alleges that the plaintiff was a section hand, engaged in his line of work upon the defendant's right of way, in charge of a foreman; that, while so engaged about his work, and particularly while placing a hand car upon the rails, his limbs were pricked by such burs and thistles, wherefrom blood poisoning later set in, and caused the plaintiff great injury. The action purports to be brought under the Fed-

eral Employers' Liability Act. There was a demurrer to the petition, on the general ground that it disclosed no actionable negligence or breach of duty on the part of the defendant company toward the plaintiff.—*Affirmed.*

*W. H. Butterfield and Chas. A. Dewey*, for appellant.

*Eicher & Livingston, John N. Hughes and C. R. Sutherland*, for appellee.

EVANS, J.—The line of duty of a section hand is the care and maintenance of the right of way. Assuming that the railroad company owed a duty to the public to destroy all noxious weeds upon its right of way, it must necessarily perform such duty through employees. Weeds indigenous to the soil must necessarily grow, to some extent, upon right of ways. The best that the most diligent can do is to destroy them within a reasonable time. That some degree of danger is always present upon a right of way is a matter of common observation. Burs may prick, stones and cinders may bruise more or less. But these are among the small dangers which are incident to every active life. Such as they are, they are not hidden, but are obvious, and ordinarily avoidable. They are not perilous in any legal sense. True, the prick of a pin may result in blood poisoning and death. But the presence of a pin upon a right of way would hardly be deemed actionable negligence on the part of the railway company; and yet it would be more hidden and difficult of discovery than would the presence of sand burs and thistles. In this case, the plaintiff charges that the sand burs and thistles were thick and observable, and that he entered them only because ordered to do so by the section foreman.

The general basis of the charge of negligence is that the defendant failed to furnish the plaintiff a reasonably

safe place to work. We are clear that the mere presence of weeds upon a right of way is not of itself a breach of duty to a section hand, whose duties involve the care and maintenance of such right of way. *Vance v. Southern Kans. Ry. of Texas*, (Tex.) 152 S. W. 743, at 745; *San Antonio & A. P. R. Co. v. Burns*, (Tex.) 89 S. W. 21; *Gulf, C. & S. F. R. Co. v. Oakes*, (Tex.) 86 Am. St. Rep. 835; 5 Thompson on Negligence, Sec. 5855.

2. MASTER AND  
SERVANT:  
Federal Em-  
ployers' Lia-  
bility Act:  
exclusiveness  
of act.

Some stress is laid by appellant upon the fact that we have an Iowa statute which requires landowners to destroy noxious weeds both upon the highways and upon railroad right of ways. It is urged that the defendant was guilty of a violation of this statute. There are several answers to this position of appellant's:

1. Having brought this action under the Federal Employers' Liability Act, his case must be considered from the standpoint of Federal legislation, and ordinarily without reference to any state statute. Ordinarily, the rights of litigants under the Federal Employers' Liability Act cannot be affected favorably or unfavorably by state statutes. *Spokane & I. E. R. Co. v. Campbell*, 60 L. Ed. 1125 (241 U. S. 497); *Texas & Pac. R. Co. v. Rigsby*, 60 L. Ed. 874 (241 U. S. 33). Under this rule, the operation of the act is uniform upon all litigants. To hold otherwise would be to destroy such uniformity.

2. If the railway company be under the affirmative duty to remove from its right of way all weeds which are indigenous to its soil, it must necessarily perform such duty through its employees, and these must necessarily go upon the right of way for that purpose.

We think the order of the district court was proper, and it is—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

ANTON SEEFRIED, Administrator, Appellant, v. WANGLER  
BROTHERS COMPANY, Appellee.

**MASTER AND SERVANT: Place for Work—Transitory Dangers—**

- 1 **Effect.** A place for work which is otherwise reasonably safe is not rendered legally unsafe by a dangerous condition *which is extraordinary and strictly transitory*. So held in the case of an explosion.

**PRINCIPLE APPLIED:** A drug store was equipped with an ordinary stock. A soda fountain was located in the front of the room. Deceased was employed solely to tend said fountain, though at times he was seen to sell cigars and other small things, to put packages on the shelves, and to sweep the floor. In the rear part of the room, and some 120 feet from the soda fountain, was a prescription counter, enclosed on three sides. All compounding of ingredients was done at this counter, and was in charge of a competent registered pharmacist. Deceased never worked at this prescription counter, and had no duty to be performed thereat. This counter was easily reached from any part of the store.

The said pharmacist received an order for colored fire. It was his sole duty to compound it. He took a recognized formula, weighed out the proper amount of shellac, sulphur, and chloride of potash, properly placed the same in a mortar, and placed the pestle a foot to one side of the mortar. This was all done at the prescription counter. The deceased, at this moment of time, was at the soda fountain. Said ingredients were entirely harmless when kept separate, and the mixture, as it existed in the mortar, was equally harmless, *provided no force or friction was applied to said mixture*. A violent explosion of said mixture without a blow or friction thereon would, under the evidence, have been an extraordinary occurrence. The pharmacist knew this fact. After mixing the said ingredients, the pharmacist, with no one present but himself, turned from the mortar and mounted a nearby ladder in order to secure a fourth ingredient. When on the ladder, he was some five feet from the mortar. While on the ladder, the pharmacist heard the voice of the deceased, who said, "I am going to stir it." The pharmacist instantly said, "Bill, don't stir it," and turned to look, but before he could see the deceased, a violent explosion

occurred. When the explosion occurred, the pharmacist had been away from the mortar for about one or two minutes. Deceased was, apparently, instantly killed. He was found, frightfully mangled, near the prescription counter. One arm was blown off, and pieces of the mortar were blown into his stomach and bowels. *Held:*

1. The store, with its arrangement and condition, being a reasonably safe place, was not rendered unsafe, in a legal sense, by the transitory danger arising from mixing said ingredients.
2. Assuming the negligence of the pharmacist, yet the master had fully met his duty, and was not liable for said negligence.
3. The master was under no duty to apprehend that the deceased would intermeddle in the compounding of said ingredients, and therefore was under no duty to warn deceased of the danger attending such an act.
4. The declarations of the deceased and the attending circumstances justified the conclusion that the deceased was the one who applied the friction to the mixture.

**MASTER AND SERVANT: Fellow Servants—Negligence by Competent Servants.** When no danger attends the doing of a thing when it is properly done, and the master has placed the doing of such thing in the hands of a competent servant, he, the master, is not liable to another servant for the negligent manner in which the entrusted servant does said thing. So held in case of an explosion.

PRINCIPLE APPLIED: See No. 1.

**MASTER AND SERVANT: Warning and Instructing Servant—Unusual and Extraordinary Dangers.** A master is under no obligation to warn a servant of remote and improbable dangers, especially when such dangers do not lie in the line of the servant's employment. So held in the case of an explosion.

PRINCIPLE APPLIED: See No. 1.

**EVIDENCE: Relevancy, Competency and Materiality—Assertion of Intention.** The statement of a party to the effect that he is going to do a certain act, followed by the act's being done, or what would indicate that the act had been done as indicated, is substantive evidence of the doing of the act by the person making the declaration.

PRINCIPLE APPLIED: See No. 1.

*Appeal from Black Hawk District Court.*—GEORGE W. DUNHAM, Judge.

SATURDAY, OCTOBER 27, 1917.

ACTION to recover for personal injuries. Opinion states the facts. The court below directed a verdict for the defendant. Plaintiff appeals.—*Affirmed.*

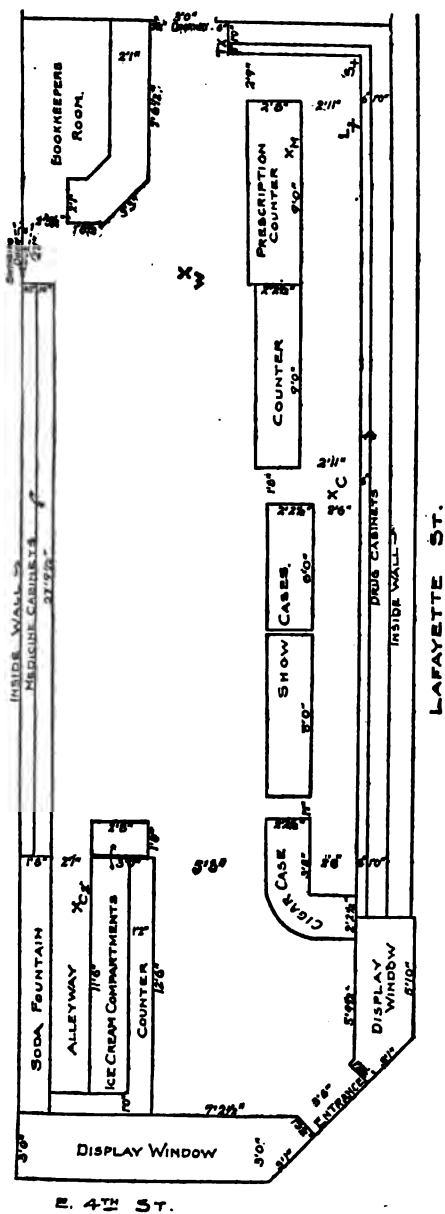
*J. C. Murtagh and Mears & Lovejoy*, for appellant.

*E. H. McCoy and Sager, Sweet & Edwards*, for appellee.

GAYNOR, C. J.—Plaintiff is the administrator of the estate of one William Schneiderman, and brings this action to recover damages on account of his death. It is claimed that his death was due to the negligence of the defendant. Schneiderman was killed on the 1st day of December, 1913. His death was due to the explosion of a certain chemical compound while he was in the employ of the defendant.

Defendant was conducting a drug store in the city of Waterloo. The explosion occurred back of what is known as the prescription case, a place set apart for the filling of prescriptions and the compounding of medicines and other drugs. The interior of the store, at the time of the happening of the accident complained of, is as shown by the following plat:





The prescription counter shown in the plat was shut off from the rest of the store by a glass screen enclosing it on three sides, and about four feet high. This screen extended along the entire front of the prescription counter and on both ends. One could, however, pass behind the prescription case from any point back of the show cases. Access might also be had from the center of the store by passing around the rear end and turning to the right. The store was about 120 feet deep from the front windows to the rear.

Plaintiff's intestate was employed to work at the soda fountain. It appears, however, that he worked in other parts of the store as occasion required, but never behind the prescription counter. The record discloses that a few times he left his place behind the soda fountain and waited on customers at the cigar case, sold small packages, and sometimes placed drugs and medicines upon the shelves, and also swept the floor and dusted the counters. There is no affirmative evidence that this was in the line of his employment, but he was seen to do these things. He was really employed to serve at the soda fountain, and that was where his main duties were performed. Just before the fatal accident, he was so engaged, and was seen at the ice cream compartment. It appears that he commenced work about six weeks prior to the happening of the injury complained of. At the time he was hired, he was told to work at the soda fountain, and he continued to work there up to the time of his injury.

There is practically no dispute in the evidence. The facts are as follows: On the day of the accident, an order was received by one John Roberts, a registered pharmacist in the employ of the defendant, for some colored fire. The duties imposed upon Roberts, by his employment, consisted of putting up drugs and compounding prescriptions. The ingredients necessary to make this colored fire were

shellac, sulphur, and chloride of potash—one ounce of shellac, two ounces of sulphur, and six ounces of potash. Upon receipt of this order, Roberts proceeded to compound the mixture. He weighed out the different ingredients according to what seems to be a recognized formula, and placed them in a mortar. After he had them put together in the mortar, he placed the pestle on the right-hand side of the mortar, and went up a ladder, a few feet back of the prescription case, to get some other chemicals needed in the formula. "L" in the plat represents where the ladder stood. "M" represents where the mortar stood at that time. The explosion occurred while he was on the ladder. As a result of the explosion, he was injured and Schneiderman was killed. When he went up the ladder, there was no one in sight. The mortar and pestle were as indicated. The pestle was from 12 to 14 inches on the right side of the mortar. It was approximately from one to two minutes from the time he turned from the prescription case and went up the ladder until the explosion occurred. While on the ladder, he was from four to six feet from the mixture. The mortar, with the ingredients, was standing free and clear on the table. Around the prescription case and on shelves were bottles and packages containing drugs and medicines in what are termed pigeon holes. While on the ladder, he heard the deceased speak, and say, "I am going to stir it." Roberts said, "Bill, don't stir it." He turned, but before he had time to see deceased, the explosion occurred. He says the explosion occurred almost instantaneously upon his saying, "Don't stir it."

These facts are undisputed. Upon these facts the plaintiff predicates his right to recover, and says: That the defendant was negligent in that it failed to furnish Schneiderman a reasonably safe place in which to work; that the place became, and was, unsafe because used for the compounding and mixing of highly explosive and dan-

gerous compounds; that the ingredients of said compounds were of a "highly inflammable and easily explosive character" when brought in contact by mixing in one receptacle, all of which was well known to the defendant; that the contact of said ingredients rendered them highly explosive and dangerous; that the mixing of said compound in the store rendered the place highly unsafe and dangerous, and defendant thereby carelessly and unlawfully created and maintained a public, dangerous and deadly nuisance upon its premises, and thereby negligently exposed Schneiderman to great danger and peril; that the defendant, after mixing the said ingredients, negligently allowed the compound to remain in the store unguarded and uncared for, and at a place where the deceased was accustomed to go in the performance of his duty,—a place of easy access,—and without giving any warning to the decedent of the dangerous or explosive character of the compound; that Schneiderman was free from any negligence on his part.

We take it that plaintiff's action rests upon two charges of negligence: (1) That the place in which deceased was required to work was unsafe by reason of the use to which it was put; that the using of the place in which the deceased was required to work for the compounding of explosives was a breach of the duty which the defendant owed to the deceased, and, injury resulting therefrom, such breach of duty was actionable; (2) that, conceding that the place was not rendered dangerous by reason of the use to which it was put, yet, when defendant undertook to compound this dangerous explosive on the premises, it became its duty to exercise great care to protect those in the building from injury from its presence, and that it failed in this duty, and negligently left the compound unguarded and uncared for at a place where the deceased was accustomed to go in the performance of his duty.

At the conclusion of all the evidence, the court instructed the jury to return a verdict for the defendant. The jury returned a verdict for the defendant, and upon the verdict so returned, the court entered judgment for the defendant, dismissing plaintiff's petition. From this, plaintiff appeals.

The only error assigned is that the court erred in sustaining defendant's motion for a directed verdict, and in entering judgment against the plaintiff for costs.

The first point relied upon for reversal

1. MASTER AND SERVANT: place for work: transitory dangers: effect.

is that it was the duty of the defendant to furnish deceased a reasonably safe place to work, and that it failed to do this, and that this failure was the proximate cause of

the injury. That this duty rested upon the defendant cannot be disputed. The general rule so often stated is that it is the duty of the master to exercise reasonable care to see that his employees have a reasonably safe place assigned them in which to discharge the duties imposed upon them by their employment, and when it is made to appear that a failure to discharge this duty was the proximate cause of an injury, the master is liable. The question here is, Did defendant exercise reasonable care in attempting to discharge this legal duty, and did it furnish the deceased a reasonably safe place in which to work, or did it fail in the discharge of this duty to the deceased? Is there any basis in the evidence, any theory of the evidence, upon which a jury, acting within the scope of its duties, could, under the law, say that the defendant failed in this respect in the full discharge of its legal duty to the deceased, before and at the time of the injury?

This resolved itself into a law question. The facts are not in dispute.

The defendant was running an ordinary drug store, with all the incidents which attach to modern drug stores,

—ice cream, soda fountain, cigars, perfumes, patent medicines, and such other articles as are found in all well regulated drug stores. The compounding of medicines and filling of prescriptions incident to the business were in the hands of a competent registered pharmacist. He testifies, and his testimony is not disputed, that, shortly before the explosion happened, he received an order for colored fire of some kind; that the order was handed to him personally; that it was for someone out of town; that the order did not prescribe the ingredients; that he had a recognized formula for mixing the compound; that he had the formula before him when he mixed the compound; that the ingredients in the compound were shellac, sulphur, and chloride of potash—one ounce of shellac, two ounces of sulphur, and six ounces of chloride of potash; that the amount of the compound represented  $1\frac{1}{2}$  pounds of mixture; that the order called for  $1\frac{1}{2}$  pounds of each of the three different fires, making  $4\frac{1}{2}$  pounds, all told. He testified:

“The first thing I did in mixing this compound was to weigh out the shellac according to the formula, place it in a mortar and triturate it to a fairly fine powder; that is, I ground it up with a pestle; then I placed the pestle on the right-hand side of the mortar about a foot, and weighed out the sulphur according to the formula, and placed it in the mortar. The sulphur needed no pulverizing. I put the sulphur on top of the shellac in the mortar; then I weighed out the chloride of potassium and placed it in the mortar. This did not require any powdering. After getting all three ingredients in the mortar, I went up the ladder a few feet back of the prescription case to get one of the other chemicals needed in the formula.”

Professor Bond, called on behalf of the plaintiff, testified:

“I am professor of chemistry in the State Teachers' College at Cedar Falls. Before that was instructor at Ar-

mour's Institute in Chicago for three years; for a short time instructor in chemistry in the State University of Iowa; am familiar with the ingredients used in this particular compound."

He was asked this question:

"Suppose that one ounce of shellac ground up to a powder and put into a mortar, and on top of this shellac should be poured two ounces of sulphur, and upon the two ounces of sulphur should be poured six ounces of potassium chloride, would or would not the explosion of that substance in the mortar be violent or not?"

He answered:

"It would be violent. Q. What would be the most effective agency for producing an explosion if this substance were poured together in the way I have described? A. I suppose a blow or friction. The use of the hammer furnishes the blow, the friction, or both, necessary to set it off. In case you set fire to this mixture, it burns more quietly. There is not the explosion that comes from a blow or strike. These ingredients are commonly used in tableau lights. If a violent explosion resulted from a mixture of that kind, I would assume that violence or friction had been applied to it in some degree. The mere fact of an explosion would indicate that force or friction had been applied. The mere presence together of these constituents does not produce an explosion. Until disturbed by force or friction, they would remain harmless. I would not expect an explosion merely from these chemicals, in these proportions, standing in an open vessel. It would be an extraordinary occurrence. There would be a remote possibility of an explosion. These constituents taken by themselves are not explosive. They could not be exploded separately. There is a possibility of an explosion without the application of force or friction, but it is very remote. It has been

known to explode by mere spontaneous combustion, but that would not be this type of explosion unless the material was confined. It would ignite and burn more slowly."

Professor Getchell, called by the defendant, testified:

"I have been employed at the Iowa State Teachers' College for six years as professor of chemistry; am a graduate of the Iowa State Teachers' College and University of Wisconsin; have occasion to use sulphur and chloride of potassium. The ingredients of this compound by themselves are not explosive. If these ingredients were in a mortar, an explosion would be caused by external force, namely, friction or a sudden blow. The amount of friction used would not have to be pronounced. Rather slight friction would produce an explosion, but the friction would have to be between two hard substances. The application of friction to a substance of this character may be by different methods. Just a blow would produce friction which might cause the explosion, or it might be done by scraping between hard surfaces, something like the scratching of a match, if it was of sufficient force."

This is all the evidence on this branch of the case.

It is apparent that the defendant violated no duty owed to the deceased, in keeping these ingredients in the store in which deceased was required to work. These ingredients, in and of themselves, were harmless. The danger, if any, arose from compounding them or mixing them together. There is no evidence that there was any negligence in the manner of mixing, or in the method used. They were placed in an open mortar, and would not explode except on the application of friction or a blow from without. The mere presence together in an open mortar would not produce an explosion. Until disturbed by force or friction, they would remain harmless. The mixing was done by one skilled in the art of mixing.

When Roberts left it on the prescription table and went



up the ladder, the mixture remained a harmless compound, and would not explode under any circumstances unless friction was applied from without. Professor Bond says:

"I would not expect an explosion from these chemicals, in these proportions, standing in an open vessel. It would be an extraordinary occurrence. There would be a remote possibility of an explosion. The mere fact of an explosion would indicate that force or friction had been applied."

At the time Roberts left the compound to go up the ladder, there was no one behind the prescription case. Even an experienced chemist would not expect an explosion from these chemicals standing in an open vessel upon the table. An explosion would be an extraordinary occurrence. To produce an explosion, there must be force applied from without. Did the presence of this compound on the table, under those circumstances, violate the duty which the defendant owed to the deceased to furnish him a reasonably safe place in which to work? There are few places to be occupied in the world that are not attended with some danger. The dangers to be guarded against are those which are reasonably to be anticipated as a natural and proximate result of the conditions permitted. There is no evidence in this record that explosions such as here complained of had, prior to this time, occurred in this drug store or any other drug store from the mixing of this compound, or that an explosion ever occurred while the compound remained in an open mortar, without the application of force from without. Under this record, in no sense could the store in which the deceased was working be said to be an unsafe place, except, if at all, during the time this compound was in an open mortar behind the prescription counter. It remained there but a short time, while Roberts turned to secure from the shelf above him an added ingredient for the compound. There is absolutely nothing in this record on which to base a claim that the place was unsafe, except while this compound stood

upon this table for one or two minutes. The undisputed evidence shows that, as it stood there undisturbed, it was perfectly harmless, and would not explode except by the application of friction from without. There is no evidence that the explosion occurred through any fault of Roberts in the handling or in the mixing. Further, the danger from an explosion, if any danger there was, was purely transitory. Roberts understood and knew the necessity of avoiding friction in the making of this compound. Except for the transient hazard of the presence of this compound for this short time, a hazard from which no injury could come except by the interposition of force or friction to the substance from without, there was nothing to suggest danger to anyone from its presence. A different condition would arise had the evidence disclosed any basis for reasonable apprehension that friction might be applied to this substance in the condition and at the place it then occupied, or if the explosion had resulted from incompetency on the part of the one intrusted with its handling. We cannot say that the mixing of this compound in the store, at the time and under the circumstances, rendered the place, as a matter of law or fact, unsafe, so as to say therefrom that the defendant failed in its duty, in not furnishing deceased a reasonably safe place in which to perform his work.

The liability of the master for a failure to furnish a reasonably safe place to work exists only as to those dangers which inhere in the place, and are known to the master, or which the master, by the exercise of reasonable care, should have known, and are distinguished from those dangers which arise in a place as a result of the manner in which the servant of the master performs the duties assigned him. Where the thing to be done is in the hands of a competent servant, skilled in the doing of the thing, and it is apparent that no danger arises from the do-

2. MASTER AND  
SERVANT: fel-  
low servants:  
negligence by  
competent  
servants.

ing when properly done, the master is not liable to another servant for the injury that results from the careless doing of it by the servant intrusted. Where the doing of the thing is attended with danger, and a skillful servant is placed in charge of the doing, and injury results from causes not inhering in the act itself, but in the manner of performing the act, the master is not liable to the servant as for a failure to perform masterial duty. To hold otherwise is to abandon the fellow-servant rule. A different rule arises where danger inheres in the doing of the act, and an incompetent servant is charged with the doing. In the latter case, the liability of the master is not found in the negligent doing by the servant, but in his own negligence in placing in charge of a dangerous instrumentality an ignorant and incompetent servant. As bearing upon this question, see *Wolters v. Summerfield Company*, 160 Iowa 127; *Galloway v. Turner Improvement Co.*, 148 Iowa 93; *Hendrickson v. United States Gypsum Co.*, 133 Iowa 89; *Meehan v. Spiers Mfg. Co.*, (Mass.) 52 N. E. 518; *Johnson v. Jackson*, (Mich.) 133 N. W. 945; *Chicago & E. R. Co. v. Din-ius*, (Ind.) 84 N. E. 9. These cases lay down the doctrine that the master is required to anticipate and foresee or guard against what usually happens, or is likely to happen, but is not required to anticipate or foresee and guard against that which is unusual and not likely to happen, that which is only remote and slightly probable. The test is not whether the injurious result or consequence was possible, but whether it was probable; that is, likely to occur according to the usual experience of persons, and it is said that the fact of injury and the possibility of guarding against it do not necessarily make out a case of culpable negligence. Very few acts in life are done with such care to prevent accident as would have been possible, and the law only requires of anyone that degree of care and prudence which persons who are reasonably careful ordinarily ob-

serve. *Paul v. Consolidated Fireworks Company*, (N. Y.), 105 N. E. 795; *Whittaker v. Bent*, (Mass.) 46 N. E. 121.

Under this record, it is clear that the cause of the explosion was one which the defendant could not have anticipated. When Roberts left the compound in the mortar and turned to the ladder, deceased was at the soda fountain.

This brings us to the second question:

3. MASTER AND  
SERVANT:  
warning and  
instructing  
servant: un-  
usual and ex-  
traordinary  
dangers.

Was Roberts negligent in leaving this compound exposed on the table and turning as he did to the ladder for the space of time shown in this record, assuming, for the purpose of this case, that his act was the act of the defendant? The compound was harmless unless friction was applied. Is there any basis shown in this record for holding that the master should have anticipated that another of the employes would come to this point during that short interval and apply friction to it? Was there negligence in failing to warn the other employes of the fact that the compound was there subject to explosion upon friction? The general rule is that the master is not required to anticipate and warn against every possible danger to which a servant may be exposed in the course of his employment. Generally, it is the duty of the master to instruct the servant as to the nature of the risks and dangers to be apprehended in the course of his employment. He is not required to warn against special dangers which spring out of particular conditions which in detail cannot be foreseen. Was there danger present at the time Roberts turned to the ladder, the existence of which should have been made known to deceased, and against which he should have been warned? A master is not required to warn against danger in which he has no reason to anticipate that the servant can be involved, and certainly not when the danger is not in

the line of the employment of the servant. This is true where the danger does not inhere in the work when properly done, and is traceable only to the manner of the doing. When the thing or condition permitted to exist in and of itself does not render the place unsafe, and injury can result only from the interposition of an outside independent agency, and the interposition is such that the master could not foresee and guard against it by the exercise of reasonable care, the master is not responsible for results that follow such interposition.

In the instant case, the defendant had placed a competent and skilled person in the preparation of this compound. The compound, in and of itself, when handled by a skilled person, was attended with no danger. The compound was being prepared in a part of the store set apart for that purpose. It was in process of preparation at the time the explosion occurred. The work of preparing was yet unfinished. While it was in process of preparation, and without sufficient notice to the person in charge of the compound, deceased came from his place of duty from a distant part of the store, and, ignorant of the danger and unskilled in the work, voluntarily assumed to aid in its prosecution, and applied the friction or blow which caused the explosion. It would be outside the rule of reason to say that the defendant should have anticipated and foreseen that, in the preparation of this compound, this young man, whose duty was in a distant part of the store and in no way related to the work behind the prescription case, should come, and, without warning, do the thing which alone would produce the results of which complaint is made in this suit. To anticipate such a consequence would be outside the experience of men, and would place a burden upon an employer of skilled labor greater than he could carry. Under the record in this case, no jury could in reason say

that the place was unsafe, or that the act of leaving this compound unguarded for the space of time shown in this record constituted actionable negligence.

In this discussion, we have assumed the  
4. **EVIDENCE:** fact combated by appellant in his argument,  
relevancy, com-  
petency and  
materiality: as-  
sertion of in-  
tention. to wit, that deceased applied the friction  
or the blow which caused the explosion.

Does the record justify us in so doing?  
When Roberts commenced the preparation of this compound, deceased was observed to be at the soda fountain. We assume that this was when Roberts commenced the preparation of this compound. The record justifies this assumption. After he had these ingredients together, he turned to get another essential to the compound. While Roberts was on the ladder, deceased was heard to say, "I am going to stir it." Almost instantaneously upon this declaration an explosion occurred. The explosion could have been produced only by friction or a blow. After the explosion, deceased was found at the place where the explosion occurred, away from the place assigned him for his work, and the character of his injuries leaves no doubt that he was in close proximity to the compound at the time of the explosion. Pieces of the mortar were driven into his body, into his stomach and bowels. One arm was blown off, and he was frightfully mangled and injured. That he came to the place where the compound was being prepared, cannot be questioned. That he was very close to where the compound was at the time of the explosion, the character of his injuries makes manifest. Immediately before the explosion, he declared his purpose to stir this compound. This declaration indicated a purpose in his mind to do the thing which the evidence shows would produce the explosion. Having declared the purpose to do the thing, it must be assumed that that purpose existed in his mind, nothing to

the contrary appearing. When purposes are formed in the mind which require bodily action to make the purpose effectual, it must be assumed that the body obeyed the direction and purpose of the mind, and did the thing which the declaration indicated a purpose to do. The mind directs and controls the body. All voluntary action reflects and is the manifestation of the mental condition or purpose formed in the mind. Of course, this is not always true, but in the absence of any showing to the contrary, it must be assumed that there existed in the mind a purpose to do the thing declared, an intention to do the thing declared to be the purpose to do. In the instant case, the explosion following instantaneously upon the declaration of the deceased of a purpose to do that which, being done, would produce the explosion, it must be assumed, the contrary not appearing, that he did the thing which he declared his purpose to do, the doing of which would cause the explosion.

There is no evidence of the interposition of any independent producing cause of this explosion, except that which deceased declared it to be his purpose to interpose. When the evidence shows a recognized, rational cause for conditions shown to exist, the mind settles on that at once as a producing cause, and does not speculate as to other causes not shown to exist, even though in speculation the mind is able to grasp the possibility of other producing causes not shown in the record to be present at the time. The record discloses that the doing of the thing which the deceased declared it his purpose to do, would produce the explosion. The record shows that, immediately upon his declaring his purpose to do this thing, the explosion followed. The record of his injuries shows that he was present and in a position to do the thing he declared it his purpose to do. There is no rational conclusion to be reached from this record other than that the deceased did exactly what he declared to be his purpose to do, and that

the execution of his purpose followed the declaration and caused the explosion. There is no other cause shown for the explosion, and the finding of any other cause than the act of the deceased would have no support in the evidence. Upon this question, see *State v. Beeson*, 155 Iowa 355; *In re Mahin*, 161 Iowa 459; *Larsen v. Telegraph Cable Co.*, 150 Iowa 748; *Lake Shore & M. S. R. Co. v. Herrick*, (Ohio) 29 N. E. 1052; *Rogers v. Manhattan Life Ins. Co.*, (Cal.) 71 Pac. 348.

On the whole record, we think the court did not err in sustaining defendant's motion for a directed verdict, and the cause is therefore—*Affirmed*.

LADD, EVANS and SALINGER, JJ., concur.

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SINGMASTER & SON, Appellees, v. W. A. ROBINSON, Appellant,

**SALES: Warranties—Waiver—Evidence.** A written warranty,  
1 limited as to duration and remedy in case of a breach, may not  
be ignored in the absence of fraud or waiver.

**EVIDENCE: Best and Secondary—Notice to Produce.** Copies of  
2 correspondence passing between litigants are admissible only  
after due notice to produce the originals.

**EVIDENCE: Parol as Affecting Writing—Contemporaneous Waiv-**  
3 **er.** Oral evidence of a waiver of conditions and limitations on  
a warranty embraced in a written bill of sale and contemporane-  
ous with the execution thereof, is inadmissible.

*Appeal from Keokuk District Court.*—K. E. WILLCOCKSON,  
Judge.

SATURDAY, OCTOBER 27, 1917.

PLAINTIFF brought this action upon a promissory note. The defendant admitted the execution of the note and pleaded a counterclaim for damages for a breach of warranty in the sale of a stallion, the note sued on being given for the



purchase price thereof. At the close of the evidence, the trial court dismissed the counterclaim and entered judgment for the plaintiff for the amount of the note. The defendant has appealed.—*Affirmed.*

*Hamilton & Beatty*, for appellant.

*Talley & Hamilton*, for appellees.

EVANS, J.—1. The note in suit is the last  
1. SALES: WAR- one of a series of notes executed and deliv-  
rancies: warr-  
er: evidence. er: evidence.  
as the purchase price of the stallion. The contract of purchase was made on May 5, 1911, and the purchase price was \$1,100. The purchase was made from Singmaster & Walker, a partnership firm which included in its membership the members of the partnership firm of Singmaster & Son, which is plaintiff herein. The vendor of the horse delivered to the defendant a written contract of sale containing the following guarantee:

"We hereby guarantee the above named stallion to be a foal getter of 50 per cent. of the good producing mares bred to him owned by the above named stockholders, provided he shall have plenty of exercise, and proper feeding and grooming, care and handling, and in case he should not so prove, we agree to replace him with another of the same breed and price, upon the delivery to us at Keota, Iowa, of the above named horse in as good and sound condition as he is at present; and the purchasers of said horse hereby agree to accept said second horse so furnished in full satisfaction of any claim for damages on account of said warranty. This guarantee expires January 1, 1912."

This writing was signed by both vendor and vendee. The particular breach complained of by the defendant is that the horse purchased proved not to be a 50 per cent foal getter. The defendant kept the horse in question until October 23, 1913, on which date he died. The defendant had

not at any time elected to return the horse and to claim another under the provisions of the guarantee above set forth. It does not appear that the death resulted in any manner from the condition complained of as a breach of the warranty. The contract of guaranty by its terms purported to expire on January 1, 1912. The defendant contends that the strict terms of the guaranty were waived by the vendor by the following correspondence:

"Mondamin, Ia. July 31, 1912.

"Messrs. Singmaster & Walker, Keota, Iowa.

"Gentlemen:

"I am enclosing you check for the first payment on the Stallion Itala 64961, bought of you on May 5th, 1911. \$300.00 principal, \$4.50 interest from May 5th to August 1st, 1912. I trust you find this amount correct.

"I am very much afraid that this horse will not prove a good foal getter. As I only bred one mare a day last season and only bred 42 during the season and there are but 12 colts. And I turned down all nonproducers except one.

"I am trying him out again this year with only two a day and have bred 48 mares. I am teaching him to work now and will work him a little this fall and winter, just enough to keep him healthy and rugged. But if he does not make any better showing this year than last I will expect some help in the matter, but in the meantime I will do everything that is possible to make him a sure foal getter.

"Yours truly,

"W. A. Robinson."

"Keota, Ia., Aug. 3, 1912.

"W. A. Robinson, Mondamin, Ia.

"Dear Sir:

"Enclosed find your note cancelled. The interest has been endorsed on the other two notes and we are very thankful for your promptness in the matter. Wishing you an abundant and prosperous season for the horse and we hope

your way of treating him will be successful and that your horse will prove all you expect of him and be a good breeder.

"Yours with regards,

"C. F. Singmaster.

"Would you care to take up the other notes without interest?"

If there was any waiver on the part of the plaintiff, it must be found in the above letter. Appellant does not point out what particular language of the letter is claimed to constitute a waiver, and we are unable to see anything that can fairly be construed as such waiver. Neither was there any declaration in the letter written by the defendant of any purpose to return the horse and to claim another. There was a suggestion therein that he might "want help." There is no claim of fraud or false representations in the case. The horse purchased was only three years old, and his foal-getting qualities had never been tested. The case involves no element of bad faith. The parties stipulated a qualified remedy in the event of a failure of the guarantee. The provisions of the contract are wholly ignored by the defendant in his counterclaim, and he seeks to recover damages precisely as though no qualification were attached to the guarantee. His theory is that, because of the death of the horse, it had become impossible for him to return him, and that he is entitled to pursue his remedy notwithstanding the death of the horse. If the death had resulted from the conditions which constituted the breach of guarantee, there might be force to plaintiff's contention; but such is not the case. It is not claimed that the horse was diseased at the time of the purchase and that such disease resulted in his death. The defendant offered further evidence of alleged waiver which was rejected by the court. These rulings will be considered in the next division hereof. Giving full consideration to the evidence actually admitted

by the court, we think there is no fair ground to claim either that the defendant complied with the conditions of the guarantee or that he proved any waiver thereof.

2. The defendant contends that he had written a letter to the plaintiff on June 30, 1913. He offered in evidence a purported copy of such letter, which was appropriately objected to. The defendant had served no notice to produce and laid no foundation for the introduction of secondary evidence. The objection thereto was, therefore, properly sustained. The defendant also offered to testify to an oral waiver of the qualifications of the written guarantee immediately after the same was signed, and before the notes and mortgage were signed. He also offered to testify that he would not have signed the notes and mortgage except for such oral waiver. Manifestly the written bill of sale, including the guarantee, and the notes and mortgage for the purchase money were all parts of the same transaction. They were all made and delivered at the same sitting. If the vendor made any oral statements or agreements after the signing of the contract and before the signing of the note, they were, in legal effect, contemporaneous with the writing. They were, therefore, properly rejected on that ground.
2. EVIDENCE: best and secondary: notice to produce.
3. EVIDENCE: parol as affecting writing: contemporaneous waiver.

We find no error in the rulings of the trial court. The judgment is therefore—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

MARY ELIZABETH HART, Appellee, v. EARL L. HART et al.,  
Appellants.

**WITNESSES: Competency—Transaction with Deceased—Nonparticipation in Conversation.** Principle reaffirmed that a party to an action against the grantee of a deceased grantor is competent to testify to a material conversation between said deceased and a third party *in which said witness took no part.* (Sec. 4604, Code, 1897.)

**WITNESSES: Credibility—Transaction with Deceased—Nonparticipation in Conversation—Effect.** That a party was present at the time of a transaction with a deceased, was vitally interested therein, and was enabled to testify thereto by reason of the claim *that he took no part in said transaction*, are facts bearing very properly on the *weight* of the evidence and the *credibility* of the party testifying.

**WITNESSES: Competency—Transaction with Deceased—Allowable Inferences.** A party to an action against the grantee of a deceased grantor, wherein the cancellation of the deed is sought, is competent to testify to a state of facts relative to a personal transaction with said deceased, from which state of facts the existence of other facts *may be inferred (a rule which the court specifically declines to further extend)*, but is not competent to testify to a state of facts *which leaves absolutely nothing to inference.*

**PRINCIPLE APPLIED:** Simpson deeded lands to defendant. After Simpson died, plaintiff sought the cancellation of the deed, on the claim that Simpson, long prior to the execution of said deed, agreed with plaintiff that, if the plaintiff would render certain services to Simpson and his mother during Simpson's lifetime, plaintiff should have an equal interest in all of Simpson's present and future-acquired property, and at Simpson's death, plaintiff, if she survived, should have *all* the property. Plaintiff claimed that she fulfilled her part of the agreement. On the trial, plaintiff claimed that her own money in part went into the property, and in part was given to Simpson. Plaintiff testified:

1. "Q. Were you informed by any person that if you per-

formed said services you should become a joint owner with Simpson of the land?

2. "A. Yes.

3. "Q. Were you so informed by any person other than Nicholas Simpson?

4. "A. No."

*Held*, Question 3 and Answer 4 left nothing to inference, and plaintiff was incompetent to so testify. (Sec. 4604, Code, 1897.)

**WILLS: Contract to Devise or Bequeath—Evidence—Sufficiency.**

- 4 Evidence with reference to an alleged contract by which plaintiff was to have all of the property of deceased reviewed, and held too indefinite and uncertain to establish said contract.

*Appeal from Keokuk District Court.*— K. E. WILLCOCKSON.  
Judge.

SATURDAY, OCTOBER 29, 1917.

SUIT to set aside conveyance of certain lands, and to settle title thereto in plaintiff. From decree as prayed, defendant appeals.—*Reversed*.

*Stockman & Baker*, for appellant.

*Wagner & Updegraff* and *Hamilton & Beatty*, for appellee.

LADD, J.—Nicholas Simpson died intestate, October 21, 1912. Shortly before, on August 15th of the same year, he executed to defendant a conveyance of the land on which he resided, said in the deed to be "45 acres more or less," and by a witness to be about 33 acres. Therein a life estate is reserved to plaintiff, Mary Elizabeth Hart, and the conveyance is subject thereto. Simpson never married. Miss Hart was his niece, being the daughter of Simpson's sister, and came to his home in March, 1878. For about a year and one half she had been an inhabitant of a poorhouse in Ohio, and, though she was never married, had a daughter, who was reared by others. She kept house for Simpson from

the time of her arrival until his death, and besides, cared for his mother, during the first ten years. The defendant, Earl L. Hart, is a son of the plaintiff's brother, upon whose death, in January, 1896, he was brought to the Simpson home. He was born in November, 1890, and resided with Simpson and plaintiff until Simpson's death. Others are made parties defendant, but Earl L. Hart alone appeals. The plaintiff contends that, about the time she came to the home of Simpson, he agreed that, "if she would remain at his home and perform the services of housekeeper and aid him with the work and in taking care of his aged mother, that she should become a joint owner of all the land which he owned, or should afterwards acquire, and that, if plaintiff survived him, that she should become the absolute owner of all the land which he then owned or that he might afterwards acquire during his lifetime;" and that she complied with her part of the arrangement and became owner of the land in pursuance of this arrangement. She prays that the deed from Simpson to defendant be set aside, and also a deed to defendant from Alsop of a parcel of land known as Lot 3, being made in consideration of the conveyance of Lot 4 by defendant to Alsop, in partition, as both lots had been owned by the latter and decedent in severalty; and that she be decreed the owner of said estate. The answer puts in issue allegations of the petition and interposes a plea of estoppel.

To establish the alleged agreement, plaintiff relied on her own testimony and that of the other witnesses. There is no controversy but that she kept house for Simpson, and helped about the place as farmers' wives ordinarily do, and cared for his mother (her grandmother), as claimed, and at the same time was provided a home and board and clothing for herself.

I. In support of the petition, plaintiff testified that, shortly after she arrived at Simpson's home:

1. WITNESSES:  
competency:  
transaction  
with deceased:  
nonparticipation in conversation.

"Nate Updegraff solicited me to do housework for him. He came to Nicholas Simpson's home about two years after I

came there, and I heard a conversation between Nicholas Simpson and Nathan Updegraff, in which I took no part.

Q. You may state to the court, in substance, the conversation. A. Well, Mr. Simpson told him that he did not want me to go; that he had no one to do anything for him—to keep house for him; and that, if I stayed with him, that everything was to be mine for my services. Nicholas Simpson said to Nathan Updegraff that he would fail to give me what he had promised if I went; that I was to stay as long as he lived and I lived. I was to do the housework, cooking and washing. I did not go to work for Nathan Updegraff. After that time I never accepted employment away from the home."

This testimony was received, and rightly so, over the objection "incompetent, immaterial, and that the witness was incompetent under Section 4604 of the Code, and because self-serving declarations." As she testified that she did not participate in the conversation, the evidence was admissible. *Mallow v. Walker*, 115 Iowa 238; *McElroy v. Allfree*, 131 Iowa 112; *Calhoun v. Taylor*, 178 Iowa 56.

But the circumstance that she claimed that, though present, she did not participate in a conversation vital to her own interests, is always a matter to be taken into account in weighing the evidence and in ascertaining the credibility of a witness.

2. WITNESSES:  
credibility:  
transaction  
with deceased:  
nonparticipation in conversation:  
effect.

II. Plaintiff was asked:



"After your coming to the state of

3. WITNESSES : Iowa, were you informed by any person that  
competency : if you remained at the home of Nicholas  
transaction : Simpson and performed the service of a  
with deceased :  
allowable in-  
ferences.

housekeeper and to assist in the taking care

of the mother of Nicholas Simpson, that you should become the joint owner with him of the land which he then owned and of whatsoever land he might afterwards acquire? A. Yes, sir. Q. Were you so informed by any person other than Nicholas Simpson? A. No, sir."

The answer first above was received over the objection, there being no ruling heretofore set out, and, as we think, cannot be considered. The statute prohibiting a party to any action from being examined as a witness as to any personal transaction or communication between such person and a person since deceased, against the assignee of such deceased person, cannot be evaded in this fashion. For a witness to say something has been done, and that none other than a named person did it, is equivalent to saying that such person did what was done. This method leaves nothing to inference, but is direct testimony of the fact proposed to be proven. None of the decisions go to this extent. In construing Section 4604 of the Code, it is well to bear in mind that it does not prohibit the witness declared to be incompetent from testifying, but from being "examined as a witness in regard to any personal transaction or communication" between the witness and deceased person. "In regard to," as here employed, means "concerning," "with respect to," or "about."

One who denies, testifies in regard to the subject of denial quite as certainly as though he had affirmed. *In re Will of Winslow*, 146 Iowa 67. Swearing that none other than decedent had declared the matters specified, or done the particular thing mentioned, would seem equivalent to

testifying that, if anyone made the declarations or did the thing mentioned, the decedent was the person, and this would be giving evidence concerning, with respect to, or about,—that is, in regard to,—a communication or transaction between the witness and deceased. The significance of the peculiar wording of the statute seems to have been overlooked in some of our decisions, or possibly its restrictions somewhat limited in the search for truth. However this may be, in a long line of decisions, beginning with *McElhenney v. Hendricks*, 82 Iowa 657, the interrogation of a witness incompetent, under this statute, to testify in regard to transactions or communications between the witness and decedent, has been permitted where the answer, by excluding all others, included the decedent. In that case, *McElhenney v. Hendricks*, supra, the question ruled to be proper was, in substance, whether checks payable to decedent or bearer had ever been delivered to anyone other than him, the issue being whether payment had been made. This decision was followed by *Walkly v. Clarke*, 107 Iowa 451, where the inquiry was whether a note and mortgage had been transferred to anyone other than decedent. In *Graham v. McKinney*, 147 Iowa 164, the claim was for board, lodging and keep, and a question as to whether “any other person than herself had rendered him any services during his illness,” was adjudged proper. In *Yoder v. Engelbert*, 155 Iowa 515, these decisions were followed. But in none was the inquiry followed by permitting the witness to say that the particular thing inquired about had been done, as whether the checks in the first mentioned case had in fact been delivered or the note and mortgage transferred, and the like. Nor has the court gone to the length of approving an inquiry as to whether a conversation described was had with any person other than deceased. Manifestly, were this

permitted and the witness allowed to add that the conversation was had, the statute would be effectually avoided and rendered inoperative in preventing the examination sought to be prohibited. We are not ready to extend the ruling of these and other like decisions, and thereby further impinge on the manifest meaning and purpose of this statute, Section 4604 of the Code. In our opinion, plaintiff was incompetent, as a witness, to be examined concerning any conversation had with her deceased uncle, or indirectly as to whether an alleged conversation took place, and then whether it was had with any person other than deceased. *Minion v. Adams*, 181 Iowa 267.

III. After testifying to having received remittances of money from her father and brother in sums of \$5 up to \$20, in all about \$500, she was asked:

"What did you do when they were sent to you—what did you do with the several sums of money as you received them? A. A portion of it was used for my clothing, a portion of it for the house, and the balance of it was given to Nicholas Simpson. Q. You may state whether or not you gave any part of this money to any person other than Nicholas Simpson. A. No, sir; I did not. Q. Was this money, or any part of it which you received from your father, used for the benefit of any other person other than yourself and Nicholas Simpson? A. It was not."

These answers were received over the objection last above noted, there being no ruling. A motion to strike out the portion of the first answer referring to the giving of funds to Simpson must be sustained, for that the witness might not be examined as to this matter because of the prohibition of Section 4604 of the Code. This appears to have been conceded by the next interrogatory, which seems permissible under the decisions heretofore cited. *McElhenney v. Hendricks*, supra, was decided over twenty-five years ago, and, though its holding and that of like cases are open to

criticism as impinging on the prohibition of the statute, we are not inclined to interfere with the ruling further than to decline to extend it further, or to carry it to its logical sequence in the utter emasculation of this section of the Code.

IV. Aside from the evidence referred to, one Alsop testified that he lived, for many years, within a few rods of the Simpson home, which consisted of two rooms and a summer kitchen; that he knew of plaintiff's receiving "sums of money, \$5 and \$10 bills and gold pieces;" that part of it was used to pay for building a summer kitchen and a woodshed; that, in so far as he knew, she used all the money she got on the place, but could not "say just exactly what she did with it;" and further, that, in May, 1911, he "drove up there and came down northeast of the house, talking, and my uncle came out and sit down, and he got to talking, and sit there and talked quite a while, and I asked him what he was going to do—he had been sick, and he was talking about feeling bad, and I asked him what he was going to do with what he had, if he passed away, and he said Elizabeth always stayed there, and helped take care of mother, and helped on the place, and if she continued to stay there, and continued to take care of him, she was to have what was left."

One Bitner testified that he was at Simpson's house in July or August, 1912, and that he then said "he aimed for Elizabeth Hart to have it. He said if he hired her by the week that he would not have anything, because she cared for his mother and for the house; \* \* \* that what money she got from her father, that she let him use it on the place." On cross-examination: "He said that he aimed to leave her all of it, to Mrs. Hart,—all the land."

Beman testified that he operated a hardware store; that, about 10 years previous, Simpson talked about buying

4. WILLS: con-  
tract to devise  
or bequeath:  
evidence:  
sufficiency.

some chicken fence, but remarked that he had no money; that thereupon the witness offered to charge it, if he would tell him whom to charge it to, and Simpson replied: "Well, it would be immaterial, as Lib and I have equal interests there, and it will be paid for;" that both had interests in that land, equal interests. "He said they had one pocket-book; his pocket was hers and hers his."

This is all the evidence bearing on the existence of a contract such as alleged, and we are of opinion that it falls far short of the requirement that such a contract be established by clear, unequivocal and definite proof. *Bevington v. Bevington*, 133 Iowa 351. What Alsop related is entirely consistent with the theory that decedent merely intended to give the property if plaintiff continued in his service, and this is true of the story of Bitner. In neither conversation did decedent allude to any previous or existing arrangement with plaintiff, or that he was to bestow the property in pursuance of any obligation so to do. Such evidence, though indicating a favorable disposition and an existing design to leave the property to plaintiff, is consistent with the nonexistence of any contract so to do. It is of little probative value. *Stennett v. Stennett*, 174 Iowa 431. Beman's testimony is more satisfactory; for, if the statements were made as related by him, decedent declared that he and plaintiff had equal interests in the land and kept a joint purse. This, though not referring to any previous arrangement between them, nor touching upon how such equality came about, may well be regarded as corroborative of plaintiff's testimony of what decedent said to Updegraff over 35 years previous, in that it indicated a condition of things which would have come about had there been such a contract as alleged. The trouble is that there was no sufficient proof of the contract. All the evidence bearing thereon is what plaintiff claims to have heard decedent say

to Updegraff, "that if I stayed with him that everything was to be mine for my services." This might have happened independently of any agreement between them, and it is to be observed that she does not pretend that anything was said with reference to any understanding between her and decedent. What was said is entirely consistent with a purpose on his part, without there having been an understanding between them. Moreover, he then owned but a few acres of the land in controversy, and the word "everything" can hardly be construed to include all property he might acquire within the next 35 years. Surely, the evidence does not meet the requirement of definiteness and clearness in proof. We are of opinion that plaintiff failed to make out a case. This being so, it is unnecessary to allude to circumstances affecting the credibility of witnesses, or to consider the plea of estoppel. The petition should have been dismissed.—*Reversed.*

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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J. C. QUILLEN, Appellant, v. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellee.

**CARRIERS:** Carriage of Live Stock—Pleading—Variance. A shipper who bases his right to recover solely on a written contract may not recover on evidence of an oral or implied contract.

*Appeal from Mahaska District Court.*—K. E. WILLCOCKSON, Judge.

MONDAY, OCTOBER 29, 1917.

ACTION for damages for delay in the shipment of stock. At the close of the evidence, there was a directed verdict for the defendant, and the plaintiff appeals.—*Affirmed.*

*Malcolm & True*, for appellant.

*Burrell & Devitt*, for appellee.

CARRIERS:  
carriage of live  
stock: plead-  
ing: variance.

EVANS, J.—On December 14, 1913, the plaintiff delivered to the defendant four carloads of sheep at New Sharon, Iowa.

These were transported by the defendant to Pickering, Iowa, and there delivered to the Chicago, Milwaukee & St. Paul Railroad Company. They were further transported by the Chicago, Milwaukee & St. Paul Railroad Company to Bensonville (20 miles out of Chicago), and there delivered by such railroad to one of the belt lines for further transportation to the Union Stock Yards.

According to the petition, this live stock was loaded at New Sharon at about 8 o'clock A. M. The usual time of shipment from New Sharon to the Union Stock Yards is about 24 hours. The shipment did not in fact reach the stockyards until 11:03 A. M. the following day. The shipment was on time at Pickering, and also at Bensonville, the entire delay having been caused in the last 20 miles, on successive belt lines. Theoretically, the stock market at the Union Stock Yards is open until 3 P. M. Practically, however, the best market is in the earlier morning hours, and afternoon sales, if made at all, must be made upon a lower market than that of the forenoon. The plaintiff's stock was in fact carried over and sold on December 16th at a loss of 25 cents a hundred, as compared with the market of December 15th.

In view of the dismissal of plaintiff's case at the close of the evidence by direction of the court, the decisive question on this appeal is one of pleading and proof and of variance between them. The petition of the plaintiff declared upon a written contract, whereby the defendant, as averred, undertook to transport the plaintiff's shipment to the Union Stock Yards. This allegation was denied. The plaintiff offered no proof in support of the allegation, but ignored the same. The only testimony offered by him at this point was his own, as follows:

"On the 14th of December, 1913, I shipped four carloads of lambs over the M. & St. L. or Milwaukee & St. Paul."

It appears from plaintiff's testimony that there was no negligence on the part of the defendant railroad company in the transportation over its own line. Concededly, the defendant could become liable for the negligence of a connecting carrier. The plaintiff in his petition expressly predicated such liability upon the written contract entered into. The written contract, therefore, was material to the proof of plaintiff's case. If it should appear therefrom that the defendant did contract for through transportation to the Union Stock Yards, then it would be answerable to the plaintiff for the negligence of connecting carriers, subject to the limitations of the written contract. On the other hand, if the defendant simply contracted to transport the stock from New Sharon to Pickering, it could not be thus answerable for the neglect of other carriers in the subsequent transportation. The question thus presented has not been discussed at all by the appellant in his brief. In support of his appeal, it was incumbent upon the plaintiff, as appellant, to show that there were no grounds upon which the trial court could properly direct a verdict. In support of the order of the trial court, the appellee defendant has devoted his brief largely to this feature of the record. The appellant has made no response thereto. We see no escape from the conclusion that there was a fatal variance between pleading and proof of plaintiff's case. This of itself was sufficient to support the ruling of the trial court. Its order must, therefore, be—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.



## STATE OF IOWA, Appellee, v. ROY YATES, Appellant.

**WITNESSES:** Competency—Immature Children. The ancient  
1 and conclusive presumption that a child under the age of nine  
years was an incompetent witness has no place in our modern  
law. With us it is simply a fact question whether the child,  
irrespective of his age, has, *when offered as a witness*, sufficient  
understanding to comprehend that, when he is placed under  
oath, he is pledged to tell nothing but the truth and will be  
punished if he does not. *Held*, a child of seven years was, un-  
der the record, competent.

**CRIMINAL LAW:** Parties to Offense—Accomplices—Immature  
2 Children—Corroboration. Mere *submission* of a child of seven  
years to a crime against nature gives rise to no presumption of  
consent on the part of such child to such act; therefore, not  
being deemed an accomplice from the act of submission, his  
uncorroborated testimony will support a conviction.

*Appeal from Mahaska District Court.*—HENRY SILWOLD,  
Judge.

MONDAY, OCTOBER 29, 1917.

DEFENDANT was indicted and convicted of sodomy, and  
appeals to this court.—*Affirmed*.

C. C. Orcis and O. C. G. Phillips, for appellant.

H. M. Havner, Attorney General, Maxwell A. O'Brien,  
County Attorney, and McCoy & McCoy, for appellee.

GAYNOR, C. J.—Defendant is accused of the crime of  
sodomy alleged to have been committed upon the person  
of one Glenn Doner on or about the 27th day of October,  
1916, in the county of Mahaska, in the state of Iowa. In  
the court to which the indictment was returned, defendant  
entered a plea of not guilty, was tried to a jury and con-  
victed, and from this conviction appeals, and urges that the

evidence against him was wholly insufficient to justify the verdict.

A careful reading of the record discloses that Glenn Doner was but seven years of age; that his testimony was relied upon by the State to sustain the charge against the defendant; that without his testimony the verdict cannot stand; that with it the verdict is sustained and justified.

It was urged on the trial and is urged

1. **WITNESSES :** here that the evidence of Glenn Doner  
**competency :** should not have been received because of  
**immature**  
**children.** his tender age; that he was not competent as a witness because he lacked that understanding necessary to a proper appreciation of the obligation of an oath; and that an oath had no binding force upon his conscience, and could not, therefore, limit or control him in the giving of his testimony.

It has been held by this court that there is no presumption in favor of the competency of one under fourteen years of age, and it is said that anciently a child less than nine years of age was conclusively presumed to be incompetent of understanding the obligation of an oath. In these modern times, the courts are holding that, while there is no presumption in favor of competency, there is no presumption against competency; that the competency of a child depends upon his intelligence and capacity for understanding. Our statute provides:

"Every human being of sufficient capacity to understand the obligation of an oath is a competent witness." Section 4601, Code, 1897.

There is no age limit placed in the statute. Competency is, therefore, a fact to be determined at the time the child is offered as a witness, and the test is whether the child has sufficient capacity, in fact, to understand the obligation of an oath at the time he is offered. The test is not whether the child, at some previous time or place, un-

derstood the obligation of an oath, but whether the child, at the time he is offered in the particular case, understands and appreciates this obligation. As said, this boy was a witness against the defendant. Before he was sworn, these questions were propounded to him:

"Q. What is your name? A. Glenn Doner. Q. How old are you? A. Seven. Q. What is your birthday? A. September 28th. Q. Do you go to school? A. Yes, sir. Q. What room are you in? A. In the third room. Q. Do you go to Sunday School? A. Yes, sir. Q. Glenn, if the judge here would have you stand up and hold up your hand like this (indicating), and so have you to promise to testify to the truth, the whole truth and nothing but the truth, would that mean to tell a lie? A. No, sir. Q. What would that mean to you? A. To tell the truth and nothing but the truth. Q. Is it right to tell a lie? A. No, sir. Q. What would happen to you if you told a lie? A. Get punished. By the Court: If I should administer the oath to you, — that is, to swear you, as suggested by the county attorney, — and you would then tell a falsehood, what would become of you? Would you be sent to the penitentiary for perjury, or punished in some way by the state? A. Yes, sir."

Thereupon, over the objection of defendant's counsel, the witness was sworn and permitted to testify.

As said in many authorities cited hereafter, it is not necessary that a child should be able to define an oath or to give a correct definition of perjury or testimony. This is not determinative of his capacity. If it is shown that he comprehends and understands that, upon taking the oath, he is bound thereafter to tell the truth and not to lie, he is competent. If he understands that, upon the formal administration of the oath by the judge, he is bound thereafter to a statement of the truth and only the truth in his testimony, and that he has pledged himself not to tell a

lie, he is competent. The holding generally is that, if the answers indicate an intelligence sufficient to satisfy the court that the witness was impressed, and understood that it was his duty to tell the truth on such solemn occasion, rather than to tell a lie, and it is made apparent by his answers that he is sensible of the wickedness of telling a falsehood and comprehends the danger of not telling the truth, he is then competent as a witness. He is then shown to have sufficient capacity to understand the obligation of an oath.

Some claim is made that, when this child was before the committing magistrate, his answers did not indicate that he understood the obligation of an oath. The question here is not what he understood on some prior occasion, but rather what he understood at the time he was called upon to testify in this case. The showing here is very satisfactory on that question. The court did not err in receiving his testimony. This question has been so fully discussed by this court heretofore, in cases cited hereafter, that we do not deem it necessary to further discuss it. An examination of these cases will show that age does not altogether control; that children of much more tender years have been allowed as witnesses, and in some cases where the showing of capacity was not nearly as satisfactory as in the case at bar. See *State v. Wheeler*, 116 Iowa 212; *State v. King*, 117 Iowa 484, 486; *Clark v. Finnegan*, 127 Iowa 644, 645; *State v. Meyer*, 135 Iowa 507; *St. Peter v. Telephone Co.*, 151 Iowa 294, 298.

It is next contended that, assuming this boy to be a competent witness, the defendant cannot be convicted upon his unsupported testimony; that there must be other testimony in the record tending to connect the defendant with the commission of the offense. Upon this point we have to say that the author-

2. CRIMINAL  
LAW: parties  
to offense: ac-  
complices: im-  
mature chil-  
dren: cor-  
roboration.

ities are against the contention of the defendant. The evidence does not show consent. The best that can be said for it is that it shows submission to the will of the older and stronger man. To hold this boy an accomplice would be to hold that by mere submission he consented to the crime and became a party to its commission. The law does not presume consent on the mere act of submission on the part of a child of such tender years. There is no proof of consent or participation in the crime further than is found in the act of submission. Intent is a necessary ingredient of crime, and is an essential to render one an accomplice in the commission of a crime. As bearing on this point, see *State v. Sparks*, 167 Iowa 746; *State v. Heft*, 155 Iowa 21, 36; *State v. Pelsner*, 182 Iowa—; *Means v. State*, (Wis.) 104 N. W. 815. In this last case the defendant was indicted for the same character of offense involved in the suit at bar. The court said:

"It is said that the boy was an accomplice, and that no conviction can be sustained upon his uncorroborated evidence. Such is not the law in this state. \* \* \* Moreover, an accomplice is one who consents, and a boy of such tender years is not capable of legal consent, and hence is not an accomplice."

See *Kelly v. People*, (Ill.) 61 N. E. 425. The defendant in this case was indicted for a crime against nature. The evidence in the case disclosed that the boy on whom the crime was committed was, at the time, six or seven years of age. It was contended that to convict the defendant the boy must be corroborated in his testimony. The court said:

"Consent on the part of the boy in this case cannot be presumed, he being incapable of understanding the nature of the act. He was incapable of committing a crime. We are not unmindful of the fact that the crime is of a class easily charged and difficult to disprove, and that it should, there-

fore, be established with clearness; but whether it was established in this case must depend upon whether or not the jury believed the testimony of the boy;" and the court held in that case that the evidence of the boy, uncorroborated, was sufficient to justify the verdict.

See *Mascolo v. Montesanto*, (Conn.) 23 Atl. 714. The court held that a minor twelve years of age cannot consent to the act of sodomy on his person, and if he submits to it without resistance, the act is still done by force.

Next, error is predicated upon the action of the court in allowing the State to propound questions to the boy, Glenn Doner, and in allowing Glenn Doner to answer questions that called for hearsay testimony. We have examined the record in respect to these complaints, and find no prejudicial error therein. The matters were purely preliminary, and the answers were in no way prejudicial to the defendant.

Some complaint is made of the argument of counsel for the State, and this, too, is without merit.

An examination of the whole record satisfies us that defendant had a fair trial; that there is no reversible error in the record; and the cause is—*Affirmed*.

LADD, EVANS and SALINGER, JJ., concur.

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W. H. TAYLOR et al., Appellees, v. INDEPENDENT SCHOOL DISTRICT OF EARLHAM et al., Appellants.

**APPEAL AND ERROR:** Reservation of Grounds—Corporate Legality—Quo Warranto or Equity. That *quo warranto* and not an equitable action for injunctive relief is the only remedy to test the legality of a public corporation, may not be raised for the first time on appeal.

**STIPULATIONS:** Subject—State of the Law. Principle recognized that parties may not stipulate as to what is public law.

**SCHOOLS AND SCHOOL DISTRICTS: Consolidation—Size of Remaining Corporation—Prohibition.** The statutory prohibition that, in the formation of a consolidated school district, no school corporation shall be left with less than four contiguous government sections (Section 2794-a, Code Supplement, 1913), has no application to a *subdistrict* of a school district township.

**ELECTIONS: Qualifications of Voters—Residence—Schools and School Districts.** The constitutional requirement that a citizen shall have resided in the county in which he proposes to vote, for 60 days preceding the election, is an *absolute* requirement—just as absolute as the requirement that he shall have reached the age of 21 years. Where a proposed consolidated school district comprised territory within two adjoining counties, *held* that an elector who had resided in the proposed district for more than 60 days, but had moved from one county to the other less than 60 days prior to the election to consolidate, was not qualified.

**ELECTIONS: Definition—Voting on School Consolidation.** Voting on a proposal to create a consolidated school district is an "election," within the meaning of the constitutional provision which prescribes the qualifications for electors. (Art. 2, Sec. 1, Constitution.)

**ELECTIONS: Right of Suffrage—When Nonexistent.** Principle recognized that no one would have the right to vote at an election (a) if it was not a constitutional election, (b) if the legislature had fixed no voting qualifications for voters, and (c) if the legislature had not provided for voting without qualifications.

**ELECTIONS: Qualifications of Voters—Construction of Statute—Schools and School Districts.** The statutory creation of an election, with proviso that only "voters" shall vote thereat, without more, manifests a clear intent to treat such election as a constitutional one—a clear intent to adopt the constitutional requirements governing the qualifications of electors.

**ELECTIONS: Qualifications of Voters—Residence—Intention—Temporary Inability to Consummate.** A citizen who wholly abandons his residence in one county with no intention to return thereto, and, with his family, moves to another county with the good-faith intention to there take up his home, becomes a resident of such latter county at once, upon his arrival at his intended abiding place, even though, for reasons not under his

control, he was *temporarily* unable to fully consummate said latter intention by physically remaining in said latter county.

LADD, J., dissents as to the effect of the record facts.

**PRINCIPLE APPLIED:** One Cook wholly abandoned his residence in Union County, with no intention to return thereto, because of having contracted to work from March 1st in Madison County for one Wilson. Apparently, Wilson had contracted to furnish Cook with a house in which to reside. When Cook, with his family, arrived at the house in Madison County, on January 23d, he found it occupied by another person, whose right of occupancy did not expire until March 1st. With the aid of Wilson, an arrangement was had on the same day with the occupant, under which Cook stored his household goods in said house until he could take undivided possession. Having so stored his goods, except the clothing for himself and family, Cook and his family, on the same day, went to Dallas County and there boarded and lodged with a relative until February 29th following, when he and his family returned to said house in Madison County and took full possession. The going to Dallas County and remaining was with the uninterrupted intention to return to said house in Madison County immediately upon its vacation by the other occupant.

*Held*, Cook became a resident of Madison County on January 23d, and not on February 29th.

**APPEAL AND ERROR: Parties Who May Allege Error—Non-App**  
 9 **pealing Party.** Principle recognized that an appellee, *without presentation of error points*, may show, if he can, that he was so erred against as to entirely neutralize any errors against appellant. Applied when appellant, in an election contest, was able to show that the trial court had erroneously *rejected* one vote, and appellee countered with a showing that the trial court had erroneously *accepted* one vote.

**ELECTIONS: Qualification of Voters—Residence—Intention to Re-**  
 10 **turn—Temporary Absences.** One's voting residence is at the place which he treats as his home and to which he intends at all times to return when not employed at other places. Evidence reviewed, and held not to show legal residence in the district where the election was held.

*Appeal from Madison District Court.* — J. H. APPLEGATE,  
 Judge.



MONDAY, OCTOBER 29, 1917.

THIS is a suit in equity, in which plaintiffs seek and had injunctive relief to prevent certain of the defendants from acting as officers of the so-called Consolidated Independent School District of Earlham, the prayer for relief being bottomed on the claim that said consolidated district has no legal existence. Defendants appeal.—*Affirmed.*

*John A. Guiher, J. W. Rhode, and Strock, Wallace & McConlogue*, for appellants.

*John B. White and J. P. Steele*, for appellees.

SALINGER, J.—I. The petition alleges: (1) That a pretended consolidated district has no legal existence, because the proposal to create it failed to receive the sanction of a legal majority of the voters; (2) that, despite this, a pretended election was held to name school directors for said pretended district; (3) that defendants claim, on account of said pretended elections, to be directors and officers of said pretended district; (4) that these are threatening and proceeding to discontinue the use of schoolhouses and the maintenance of schools heretofore and now existing and being maintained in an independent district now claimed to be a part of the consolidated district; (5) that they are threatening to sell, dispose of and remove said schoolhouses and to discontinue the schools heretofore and now maintained in each of named subdistricts located near the homes of the plaintiffs, and thereby to deprive plaintiffs of convenient and valuable school privileges for their school children, and require plaintiffs to send such children many miles away for their school privileges; (6) that they are about to proceed to erect extensive and expensive school buildings, at great cost to these plaintiffs and other electors residing within the territory attempted to be included within the pretended consolidated independent district; (7) that they will cause taxes to be levied

to pay therefor, and these plaintiffs and all other property owners within the pretended district will sustain great and irreparable loss by being compelled to pay a heavy tax to support and maintain the proposed school: and that this will all be done unless defendants are restrained by injunction. Plaintiffs pray an injunction and decree restraining defendants from assuming to act as a board of directors of the pretended consolidated district; from taking any further steps in the organization of the pretended school corporation; restraining them from tearing down or disposing of the school buildings aforesaid; from erecting any buildings or directing the levy of any taxes in favor of the pretended consolidated district; from interfering in any way with the property or the maintaining of schools in described territory pretended to be included in the consolidation; and that the court "adjudge all proceedings in which it was attempted by a pretended election to organize said Consolidated Independent District of Earlham to be void and of no effect." General equitable additional relief is prayed. A decree was entered substantially as prayed, and which holds, among other things, that the election upon which the defendants claim to be directors was illegal and without authority of law, that all steps taken and proceedings had were and should be set aside and held for naught. The consolidated district itself was perpetually enjoined and restrained from assuming to act as such district, and, as said, there is a restraining order granting, in substance, all that was prayed.

1-a

The petition was in no manner assailed.

1. APPEAL AND  
ERROR: reservation of  
grounds: corporate legality: *quo warranto* or equity.

No objection was made below that a court of equity could not give the relief sought. But it is urged on the appeal that the court had no jurisdiction, and that, therefore, we must pass upon the point, though it was

not raised below. This is true only if the trial court had no power to do what it did. In so holding, we do not overlook that whether a school corporation has been legally formed is a question of public law; that failure to object

is, in a sense, consent; and that parties cannot settle by consent what public law is.

2. STIPULATIONS:  
subjects: state  
of the law.

See *Tuttle v. Pockert*, 147 Iowa 41, 43; *Ford v. Dilley*, 174 Iowa 243, at 250; *Heiman v. Felder*, 178 Iowa 740, at 752; *State v. Aloe*, (Mo.) 54 S. W. 494. This rule is not in conflict with the one that will not permit a point other than a jurisdictional one to be first made on appeal. It but means that, if a question of public law is mooted below, we are not bound to settle it as the parties agreed it should be. It does not mean that an issue tendering what is public law must be passed upon on appeal, though it was not tendered in the trial court.

In *Nelson v. Consolidated Ind. School Dist.*, 181 Iowa 424, it is settled that *quo warranto* alone affords a remedy where the sole question is whether a municipal corporation was legally formed. But it does not hold that this goes to jurisdiction or may be raised for the first time on appeal. It does hold, and we do now, that, when the formation is merely emergent or incidental, a court of equity may pass upon its legality. We hold further and now that the point is purely modal, and that it may not be raised first on appeal that the court of chancery acted and that *quo warranto* is the exclusive procedure. See *Hogueland v. Arts*, 113 Iowa 634; *In re Receivership of Wagner*, 173 Iowa 299, at 313.

## II. One ground upon which injunctive

3. SCHOOLS AND  
SCHOOL DIS-  
TRICTS: con-  
solidation:  
size of re-  
maining cor-  
poration:  
prohibition.

relief was asked was that the formation of the Consolidated Independent School District left some subdistricts not taken into the consolidation with less than four government sections. But the school township

in which said subdistricts lie had more than four government sections. The trial court held that, while a school corporation may not be reduced below four sections, this had no application to a subdistrict, and that no relief was due upon this allegation. We have so held repeatedly, and, therefore, affirm this ruling. See *School District v. Independent District*, 149 Iowa 480; *Consolidated Ind. School Dist. v. Martin*, 170 Iowa 262; *Lacock v. Miller*, 178 Iowa 920.

III. The territory of the proposed consolidated district lies in Madison and in Dallas County. Three men voted for consolidation who have lived in said territory for more than 60 days prior to the time they so voted, but, on account of moving from one county into the other, neither had lived in the county where he resided when he cast his vote for 60 days prior to casting it. They had the right to vote, unless the fact that their residence in that county for less than 60 days before voting disqualifies them. The court held that they were disqualified.

The right to vote is a political and not a natural one, and if it is not conferred by law, it does not exist. The denial of it is completely justified if the Constitution requires a stated qualification, or the statute imposes one which is not in conflict with the Constitution, and the citizen lacks that qualification. Paine, Elections, Secs. 57, 58; *Morrison v. Springer*, 15 Iowa 304, 342; 10 Am. & Eng. Encyc. of Law, 563, 596-607; *In re Denny*, (Ind.) 59 N. E. 359; *Greenough v. Board*, (R. I.) 74 Atl. 785; *State v. Blaisdell*, (N. D.) 119 N. W. 360; 29 Am. & Eng. Encyc. of Law, 1075. Section 1, Article 2, of the Constitution provides:

"Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state six months next preceding the election, and of the

4. ELECTIONS:  
qualifications of voters: residence: schools and school districts.

county in which he claims his vote, sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law."

Assuming, for the purposes of present discussion, that the vote taken on this proposed consolidation was an election, and we have the question whether the residence for 60 days is merely a direction to avoid fraudulent voting, facilitated by lack of personal acquaintance with those tendering a vote, or whether a residence for at least 60 days before the day of election in some county is one of the qualifications for voting at all—whether the lack of such residence is akin to the requirement as to age. Is the residence requirement merely a precautionary direction, or is it an essential qualification? Does it do no more than work that one who has not lived in the county the stated length of time ought not to vote, or should not be allowed to on challenge, or is the true construction that, if one does not have such residence, he can no more vote in any place in the state or for any purpose than if he were less than 21, or not a resident of the state for the prescribed length of time? *Langhammer v. Munter*, (Md.) 31 Atl. 300, *Fry's Election Case*, 71 Pa. 302, 306, and Dicey, *Law of Domicil*, page 55, declare it to be obvious that state residence and district residence are of the same nature, and whatever is necessary to constitute the one is essential to define the others. *Kreitz v. Behrensmeyer*, (Ill.) 17 N. E. 232, 253, holds if a voter abandon his residence in a voting district at a date too near the election for the requisite intervening time of the residence to be a voter in the new district to which he has removed, he will be entitled to vote in neither district. The required residence seems to be precisely equal to requirements like that as to age and being a male. *State v. School District*, (Neb.) 7 N. W. 315, 316; *State v. Boyd*, (Neb.) 48 N. W. 739. One must be an "inhabitant" to be a voter. *Baldwin v. Town of N. Branford*, 32 Conn.

47, 53; *Walnut v. Wade*, 103 U. S. 683, 693. Similar holdings there are as to qualifications by residence to render one competent to sign a petition to change the boundaries of a school district, and as to what constitutes a patron of a school with reference to signing a petition for relocation of the school. *School District v. School District*, (Ark.) 39 S. W. 850; *Willan v. Richardson*, (Ind. App.) 98 N. E. 1094. He is not a voter without having the prescribed residence. *Langhammer v. Munter*, (Md.) 31 Atl. 300, at 301; *Kreitz v. Behrensmeyer*, (Ill.) 17 N. E. 232, 253; *Carter v. Putnam*, (Ill.) 30 N. E. 681. We said, in *State v. Savre*, 129 Iowa 122, at 124, in approval of *Vanderpoel v. O'Hanlon*, 53 Iowa 246:

"He is entitled to vote only in the county where his home is, where his fixed place of residence is for the time being."

And in *State v. Minnick*, 15 Iowa 123, at 125:

"But a person may be a qualified voter, so far as age, residence in the state or county are concerned, and yet if he simply votes in the wrong township, he is clearly guilty of illegal voting, under Section 4337. It was the intention of the statute to confine voters to the township of their residence, and the disability attaches when they offer to vote in any other, as much as if they were not twenty-one years of age."

The words of the Constitution, that he "shall have been a resident \* \* \* of the county in which he claims his vote," may have been written in oversight of the fact that, as to some elections and some voting, it should be immaterial that one claim a vote in a particular county. But though there was this oversight, it does not alter that, so far as the Constitution goes, it gives no right to vote at any election unless one claim the right to vote in a particular county, and has resided in that county for the specified time. It is no answer that one who lives in

either of several counties to be affected by an election has the same interest in the general result, no matter in which of the counties he lives. There are some senatorial districts within this state composed of two or more counties. It will hardly be claimed that, if an inhabitant of the district should move from one county therein to another, and not reside within the county into which he removes 60 days before an election for senator is held, he might vote because he had been a resident of the senatorial district for more than 60 days prior to his voting. So of one who has always lived in one county in Iowa up to his first removal, and who moves to another and distant county in the state. Whether or no he shall have resided 60 days before election in the county to which he is moving or shall be in transit on the day of election, he is as much interested in who shall be elected governor as though he had never initiated a removal. So far as his interest in the matter and natural right is concerned, there is no good reason why he should not vote at any polling place en route, or vote in the county to which he is removing, though he has lived therein only 59 days before election is held. The only reason why he cannot vote is that the only grant of power has, with or without good reason, a limitation requiring the 60 days' residence; that there are no equitable principles that can be applied; that the sole inquiry permitted is whether law has granted authority; and that the law is not obliged to see to it that all citizens have the right to vote somewhere at all elections. *Kreitz v. Behrens-meyer*, (Ill.) 17 N. E. 232.

## 3-a

5. ELECTIONS :  
definition :  
voting on  
school con-  
solidation.

We have assumed that the voting on the proposal to create a consolidated district is an election, within the meaning of the Constitution. It is not an election as to which county lines are always material.

The voting we are considering could not be called either a Madison or a Dallas County election. It was, of course, no part of a general election. Section 2746, Code, 1897, creates an annual meeting of the voters of school corporations. Such meeting may be conceded to be an election, and there is express provision in Code Section 2747, that those who vote thereat must have the qualifications for voting at a general election. Section 2750, Code Supplement, 1913, provides for a special meeting of the voters of the corporation, which may also be conceded to be an election. So of the meeting of the voters of a subdistrict, provided by Code Section 2751. But all this does not make the voting upon consolidation an election. Such voting is neither the statutory annual meeting, the statutory special meeting, nor the statutory subdistrict meeting; nor is there a provision that in terms requires those who vote on consolidation to have the qualification for voting at a general election. And while one can vote only if he have qualifications exacted by law, a distinct question arises as to what one may do if no qualifications are exacted. We are not concerned with qualifications until we can find that there was an election to be qualified for. Undeniably, the term "election" is not given its broadest possible meaning in all cases, and is often restricted to a choice of public officers. Yet it has been held that a vote to determine whether or not intoxicating liquor may be sold is an election. *State v. State Board of Canv.*, (S. C.) 59 S. E. 145. *Seaman v. Baughman*, 82 Iowa 216, had the question whether voting at the annual meeting created by statute must be by ballot. It was argued that the Constitution provides that "all elections by the people shall be by ballot." It is in reply that we said that "elections," as used in this particular constitutional provision, was used less broadly than to signify choice, and was restricted to choosing public officers. It was significantly added that there is nothing in the an-



nual meeting statute to lead one to conclude that such meeting was an election, in the popular acceptance of the terms, and said as argument for the limitation that "judges of election are not provided for." Now, everything in Section 2794-a indicates that the legislature treated the vote on consolidation as an election. Its reference to the call is that it shall be the duty of the board within ten days "to call an election in the proposed consolidated district." The next provision is, "at which election all voters residing in the proposed consolidated district shall be entitled to vote." The next reference is a statement of what "the judges of said election shall do. Next, there is a provision what shall happen "if a majority of the votes cast by the electors" be a given way. The movement is to be initiated by a petition signed by "electors residing on such territory." The Constitution authorizes voters having certain qualifications "to vote at all elections which are now or hereafter may be authorized by law." Manifestly, this permits the legislature to create elections that did not exist when the Constitution was adopted. We have attempted to show that an election has been made out of voting on whether there shall be a consolidated independent district. Therefore, we are of opinion that such poll is an election, at least in such sense as that those who have the qualifications named in the Constitution may vote thereat. It is not necessary to determine whether, as to such an election, the legislature might not dispense with all or some of those qualifications. If this poll is not an election within the meaning of the Constitution, then the qualifications it prescribes are not requisite. But what does that accomplish? That a constitution does not impose restrictions on a vote is not so material as whether any law authorizes anyone to vote. The naked fact that one is an elector or a citizen is, of itself, no authority to vote, much less an authority to settle by an exercise of the voting franchise what the law

does not authorize to be thus settled,—to take part effectively in an election or an attempt at an election at which no law gives a right to vote. An elector may not be a voter. *Mills v. Hallgren*, 146 Iowa 215; *McEvoy v. Christensen*, 178 Iowa 1180; *In re Carragher*, 149 Iowa 225, at 227; *Gill v. Board of Com'rs*, (N. C.) 76 S. E. 203; *Oppegard v. Board of Com'rs*, (Minn.) 139 N. W. 949; *Dorsey v. Brigham*, (Ill.) 52 N. E. 303. There is no rule of

6. ELECTIONS:  
right of suff-  
rage: when  
nonexistent.

law that a man must be entitled to vote somewhere. *Kreitz v. Behrensmeyer*, (Ill.) 17 N. E. 232. Manifestly, there is even less

natural right to vote for the purpose of accomplishing some particular object. On the theory that this poll is not a constitutional election, then, if the legislature has fixed no qualifications nor authorized voting without qualifications, no one was authorized to vote. Therefore, if we held with appellant that the constitutional qualifications were not necessary because this poll was not an election, it would profit him nothing, because we should be compelled to hold at the same time that the consolidation was not lawfully adopted because none who voted had by

7. ELECTIONS:  
qualifications  
of voters:  
construction of  
statute:  
schools and  
school dis-  
tricts.

law been given the right to vote. But it is not the fact that the legislature has done nothing. What it has done creates another angle of argument for the proposition that the qualifications prescribed in the Constitution were requisite, even though there

was, in strictness, no constitutional "election." As to an election or referendum which is not such "election," the legislature may prescribe qualifications. Statutes authorizing women to vote on some questions have been upheld. Such work a dispensation with some constitutional requirements in cases which do not involve constitutional elections. It may well be said that, since the legislature is permitted by the Constitution to add to elections, that,

when it creates an additional election, that act itself adopts the constitutional qualifications, unless the legislature can, or at any rate does, dispense with some or all of them. Passing that, the legislature certainly can, as to such additional elections, expressly adopt the constitutional qualifications. Section 2794-a gives voting rights to "voters." The Constitution is the only Iowa law that gives a definition of voter, and part of it is that he is a person who has resided in the county where he votes for at least 60 days before voting. If the statute does not adopt this part of the definition by using the word "voter," then use of the word adopts no other part of the constitutional definition, and we must be prepared to say it was intended that, on consolidation, persons who were not 21 years old might vote. That this would otherwise result impels us to believe the statute adopts the constitutional qualifications by the use of the word "voter." We do not overlook that it requires the voter to reside in the district. The most that can be said for appellant is that, if "voter" means 60 days' residence in the county, it was tautology to add a requirement of residence in the district. To this there are what we think sufficient answers. (1) It were better to find that there is tautology than to find an intent to abandon universally well regarded safeguards of long standing. (2) There is no tautology. This proposed district lies in parts of Madison and Dallas Counties. If Section 2794-a had not limited voters to those who resided in the proposed district, any elector who had lived anywhere in either of the counties for more than 60 days before this vote was taken might have participated, though he did not live in any part of the counties in which the territory of the proposed district lay. The statute adopted all the constitutional requirements, and added what was needed for the special case being legislated for.

In our judgment, the court rightly held said three votes cast for consolidation to be void.

IV. The court held that one Cook, who  
 8. ELECTIONS: voted for consolidation, was not a resident  
     qualifications of voters: resi- of either Dallas or Madison County, and  
     dence: inten- reached this conclusion by finding that,  
     tion: tempo- while Cook intended to become a resident of  
     rary inability to consum- Madison County, the intention and the act  
     mate. did not concur. Of course, residence is not established by  
     naked intention, and intent and act must concur. *Shirk v. Township Board*, 137 Iowa 240; *State v. Savre*, 129 Iowa 122. But a careful analysis of what this rule means leads to the conclusion that it is well stated in the *Savre* case, 129 Iowa 122, wherein it is remarked that, if this were not the rule, one might gain a residence which he never saw by merely intending to dwell in it as a permanent abode. But does this principle govern this case? The cases make it one element for consideration that the party has not abandoned the residence he had before he claimed the new residence. *Farrow v. Farrow*, 162 Iowa 87; 15 Cyc. 291; *Carter v. Putnam*, (Ill.) 30 N. E. 681. Cook did not merely have an intention to become a resident of Madison County; did not merely entertain that thought while retaining his residence in Union County. The first act he coupled with his intention was to abandon his residence in Union County, without intention to return thereto, with intent to reside in Madison County, in order to carry out an agreement with one Wilson, under which Cook was to live and work in Madison County. He took to that county his family and all their goods, and took them and the goods to a house in Madison County wherein, under said agreement, he was to dwell, and while living in which he was to work in Madison County. They reached it on the 23d of January, and found it occupied by one Kenworthy. It is quite clearly apparent that Cook's employment was to begin on the

first of March, and that Kenworthy was not obliged to yield possession of the house until then. This could not affect the intent and purpose which Cook then had. But Wilson, the employer, was somehow able to "furnish" room in that house in which to store Cook's household goods,—the house in which Cook and his family were to move to carry on the employment arranged for by agreement with Wilson. On consent, Cook stored his household goods in that house, and on January 23d. That is to say, he arranged to store his goods in that house until he had the right to all of it, a right which was then fixed by agreement with the owner of the house. After storing his goods, he and his family did not remain physically in Madison County, but, on January 23d, went into Dallas County to board and lodge with Cook's brother-in-law during the interim that Cook was compelled to wait in order to take possession. They took nothing into Dallas County except their clothing, and ate, slept and stayed there "most of the time." He did return on February 29th, and has since remained living in said house and carrying out the work under said agreement. All this seems to make quite plain that the storing the goods and the going to Dallas County was a mere temporary arrangement to bridge the time from January 23d until March 1st. The court held the residence did not begin until February 29th. We do not overlook that Cook as a witness indulged in general statements that "since then," meaning the time he left Union County, he lived in Dallas County, moved from that county into Madison County, and that, since February 29th, he has been living in Madison County. If the facts show that he began his residence in Madison County on January 23d, then he had the right to vote, and his said conclusions should not be allowed to overturn the facts to which we have called attention. Those facts, and not his deductions, must control.

Arriving in Madison County on January 23d, in the circumstances described, and doing what he did then, if he had in addition obtained board and lodging from the occupant of that house, or of someone else in Madison County living in the territory occupied by the alleged consolidated district, and in course of a week had found the lodging and board unsatisfactory, then, going to Dallas County and all that occurred until he returned to Madison County would not have made his vote illegal. He arrived on January 23d without a residence. He came there to carry out an intention to remain there and live and work there. He carried out this intention with every physical act that he had power to do. His going to board with his brother-in-law while waiting to get possession, intending to return and in fact returning as soon as he could get possession and go to work, involves to a certainty no change of intention that he had on January 23d, namely, to live and work in Madison County. His absence from Madison County was temporary, and for a temporary purpose, and with unchanged intent to return. Why, then, did he not gain a residence in Madison County as soon as he deposited his goods? An abandonment for the shortest time loses a residence, if there be no intent to return. *Kreitz v. Behrensmeyer*, (Ill.) 17 N. E. 232. On the other hand, a moving in may effect a residence in the first hour. *State v. Minnick*, 15 Iowa 123, at 126. If the purpose to remain is clearly proved, it is not fatal that a particular home is not occupied. Wharton, Conflict of Laws, Sec. 58; Story, Conflict of Laws, Sec. 46. It is of great materiality that there be a purpose to return. *Hinds v. Hinds*, 1 Iowa 36; *Kreitz v. Behrensmeyer*, (Ill.) 17 N. E. 232; *Love v. Cherry*, 24 Iowa 204; *State v. Savre*. 129 Iowa 122. Can there be question that Cook, who went to Dallas County so he might have board and lodging while waiting to take possession, intended to return? Naturally, it is not easy to find cases exactly in point on facts, but it

does seem as if there are cases which rule this. In *Kellogg v. Hickman*, (Colo.) 21 Pac. 325, one voter located on a pre-emption claim May 3d, and boarded with a relative, while building his house. He had left his home in Missouri some time before, and his family arrived in Colorado later in May, the exact date being uncertain, and they continued to reside on the claim from that time—and his residence was held to have begun on May 3d. And an unmarried man was held to have six months' residence, entitling him to vote at the November election, who sold out his business and left his former home, arrived in Colorado on the 3d of May, with intent to remain if he found a business to suit him. He examined different locations and selected one on the 15th of June, being all that time at different places in Colorado, where all the property he owned was, after May 3d, excepting some debts due him at his old home, he registering at first as from his former home and afterwards as from a place in Colorado. In *White v. Tennant*, (W. Va.) 8 S. E. 596, it is held that, where a person entirely abandons his former residence in one state with no intention of resuming it, and goes with his family to another residence which he has rented in another state, with the intention of making the latter his residence for an indefinite time, the latter state is his domicile, notwithstanding that, after he and his family arrived at the new residence, which is only about half a mile from the state line, they go on the same day on a visit to spend the night with a neighbor in their former state, intending to return in the morning of the next day, but he is detained by sickness until he dies, and never does in fact return to his new home.

4-a

Some cases that, on surface consideration, seem to sustain the ruling of the trial judge, upon careful examination rather militate against it. It is said in *State v. Minnick*, 15 Iowa 123, at 126, that one does not gain a residence

by coming to a place if he have no intention of remaining and has the purpose of returning as soon as some temporary object is accomplished. And so of *Carter v. Putnam*, (Ill.) 30 N. E. 681. It holds that one who rents a farm in a township more than 30 days before election, but does not move thereon at least 30 days before, does not become qualified by the fact that, more than 30 days before, he moved his corn plows, chickens, and a cupboard to the farm, remaining a resident where he had resided. But it is also said that, had he rented the farm 30 days before election, and "gone upon it himself with a part of his goods, and removed there, occupying the house as a residence until his family joined him on the 9th (less than 30 days before election), then he might with propriety claim a residence from the date he went upon the place."

4-b

We come nearer to having the question of whether Cook abandoned his residence in Madison County than whether he gained a residence there on January 23d. Much already said demonstrates that he did not abandon such residence if he ever had it. An absence for months, or even years, is not an abandonment if all the while intended to be a temporary absence for some temporary purpose, to be followed by a resumption of residence. *Kreitz v. Behrens-meyer*, (Ill.) 17 N. E. 232. We say, in *State v. Savre*, 129 Iowa 122, that "mere bodily presence or absence cannot have controlling effect in determining residence when once established," and that "persons who travel for business or pleasure for long or short periods do not lose their residence by such absence;" that "the vital inquiry, then, in determining the residence of a person always is, Where is his home, the home where he lives, and to which he intends to return when absent, or when sick, or when his present engagement ends." It was held, in *Carter v. Putnam*, (Ill.) 30 N. E. 681, that, where a man moved from Illinois to an-



other state in the spring of one year and returns to Illinois with his family in April of the following year, if he has not voted or done any act in the other state from which it might be inferred he acquired a residence there, and he declares he had no intention of staying there, he does not thereby lose his residence in Illinois. Surely, what Cook did in Dallas County is, under this pronouncement, no change of his rights in Madison County. And see, as having more or less bearing, *Langhammer v. Munter*, (Md.) 31 Atl. 300; *Faires v. Young*, (Tex.) 6 S. W. 800; and *Smith v. Thomas*, (Calif.) 52 Pac. 1079. There is nothing in *Church v. Crossman*, 49 Iowa 444, 447, that affects what we have said. Crossman was a resident of St. Lawrence County, New York, up to February 1, 1872. From the middle to the last of January of that year, he sold off his household effects, preparatory to removing to Michigan. Before February 10th, he shipped all his goods, except clothing, which he intended to carry in a trunk. On February 10th, he and his family went to his father's in Jefferson County, New York, to stay until ready to go to Michigan, and stayed there until February 13th, at which time Crossman did remove to Michigan. It was held that, on February 2d, when he had not yet departed from St. Lawrence County, he had not lost his residence therein, and that, therefore, summons then and there served was effective. In other words, the mere shipping of goods to Michigan, and a visit to his father for a temporary purpose, did not cause an abandonment of his residence in St. Lawrence County.

In *Love v. Cherry*, 24 Iowa 204, residence in Iowa was held not to be lost where a woman left Iowa to make a visit or visits and transact some business, intending to return in a convenient but uncertain time. This intention was never relinquished or abandoned, though subsequent developments rendered it necessary for her to remain longer absent than she had expected. In *State v. Deniston*, (Kans.)

26 Pac. 742, one who filed a homestead claim in Oklahoma and made a settlement and improvements thereon did not regain his former residence in Kansas by going there for a temporary purpose, intending to return to Oklahoma.

We do not disagree with the holding of *State v. Savre*, 129 Iowa 122, that, as to an unmarried man, "between the place where one rooms and sleeps and the place where he obtains his meals, without other facts indicating the contrary, the former must be regarded as his residence." But, self-evidently, the fact that Cook and his family ate and slept in Dallas County temporarily, and during the period that must elapse before they could return to the house in Madison County and get possession of same under existing agreement, does not bring this case within the rule announced in the *Savre* case.

If, on January 23d, inquiry had been made on the instant after the deposit of the goods by Cook, and while he and his family were still physically present in Madison County, as to where Cook intended to live, and then had a residence, and why he was going into Dallas County, it would surely have been found that he was presently to become a resident of Madison County, and would return and work there just as soon as the room provided for under existing agreement was available, and that he was leaving for the temporary purpose of obtaining a lodging until he could return. Clearly, a going into Dallas County in these circumstances was not an abandonment of his status in Madison County.

We think the court was in error in holding that Cook was disqualified.

9. APPEAL AND  
ERROR: parties who may  
allege error:  
nonappealing  
party.

V. On the face of the returns, the consolidation carried by four. The trial court held just four votes cast to be illegal, and upon this finding rests the relief granted. We hold it was erroneous to exclude one of

the four. If this ends the inquiry, there must be a reversal. But appellee presents that at least three illegal votes for consolidation were held legal. Though appellee has not appealed, and presents no error points, he has the right to urge that the judgment is right though some of the steps to reach it were erroneous—to show that errors against him so offset those made for him as to make the last nonprejudicial, and that, so, the final result is right. See *Voorhees v. Arnold*, 108 Iowa 77, 85; *Kelso v. Wright*, 110 Iowa 560, at 565; *Royer v. King's Crown Plaster Co.*, 147 Iowa 277, at 281; *Ford v. Dilley*, 174 Iowa 243, at 249; *Eisentrager v. Great Northern R. Co.*, 178 Iowa 713; *City of Beardstown v. City of Virginia*, 81 Ill. 541, at 547.

The trial court held one ballot valid which was cast for consolidation, and as to which appellee says that, while the one who cast it had the right to vote, he could vote legally only in Earlham, and was not entitled to vote "outside," which he did.

10. ELECTIONS :  
qualifications  
of voters :  
residence :  
intention to  
return : tem-  
porary ab-  
sences.

He is unmarried and 23 years old. His parents live in Earlham, and he was staying with them when, on March 6, 1916, he went into the employ of one Hall, who lives in the "outside" territory. He voted on and for consolidation while working at Hall's. The arrangement under which he went there to work was that, if both were satisfied, he would work until after threshing. It was his expectation that, after that was done, he would go wherever he could get a job, and he says that, whenever he had failed, or should fail for a week or two, to get a job, he would go to Earlham, and that he regarded Earlham as his home whenever he was out of a job. He "supposes" Hall's is his home, and adds, by way of conclusion, that he "had been making his home wherever he worked." When asked why he didn't vote in Earlham, he answered, "Because they let me vote in the country." While, on April 16, 1916, he went

from Hall's to vote on this consolidation, he went from the same place on the last Monday in March of 1916 to vote at the town election in Earlham. All that at all makes for a residence outside of Earlham is that he was assessed in Penn Township, and that, in 1915, he worked out a poll tax in Madison Township, which, at most, proves that he did not pay taxes in Earlham in 1915, and submitted to a tax levied in the outside territory. When he went to work for Hall on March 6th, he had been a resident of Earlham. That his going did not evince an intent to change his residence is made manifest by his voting in Earlham after he was at work for Hall. The nature of the employment did not change between the last Monday in March, when he voted in Earlham, and the 16th of April, when he voted "outside." He had not abandoned his residence in Earlham on the last Monday in March. Nothing indicates that he abandoned it later. All makes clear that the employment was a temporary incident to take him bodily for a time from Earlham, he intending and expecting to return home whenever his employment was at an end. All shows his home was always at Earlham. Therefore, the court was in error in holding he cast a legal vote when voting elsewhere than in Earlham. See *State v. Savre*, 129 Iowa 122. This works an affirmance.

VI. Appellee challenges two more votes for consolidation which the court held to be legal. It would be moot to decide this contention. If we should reach the conclusion the trial judge did, we must still affirm. If we did not, it would but accomplish that, to illegal votes enough to work an affirmance, more illegal votes would be added.

VII. Appellant presents a motion to strike some four pages of the argument for appellee from the files. The burden was on appellee, and he should have made, or at least had the right to make, the opening argument. He did not make it, and appellant did. Appellant invokes Section 44

of Rule 10 in this court, which provides that, in answering an opening argument made in these circumstances, the appellee must strictly confine his argument to matters in reply, and appellant asserts that these four pages were not strictly reply argument. We do not believe there was sufficient departure from essential reply argument to justify sustaining this motion to strike, and the same is overruled.

The decree must be and is—*Affirmed*.

GAYNOR, C. J., WEAVER, EVANS, PRESTON and STEVENS, JJ., concur.

LADD, J., concurs as to all but Division IV.

LADD, J., dissenting.—The authorities agree that two things must concur in order to constitute residence under the election laws: the fact of residence, and the intent that it be such. *State v. Savre*, 129 Iowa 122. As so employed, the word means "home" or "domicile;" a permanent abode or habitation, to which a party, when absent, intends to return. *Vanderpoel v. O'Hanlon*, 53 Iowa 246; *State v. Savre*, supra; *Hinds v. Hinds*, 1 Iowa 36. There must be a residence, and, in addition thereto, it must be permanent; that is, in the sense that the party, when absent, has the *animus revertendi*. Before one can be said to be a resident, he must have taken up his abode or dwelling somewhere, and abiding or dwelling is essential to constitute residence. Cook had abandoned his home in Union County, but his residence is presumed to have continued there until established elsewhere. No one claims that he became a resident of Dallas County, as his stay there was temporary. He had entered into an agreement to begin work in Madison County March 1st following. All claimed is that he, with his family and goods, went to the house he was to occupy, on January 23d, and found it occupied by a former employee. Bearing in mind that Cook was not entitled to possession or to his home there until over a month later, did his ar-

rangement with his predecessor to store his goods in a room of the house occupied by said predecessor, and so storing them, render him a resident at that place? He went away, and did not return with his family until February 29th, and, as I think, then, and not until then, established his residence there. Cook, as a witness, did not pretend to have been living in Madison County until February 29th. That he intended to move there in time to perform his contract, no one doubts, but I insist that there is nothing in the record before us warranting the inference that he ever became a resident, or that he ever took up his abode or dwelt in Madison County prior to February 29th, and, therefore, that he was not a qualified voter at the school election. Surely, the holding to the contrary renders easy the colonization of voters, and ought not to receive the approval of this court.

I dissent from the conclusion reached in the fourth division of the opinion.

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GARRISON GRAIN & LUMBER COMPANY, Appellee, v. FARMERS MERCANTILE COMPANY, Appellant, et al., Appellees.

**EVIDENCE: Documentary Evidence—Pleadings—Admissions—**

- 1 **Substitution—Effect.** A pleading containing material admissions may be offered and received in evidence even though such pleading has been superseded by an amended and substituted pleading.

**MECHANICS' LIEN: Proceedings to Perfect—Unauthorized Items**

- 2 **—Effect.** A subcontractor who, with knowledge that the contract between the owner and the principal contractor has been rightfully terminated, furnishes to the contractor an item of material, and serves notice of a claim for a lien *within* the 30 days thereafter, stands on exactly the same basis as a subcontractor who serves his notice *after* the expiration of 30 days from the furnishing of allowable items.

**MECHANICS' LIEN: Right to Lien—Payments by Owner to Con-**

- 3 **tractor—Estoppel.** A subcontractor who demands that certain

payments be made by the owner to the principal contractor, and who receives such payments, will not thereafter be heard to assert that such payments were unauthorized.

**MECHANICS' LIEN: Right to Lien—Payments by Owner—Cred-**  
4 **iting Contractor's Indebtedness to Another.** A building owner who is owing a building contractor a matured payment on the building may, through its managing officer, make a valid payment to said contractor by applying said mature payment on an indebtedness due from the contractor to a bank of *which said officer was also a managing officer*, even though said contractor did not request such application and had no knowledge thereof until after it was done.

**MECHANICS' LIEN: Right to Lien—Intentionally Fraudulent**  
5 **Items.** Principle recognized that the right to a mechanics' lien for labor, materials, etc., is wholly lost by the insertion in said claim of intentionally fraudulent items, howsoever small.

**MECHANICS' LIEN: Operation and Effect—Priority.** A subcon-  
6 tractor who, in good faith, and without knowledge of the cancellation by the owner of the contract with the principal contractor, continues to furnish material, labor, etc., is not a mere volunteer, and is entitled, *as against a subcontractor who furnished material with full knowledge of such cancellation*, to the establishment of a prior lien for his entire claim.

**MECHANICS' LIEN: Operation and Effect—Priority.** Where all  
7 the payments made by the owner had been made before a subcontractor commenced work, and the owner had then properly terminated the contract, the right of said subcontractor to payment, though earlier in point of filing, depends upon whether, after paying all that is due to all other claimants, the owner has enough to pay said subcontractor.

**EVIDENCE: Conclusion—Mechanics' Lien—Payment.** A contract-  
8 or may competently testify that a subcontractor has not been paid.

**MECHANICS' LIEN: Foreclosure—Interest.** An owner who has  
9 properly tendered the amount due from him is liable to interest on the amount only from the date of final decision on appeal.

**MECHANICS' LIEN: Operation and Effect—Priority—Subcon-**  
10 **tractor Inducing Unauthorized Payments—Effect.** A subcontractor who induces the owner to make a payment to the contractor *not authorized by the contract*, and in an amount greater than the claims of all other subcontractors, and receives said

570 GARRISON G. & L. CO. v. FARMERS MERC. CO. [181 Iowa

payment, will, in the adjustment of priorities, be relegated to the foot of the list of claimants.

*Appeal from Benton District Court.*—C. B. BRADSHAW, Judge.

TUESDAY, OCTOBER 30, 1917.

THIS is a mechanics' lien foreclosure. From the findings made and decree entered, the Farmers Mercantile Company alone appeals.—*Modified and affirmed.*

*Tobin & Jensen*, for appellant.

*Kirkland & White, Brown & Mossman, G. W. Burnham, and H. L. Bryson*, for appellees.

No brief or argument for appellee Grain Company.

SALINGER, J.—I. The plaintiff, the Garrison Company, and the several defendants and cross-petitioners, filed a number of sworn statements as subcontractors for mechanics' liens for alleged unpaid labor and material furnished to the principal contractor. These claims aggregate \$2,260.15, or \$1,165.69 in excess of the amount left in the hands of the owner, appellant, Farmers Mercantile Company. The principal contractor made default. The owner tendered into court the balance in its hands due the contractor, and asked that same be distributed among the several claimants as the court might see fit, praying that the liens be canceled and that it be discharged from further liability. The decree gives judgment to all the claimants, and holds the owner liable for \$2,094.46, with interest.

The contract price is .....	\$5,703.90
Amount used according to settlement to	
complete building.....\$	109.44
Payment June 2, 1912.....	500.00
Payment of July 27th (unchallenged) ..	1,000.00
Payment August 3d (unchallenged) ..	1,000.00
	<hr/>
	\$3,094.46



If this were all, the owner has on hand more than enough to pay all contenders. But it paid out \$1,000 on July 27th and \$1,000 on August 27th. If both these are payments which it can assert, then it does not owe the principal contractor enough to pay all these claimants. The trial court allowed the payment made on July 27th and disallowed the one made on August 27th. All claims were established in full save that of Shorthill, which was reduced from \$191.50 to \$135.75. No one appeals save the owner. The plaintiff, the Grain Company, has filed no brief. The defendants J. D. Barr and R. E. Overman are not in the jurisdiction of the court, and no adjudication as to them was or could be attempted herein. The defendant Wenner defaulted, and, under the allegations in the cross-petition of the defendant and appellant, Wenner's lien, if any, was canceled.

II. We gather that the original cross-petition contained an admission that the documentary evidence: \$2,000 was not paid under the contract, but pleadings: admissions: under special arrangement between the appellant and the contractor. It is contended that this pleading cannot be considered because it was substituted for. This is so only if not put in evidence. It was put in, and so became evidence, though substituted for.

III. As to the claim of the Grain Company, we are of opinion that the item of cement is not in fact the last item furnished under the contract. The Grain Company was charged with knowledge of the contract. The owner was justified by the contract in canceling. The owner did cancel. An agent of the Grain Company notified the principal contractor of the cancellation, and hence the Grain Company had notice of the can-

1. EVIDENCE:  
documentary  
evidence:  
pleadings: ad-  
missions:  
substitution:  
effect.

2. MECHANICS'  
LIEN: pro-  
ceedings to  
perfect: unau-  
thorized items:  
effect.

cellation. The cement was furnished after the contract was canceled. This works that the Grain Company did not serve notice within thirty days after furnishing the last item. It results it can have nothing which the owner did not owe the contractor.

3-a

8. MECHANICS'  
LIEN: right  
to lien: pay-  
ments by own-  
er to con-  
tractor: es-  
toppel.

We agree with the trial court that the Grain Company is estopped to claim that the \$1,000 paid on July 27th should not be treated as a justified payment, even if it had given notice within thirty days after it furnished the last item. The payment was made because the Grain Company demanded it and refused to supply material unless a payment of at least \$2,000 was made, and it received the money which it now urges was not rightfully paid. We think the trial court was right in holding, as against the Grain Company, that this \$1,000 was not owing the contractor. See *Andrews v. Burdick*, 62 Iowa 714; *Vreeland v. Ellsworth*, 71 Iowa 347.

3-b

4. MECHANICS'  
LIEN: right  
to lien: pay-  
ments by own-  
er: crediting  
contractor's  
indebtedness to  
another.

We are of opinion that what was done on August 27th constitutes a payment to the contractor. All said against this conclusion is that this payment was not made to the principal contractor because an officer of the owner, who was also an officer in a bank, applied that sum on a debt owing the bank by the contractor, and did so without his request and without notifying him of such application until after it had been made. We think *Knapp v. Cowell*, 77 Iowa 528, settles that what was here done constitutes a payment to the contractor.

We find that the trial court erred in holding that this payment was not so ratified by the Grain Company as to

estop it from contending that it was an unauthorized payment. As just seen, the payment was made by an officer of the Grain Company to help a bank of which he was also an officer. The Grain Company must, as between it and the owner, be relegated for collection to the contract price minus the conceded reductions, plus \$2,000, paid on July 27th and on August 27th. That is to say, as to the Grain Company the sum due the contractor is \$1,094.46. It cannot have more than that. It remains to be seen whether it may have so much as that.

IV. Tyler, claiming \$207.77, filed claim first, and, if entitled to anything, has priority, and is entitled to have full satisfaction, even if that exhaust the fund. See Code Sec. 3095, and *Lindsay v. Zoeckler*, 128 Iowa 558. The position of appellant is that the court should have estopped Tyler from claiming any lien at all "on account of his evidently trumped-up claim and his dishonesty of purpose." This is based upon the assertion that Tyler's statement contains a fictitious item of \$1.00 for putting in a sill for a rear door, in that Tyler claims he did this on September 23d; that he did no work on that day, or that, if he did, it was gratuitous and voluntary, and cannot be included in his claim; that, with this item excluded, the last work performed for which Tyler is entitled to a lien was done about August 21st; and that, therefore, Tyler failed to serve notice within 30 days. It is further contended that the date September 23d was inserted in the statement after it had been completed and presented to appellant, about August 26th or 27th, and it given to understand that the work contracted for by Tyler with the principal contractor had then been completed; that the amount exhibited at this time was for the same amount which is claimed now, to wit, \$207.77. The amount of the item for

5. MECHANICS' LIEN: Right to lien: Intentionally fraudulent items.

putting in the sill is, to be sure, trifling in itself, and as part of a \$207 claim. But, of course, that fact will not avail if its insertion was a fraudulent one. So the inquiry at this point narrows to whether Tyler perpetrated an intentional fraud. If he did, he can assert no lien. *Palmer v. McGinness*, 127 Iowa 118; *Nancolas v. Hitaffer*, 136 Iowa 341, at 345; *Stubbs v. Clarinda, C. S. & S. W. R. Co.*, 65 Iowa 513; 27 Cyc. 203. And see *Bangs v. Berg*, 82 Iowa 350; *Green Bay Lbr. Co. v. Miller*, 98 Iowa 468; *Hug v. Hintrager*, 80 Iowa 359. The time at which the sill was actually put in is in dispute. The importance of settling the dispute lies in the fact that, if the sill was actually put in on September 23d, it would go far to disprove all fraudulent intent, and to avoid the penalty for such intent to which we have referred.

Taking into consideration the state of the evidence on when the sill was in fact put in, and that forfeiture for fraud of what was truly earned is sought, we conclude that, upon all the evidence, such fraud is not established.

## 4-b

If it be material, we find that, though Tyler was guilty of no fraud, the last item claimed for by him was not in fact the last item, and that he must be dealt with as one who did not serve notice within the thirty days. See *Wheelock v. Hull*, 124 Iowa 752; *Jones & Magee Lbr. Co. v. Murphy*, 64 Iowa 165; *Chicago Lbr. & Coal Co. v. Garm-er*, 132 Iowa 282; *Stewart v. Wright*, 52 Iowa 335; *Parker v. Scott*, 82 Iowa 266, at 271; *Iowa Stone Co. v. Crissman*, 112 Iowa 122; *Page v. Grant*, 127 Iowa 249; *Green Bay Lbr. Co. v. Thomas*, 106 Iowa 154.

V. Appellant contends that items of labor charged for by Murphy, Freeman and Winders were, if done, not done under the contract, and were voluntary and gratui-

6. MECHANICS'  
LIEN: opera-  
tion and ef-  
fect: priority.

tous, because performed after the contract had been canceled, under authority given by the contract. We have held as to the Grain Company that it was affected by this cancellation. The argument as to these others divides into the proposition: (1) That these three claimants were bound by the contract between appellant and the principal contractor, and therefore by its provision that the owner had the right to cancel; (2) that the owner did cancel before the said items of work were done, and the cancellation was justified by the contract; (3) that these claimants were notified of the cancellation before they did this work; and (4) that no notice was required because claimants knew that the owner had the contract right to cancel.

It is true that these subcontractors were bound to know that the contract gave such right. *Blanding v. Dar-enport, I. & D. R. Co.*, 88 Iowa 225. We may assume, for present purposes, that the owner canceled, and was justified by the contract in so doing. It is true that the contract does not require notice to be given of such cancellation. But does that go beyond dispensing with notice to the principal contractor? And does the fact that he need not be notified establish that, if these claimants continued to work without notice or knowledge of the cancellation, they became volunteers, and must be denied recovery on that account? We do not think that results from the right to cancel without notice to the principal contractor. Murphy testifies that the principal contractor told him to do this item of work, and that Murphy did so without knowing the contract had been canceled. There is no affirmative evidence of this kind for Freeman and Winders. On the other hand, the claim that they were notified of the cancellation is not, as is claimed, established by the evidence of M. J. Collins. All he says is that, on October 12th, he "sent a notice to Mr. Inman (the principal contractor) containing

a memorandum from the architect and had knowledge of that memoranda from the architect on Inman that the contract was ended, I went to the building and notified the workmen there that the contract had been terminated and whatever they did was at their own responsibility \* \* \* I notified Denman, the painter, of this."

This lacks two elements to make Murphy, Winders and Freeman volunteers: the time when it was said, and a statement that, when said, these three were "workmen there." We cannot hold that the last item charged for by these three was volunteer work, and that on that account they cannot recover therefor, nor that they gave notice after thirty days from the last item because the last item claimed for was not lienable.

VI. Murphy filed next after the Grain Company. All the payments to Inman had been made by appellant before Murphy started to work, and there were no payments thereafter. The rights of Murphy, then, depend upon whether, after paying out all that is due all the other claimants, the owner has enough to pay Murphy, who filed earlier.

Following Murphy in filing come, respectively, Winders and Freeman. If it be material, Winders did not and Freeman did serve notice within the thirty days. As to both, appellant urges that there is no competent evidence that their claim is unpaid. The same point is made as to Shorthill. But Inman said, though under objection, including that it was incompetent and hearsay, that none of these claims had been paid, and the prices were reasonable. This is not open to the objections. Inman is the principal contractor, and employed these claimants. If they are not paid, he owes them. It follows that his testimony is com-

7. MECHANICS' LIEN: operation and effect: priority.

8. EVIDENCE: conclusion: mechanics' lien: payment.

petent. The witness is the debtor, and may admit competently the fact that the debt is not paid.

VII. Denman follows Freeman in filing. He gave no notice. As to him, as well as appellees other than the Grain Company, it is insisted that they may have no relief, because they furnished after they knew the contract had been canceled, and that they were bound to know, even if not notified of said cancellation. We have disposed of this point.

VIII. The Shorthill Company filed last. It did not give notice within the thirty days. It was not allowed all it claimed, but, as it has not appealed, we cannot enlarge its allowance. The point of failure to prove nonpayment has been disposed of.

IX. No interest should be allowed earlier than from the filing of this opinion, because appellant has tendered to all that it should pay. *Young v. Young*, 179 Iowa 1259.

X. The foregoing indicates that the decree below must be affirmed, but with the following modifications:

a. Tyler, having priority, will be paid ..... \$207.77

b. As to the Grain Company, its act helped to diminish by \$2,000 the fund that would else have been available for the appellees other than Tyler. Were it not for that fact, an estoppel with which these others are not affected, it would be entitled to exhaust what remains after satisfying Tyler, or ..... 886.67.

c. Because this payment was not according to contract, and the others are not estopped, out of this there should be paid:

Murphy ..... \$ 18.50

Winders .....	14.40	
Freeman .....	11.92	
Denman .....	49.50	
Shorthill .....	135.75	230.07
	<hr/>	<hr/>
Leaving to the Grain Company .....		\$656.60

Of the costs here and below, appellant will pay one third and appellee Grain Company two thirds.—*Modified and affirmed.*

GAYNOR, C. J., EVANS and STEVENS, JJ., concur.

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ALFRED ANDERSON et al., Appellants, v. AXEL ANDERSON et al., Appellees.

**WILLS: Probate—Mutual or Reciprocal Wills.** The probate of one  
1 of two wills *which together constitute, in effect, a valid mutual or reciprocal will*, with no provisions for third parties, wholly deprives the unprobated will of any further force or effect as a testamentary instrument.

**WILLS: Validity—Mutual or Reciprocal Wills—Separate Instru-**  
2 **ments.** A valid mutual or reciprocal will results whenever two persons who are under legal or moral obligation to mutually support each other execute, in pursuance of a common intent or agreement, separate wills with identical provisions in favor of each other.

**EVIDENCE: Parol as Affecting Writing—Circumstances Attending**  
3 **Execution of Wills.** Parol evidence of the circumstances attending the execution of two separate wills is admissible to show that they are in reality but one mutual or reciprocal will.

**WILLS: Construction—Substitution on Death of Devisee—Mutual**  
4 **or Reciprocal Wills.** The statutory rule (Sec. 3281, Code, 1897) that the heirs of a devisee shall take the devised property in case the devisee predeceases the testator, has no application to the heirs of a devisee when the right of the devisee to take the devise rests solely on the *unfulfilled* condition that he sur-



vive the testator. So held in the case of a devisee under a mutual or reciprocal will.

*Appeal from Winnebago District Court.*—M. F. EDWARDS,  
Judge.

FRIDAY NOVEMBER 16, 1917.

SUIT in equity to quiet title to real estate. Trial to the court, petition dismissed, and plaintiffs appeal.—*Affirmed.*

*H. A. Brown and Constant Larsen*, for appellants.

*Thompson & Loth*, for appellees.

WEAVER, J.—Carl O. Anderson and An-

1. WILLS: probate: mutual or reciprocal wills.

na Elizabeth Anderson were husband and wife. In the year 1903, having reached mature age and being childless, they each made

a will naming the other as sole beneficiary thereof. The two wills are identical in form in all respects except in date, that of the wife bearing date July 10, 1903, and that of the husband, August 15, 1903. The husband died March 27, 1910, and his will was admitted to probate. The wife died December 18, 1910, and her will was also admitted to probate. The plaintiffs are the heirs at law of the husband, and defendants are the heirs at law of the wife. The petition states the facts above recited, alleges that, under and by virtue of the wills of Carl O. Anderson and Anna Elizabeth Anderson, and of the laws of Iowa applicable to such case, plaintiffs are vested with all the estate of which the latter died seized or possessed, and asks to have such title confirmed in them. The defendants admit all the facts stated in the petition, but allege that the wills were mutual and reciprocal, constituting together a single act or transaction on the part of husband and wife, for

2. WILLS: validity: mutual or reciprocal wills: separate instruments.

the purpose of vesting all their property, whether joint or several, in the survivor of them; and that, upon the death of the husband without revocation of the will upon the part of either, the purposes of their reciprocal devises were fully accomplished by the vesting of all the property of the husband in the widow, and the will which had been made by her for the benefit of the husband in case he should survive her became null and of no effect. They further aver that, as to all of the property in controversy, the said Anna Elizabeth Anderson died intestate, and that they, as her heirs at law, have succeeded to her title, which they ask to have confirmed in them.

3. EVIDENCE:  
parol as af-  
fecting writ-  
ing: circum-  
stances at-  
tending exe-  
cution of  
wills.

The parties stipulated in the trial court to submit these issues for decision upon the pleadings in the case and probate records in the matter of the estate of Carl O. Anderson, together with the affidavit of J. E. Anderson, which was to be treated and considered as a deposition, but subject to all proper objections which might have been urged to the matters testified to by the witness had such deposition been taken in due form. The affidavit so admitted to the record is as follows:

"State of Iowa,        )  
"Winnebago County )       ss.

"I, J. E. Anderson, being first duly sworn do on oath depose and say that I am personally acquainted with Anna Elizabeth Anderson and Carl O. Anderson, husband and wife, during their lifetime. That some time during the year 1903 they desired to make their wills, and they consulted me several times in this connection. They were without children, and about forty-five years old. Their property was ostensibly owned by him, but they owned and occupied a farm near Forest City, which was their sole source of in-

come, and operated it together. Mrs. Anderson came to my office several times, and told me that she and her husband had agreed to will their property so that whoever outlived the other was to acquire the whole, and asked if it could be done that way. Later, Mr. Anderson came in, and told me that they had agreed to make a will which would give all their property to the one that lived longest. Both told me that they would dispose of their property in this way; that they wanted me to draw up wills in order that this agreement might be effectuated. I was and am an attorney-at-law. They usually came in separately, because one or the other had to stay on the farm, where they lived alone. I think that they came in together once, at least. I had several conversations with both parties. They expressed no desire, intent or agreement that any property was to go to either of their heirs, but said the bequest to the survivor was final.

"Early in July, 1903, I drew up two wills in identical terms, whereby each left all his property to the other. One will was signed by Anna Elizabeth Anderson on July 10th, 1913. I told her it was the will I had prepared in accordance with her instructions and the agreement of her and her husband. She said that was right, and that her husband would come in and sign up soon, but he was sick that day.

"About Aug. 15th, 1903, Mr. Anderson came into the office, asked for and signed the will I had prepared for him. I told him also that it was the will that was drawn to meet the agreement between him and his wife. I prepared two wills because it was difficult for both to come to town at once to sign, because I thought it the simplest and clearest way to express their desire.

"Duly verified."

The plaintiff objected to the competency and materiality of each and all of the matters shown by the affidavit.

The trial court found and held that the wills in question were the mutual and reciprocal wills of the husband and wife, constituting together a single transaction, which could be given effect but once, and that, upon the admission of the will of Carl O. Anderson to probate, the purpose of both wills was satisfied and accomplished, and that Anna Elizabeth Anderson died intestate, leaving the defendants, her only heirs at law, vested with the solé right to succeed to her estate. From the decree entered to this effect, the plaintiffs have appealed.

Counsel for appellants contest very vigorously the proposition that the wills were mutual, and especially deny the correctness of the court's conclusion that Anna Elizabeth Anderson died intestate. It is their contention that Mrs. Anderson died testate, and that her will, hereinbefore mentioned, should be given effect according to the statute (Code Section 3281), which provides that:

"If a devisee die before the testator, his heirs shall inherit the property devised to him, unless from the terms of the will a contrary intent is manifest."

The argument is addressed to two propositions: First, that the testimony of J. E. Anderson, the scrivener who drew the wills, is inadmissible for any purpose, and constitutes an attempt to amend or change a will, the meaning of which is clear upon its face; and, second, that plaintiffs' right to the benefit of the devise in the will of the wife is conclusively fixed by the statute above quoted.

I. It may be conceded that extrinsic evidence is inadmissible to vary or change the terms of a will or to make another and different will for the testator, but this does not mean that evidence may not be admitted to show the circumstances which accompanied or attended the making of the instrument, or to identify the papers or writings which in fact constitute the will of the deceased. *Lorieux v. Kel-*

ler, 5 Iowa 196; *Huston v. Huston*, 37 Iowa 668; *Bradbury v. Jackson*, (Me.) 54 Atl. 1068. And this is especially true where, as in the case at bar, it is claimed that two or more writings made at or about the same time are part of a single transaction, and together constitute in law a single will. In such case, resort may be had to all papers of a testamentary or contractual character which entered into the transaction, if any, out of which or in pursuance of which the will was made. See *Murphy v. Black*, 44 Iowa 176. The cited case is quite in point, both in its facts and in the rule of evidence there applied. Under that rule, it was entirely competent in the present case for the appellees to show, if they could, the execution of both wills, and the circumstances, if any, tending to show their mutual or contractual nature. That such testimony tends not to destroy the will of the deceased or to change or vary its terms, but rather to designate and identify the entire instrument, is obvious. The will which the rules of evidence contended for by appellants are intended to protect against extrinsic evidence, is the will as an entirety, and if its terms are to be found or deduced from two or more written parts, it is this completed instrument to which we must look to get at the testamentary intent. In the *Murphy* case, as in this case, the plaintiff planted his claim of right upon the will of a deceased wife, and there, as here, the defendants denied the effectiveness of the alleged will, saying that such will and a will made to the wife by the plaintiff were made and executed at the same time and as a single transaction; that by said wills plaintiff and his wife devised each to the other a life estate in all their property, and that together they devised the remainder, after the death of both, to the defendants. The court construed all these papers together, as necessary to a proper understanding of the wife's will. In so doing, the court says:

"These several instruments were executed at the same time, or as near the same time as could be, and were evidently intended to be parts of the same transaction. \* \* \* In the construction of wills, the intention of the testator is the first and great object of the inquiry, and all papers of a testamentary character must be taken and considered together, and therefrom the intention of the testator ascertained. \* \* \* Substantially all three of these instruments are one, executed at one and the same time, and might well have been contained in one paper."

It is true that in that case the court did not pass upon the validity of the joint or mutual will as such, saying that, for the purposes of that case, it was immaterial whether it be valid or invalid, but suggested by way of query an inclination to hold it invalid. But that doubt no longer exists, and it is now generally conceded that such wills are valid, and this is especially true as between husband and wife or other persons occupying relations which imply legal or moral obligation of mutual support. As between strangers, and in the absence of any such obligation, legal or moral, such a transaction would possibly be held to partake too largely of a mere wager or gambling transaction to command judicial approval; but this is a question which is not found in the present case, and we need not attempt its decision.

In a joint or mutual will for the benefit of the survivor, there is an element which partakes of the nature of contractual obligation. It is one, however, from which either of the parties may recede by a revocation made with notice in the lifetime of the other; but if there be no revocation before the death of one of the parties, the right of the survivor is thereby fixed and determined according to the terms of the mutual will. Much of the confusion and doubt which is liable to arise over cases of this kind is readily removed

if we keep in mind the essential truth that the two instruments *constitute a single will*, and that it is, in all essential respects, the *will of the first to die*, and when such death occurs and the will is thereby made effective and is established in probate, such joint or mutual instrument has served its full purpose, and it has no further existence as the will of the survivor. The generality of this statement is subject to this exception: that if, as sometimes happens, the mutual character of the will is limited to a fractional part of the survivor's estate, and in the same instrument such survivor includes a bequest or devise to some third person or class of persons, then to that extent the instrument is an individual will, and to that extent may be carried out. This exception is illustrated in *Rastetter v. Hoenninger*, (N. Y.) 108 N. E. 210. There the mutual and reciprocal will of husband and wife was restricted in its reciprocal feature to a life estate to the survivor in the property of the other, and the same instrument provided for a devise of the remainder over to a third person; and it was held that, because of this latter feature, the instrument was provable as the will of the survivor. Our own case of *Baker v. Syfritt*, 147 Iowa 49, is also in point.

That the two wills in this case were intended to be reciprocal can hardly be doubted, unless we are to discard all extrinsic evidence. Probably, since the wills bear different dates, the mere fact that each makes the other spouse the sole beneficiary would not, of itself, be sufficient to indicate any agreement or understanding that the two instruments were to be mutual or reciprocal, for such wills might be executed without either party's knowing what the other had done in that respect. But we think there is no rule of evidence which excludes proof of facts tending to show that the husband and wife did act each with the knowledge of the other; that the two wills were drawn by

the same person at the same time and in identical terms and at the joint request or direction of both husband and wife; and that, although the dates of their execution differ by a few days, they were in fact executed in pursuance of a common understanding and purpose. We may, for the purposes of the present case, exclude from our consideration all that the witness J. E. Anderson says of the statements of the parties to him concerning the contents of the wills or of their intentions therein expressed, and there still remains in the record enough to abundantly justify the conclusion of the trial court that the wills were the result of a mutual or reciprocal agreement or understanding between them. To use the language of the Illinois court in a similar case:

"If evidence of a mutual compact is necessary in such case, that evidence is afforded by what the parties did. We cannot see how the situation would be different if witnesses had testified that they heard this husband and wife discuss what disposition they would make of their respective estates, and that they agreed with each other that they would make a joint will such as they did make. The fact that they made such will is satisfactory proof to our minds that it was done in accordance with their mutual compact to dispose of their property in this manner." *Frazier v. Patterson*, 243 Ill. 80.

To reach this conclusion upon the record before us necessitates no disregard of the rules which require the court to construe a will according to its terms when read as an entirety in the light of the circumstances under which it was executed.

II. Does the statute which appellants invoke (Code Section 3281) have any application to this case? In our judgment, it does not. By this provision, which preserves to the heirs of a devisee who prede-

4. WILLS: construction: substitution on death of devisee: mutual or reciprocal wills.



ceases the testator making the devise the right to succeed thereto, a lapse is prevented. That is, if the devise is one which would have vested in the deceased devisee at some time had he lived, his heirs take his place in the same right. They take through the devisee, or (perhaps in more accurate terms) they take in his stead by way of representation or statutory substitution. But their right is not of any better or higher quality than was his. If, then, as we have already indicated, the wills are to be treated as mutual and reciprocal, constituting in legal effect the will of the first to die, it follows that the reciprocal devise, which would have vested in the husband had the wife died first, could never become effective or payable either to the husband or his heirs. In other words, the husband's rights in the estate of his wife were by the will made to depend solely upon his surviving her. He did not survive her, and the will she had made in his favor, conditioned upon his outliving her, can never be made effective for any purpose at the demand of his heirs. This is the logical and necessary result of the most recent holdings on this branch of the law of wills. *Baker v. Syfritt*, 147 Iowa 49; *Campbell v. Dunkelberger*, 172 Iowa 385; *Murphy v. Black*, 44 Iowa 176; *Rastetter v. Hoenninger*, (N. Y.) 108 N. E. 210; *Edson v. Parsons*, 155 N. Y. 555; *Frazier v. Patterson*, 243 Ill. 80; *In re Diez*, 50 N. Y. 88; *Cawley's Estate*, 136 Pa. St. 628; *Dufour v. Periera*, 1 Dick. Ch. 419; *Carmichael v. Carmichael*, 72 Mich. 76; *Lewis v. Scofield*, 26 Conn. 452; *Ex parte Day*, 1 Bradf. (N. Y. Sur.) 476; *Carle v. Miles*, (Kan.) 132 Pac. 146; *Gerbrich v. Freitag*, 213 Ill. 552; together with the numerous authorities cited in these precedents. While these cases are not all closely in point with the one at bar, they do together, though with some variances, afford a fair guide to correct conclusions upon a question which is not frequently before the courts, and the law upon which has not

yet progressed entirely beyond its formative period. But the present case brings it up in its simplest and least complicated form. The will, as we construe it, is wholly reciprocal. Each party thereto makes the other the sole beneficiary. It creates no remainders and no executory devises. The survivor is to take all that either or both has to give, benefits which are subject to no condition or contingency save that of survivorship. As the husband died first, the instrument is to be treated and given effect as his will alone, and when this is done, nothing is left to operate or to be given effect as the will of the survivor.

The judgment of the district court is therefore—*Affirmed.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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W. L. CARTER, Appellee, v. COHEN BROS. IRON & METAL Co.,  
Appellants, et al.

**MORTGAGES: Nature and Requisites—Absolute Deed—Evidence.**

- 1 Evidence reviewed, and held to support a finding that an absolute deed was intended as a mortgage.

**LIMITATION OF ACTIONS: Real Property—Recovery by Means of**

- 2 **Redemption.** An action to redeem from an absolute deed given as a mortgage is not, in any event, barred until the lapse of ten years from the maturity of the obligation.

**TRUSTS: Actions—Limitations—Denial of Trust.** The statute of

- 3 limitations does not commence to run against an action to enforce a trust until the trustee has in some manner repudiated the trust.

**EQUITY: Laches and Stale Demands—Effect as Between Original**

- 4 **Parties.** No delay in bringing suit, short of the statutory period, will amount to a defense as between the original parties.

*Appeal from Polk District Court.*—HUBERT UTTERBACK,  
Judge.

FRIDAY, NOVEMBER 16, 1917.

ACTION in equity to have a conveyance of real estate declared a mortgage, and to make redemption therefrom. Decree for plaintiff for the relief asked in part, and both parties appeal. The defendants Cohen Bros., being first to perfect their appeal, will be denominated the appellants. —*Affirmed.*

*Stewart & Hestell*, for appellants.

*Brammer, Lehmann & Seevers* and *W. B. Brown*, for appellee.

1. MORTGAGES:  
nature and  
requisites:  
absolute  
deed: evi-  
dence.

WEAVER, J.—On August 16, 1904, the plaintiff, Carter, and one Slater owned adjacent lots or fractions of lots in East Des Moines. On that day, they together executed a conveyance of the property by warranty deed to Cohen Brothers, for the alleged consideration of \$1,800. At the same time, and as part of the same transaction, the parties to the conveyance entered into a written contract by which the Cohens undertook to reconvey the property at the price of \$1,910, which Carter and Slater agreed to pay on August 16, 1905, with interest at six per cent, and to pay all taxes and special assessments which might be laid on the property. Time was made of the essence of the contract, with right in Cohen Brothers to declare a forfeiture in the event default was made. In October, 1905, appellants served notice on Carter and Slater of their election to declare a forfeiture. The contract price was not paid, and on March 26, 1908, the Cohens conveyed the property to one Grimes, who thereafter conveyed it to the Grimes Realty Company, the consideration for each of these conveyances being substantially

the full market value of the premises. This action was begun on August 4, 1915. The plaintiff alleges that the deed made by him and Slater, and the contract of reconveyance above mentioned, were made and intended simply as security for the payment of a usurious loan to them by the Cohens, and further alleges that the conveyances by the latter to Grimes and by him to the Grimes Realty Company were received by said grantees with notice of plaintiff's rights in the premises. Upon the case thus stated, plaintiff asks that the writing above mentioned be held and decreed to be, in equity, but a mortgage; that appellants be required to make an accounting of rents and profits received; and that, subject to such accounting, he be given the right to redeem the property.

The trial court found from the evidence that the conveyance to the Cohens and the contract to reconvey were in fact intended as mere security for a loan of \$1,800; that Grimes and the Grimes Realty Company were grantees in good faith and without notice of the defect in the Cohen title; that the rents and profits received by the appellants were substantially equal to the disbursements made by them for taxes and other charges on the property; and that the purchase price paid by Grimes was sufficient to pay the full amount due from plaintiff and leave a surplus in the Cohens' hands, which, when equalized between plaintiff and Slater, made due the plaintiff from the Cohens \$1,328.04, for the recovery of which amount judgment was given the plaintiff.

The foregoing sufficiently states the nature of the issues joined.

I. Speaking first of the case against the subsequent purchasers, it is enough to say that the finding and decree of the trial court are not only well sustained by the evidence, but the record, also, is entirely devoid of any showing

upon which any other conclusion could fairly be reached. This seems not to be seriously denied by counsel for the plaintiff, and we shall not further discuss the subject.

II. Upon the question whether the transaction between the parties to the appeal was a bona fide and absolute conveyance, and not a mortgage, there is, of course, a sharp conflict. The two Cohens testify, with much emphasis and particularity, that the deed was intended only as an absolute conveyance. In this they are corroborated by Slater, who has become very hostile to the plaintiff; and he says there was never any intention on their part to perform the contract of purchase, and that he and plaintiff entered into it on the theory that they could make use of it to "land some of the Jews." It is argued by counsel for appellants that the latter intended by the contract no more than to give plaintiff and Slater an option to repurchase the property, and that appellants had no intention to hold them to any liability as debtors in case they failed to pay the purchase price. Unfortunately, however, the contract reveals not only the express undertaking of plaintiff and Slater to pay the agreed price, but it also provides that, in case of default and failure to deliver possession (which was at all times in the Cohens, either as tenants or as holders of the legal title), they should have the right to proceed at once to collect the entire price in an action at law, or by foreclosure proceedings in equity. It is further shown without dispute that, since that date, both of the Cohens were called to give testimony in another case in which Slater was particularly interested, and, inquiry being made into this transaction with plaintiff and Slater, both appellants testified that it was simply a loan. L. H. Cohen said:

"It seems that we made him a loan at that time and he put up a contract and a deed as security for that loan. He put up a deed as collateral and we gave him a contract back,

and if they didn't pay the money when due, they should forfeit the deed, and if they did pay it, they had to give the deed back. \* \* \* He had a year or more to pay it in. The contract was in writing. He never paid the money back, and we simply forfeited the contract."

Sam Cohen, on the same hearing, said:

"We loaned him (Slater) \$1,800. I know we held a mortgage for our loan and we never foreclosed the mortgage."

When confronted with this testimony on the trial in the present case, each of the Cohens excused the very important discrepancy by saying that, on the other trial to which their attention was called, they had forgotten the particulars of the transaction, but they had since recalled the truth of the matter as having none of the elements of a loan in it. The record as a whole gives rise to very substantial doubt of the claim of appellants based upon the deed, and, on the other hand, we think the preponderance of credible evidence is with the plaintiff. It may be that the plaintiff is as bad and unreliable as counsel insinuate, but we find nothing in the testimony calling for that conclusion. Indeed, it is difficult to read the entire record without recognition of the wisdom of an old and familiar maxim, which, reduced to polite and parliamentary terms, is to the effect that he upon whom the obligation of veracity rests lightly should have a long and accurate memory. The witnesses, as we understand it, were before the trial court, and upon the matter of their credibility the conclusion of that court is entitled to much consideration upon appeal. We are not disposed to disturb its findings in that respect.

III. The appellants plead the statute of limitations, and argue in this court that, as the action to redeem was not begun until more than ten years had passed from the date of the deed, it is now barred. The ob-

2. LIMITATION  
OF ACTIONS:  
real property:  
recovery by  
means of re-  
demption.

jection is not well made. The debt to the Cohens was not due until August 16, 1905, and no attempt was made to declare a forfeiture until October 12, 1905. In no event would the action to redeem accrue until the debt had matured, and this action was begun within the ten-year period from that date. Moreover, if the transaction was a mortgage or mere plan for securing the payment of a debt, the

3. TRUSTS:  
actions: limi-  
tations: denial  
of trial.

Cohens held the title in trust for that purpose, and, until they denied the trust by declaring a forfeiture or by other act indicat-

ing a repudiation of the trust, we think the statute would not begin to run.

Nor is the plea of laches of any avail.

4. EQUITY:  
laches and  
stale de-  
mands: ef-  
fect as be-  
tween orig-  
inal parties.

As between the parties to the agreement, no delay in bringing the suit, short of the period fixed by the statute of limitations, will amount to a defense.

IV. On plaintiff's appeal we find nothing calling for our interference. It is argued that usury was shown, and that this should serve to increase the plaintiff's recovery. The evidence on this issue is not very clear, and the trial court seems not to have found the plea sufficiently sustained, and we concur in that opinion. Some point is also made upon other items which are thought to increase the plaintiff's credit in the accounting, but none are of sufficient merit or sufficiently proved to call for a reversal or modification of the decree.

The decree of the trial court is, on both appeals,—*Affirmed.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

McCULLOUGH REALTY COMPANY, Appellant, v. LAEMMLE  
FILM SERVICE, Appellee.

**LANDLORD AND TENANT: Rent—Change in Law Rendering**

- 1 **Business Unlawful—Effect.** The obligation to pay rent is automatically canceled (a) by the enactment of a valid city ordinance which renders unlawful the business permitted by the lease, and (b) by the vacation of the premises.

**LANDLORD AND TENANT: Leases—Business Permitted—Specific**

- 2 **and General Clauses—Ejusdem Generis—Construction.** A *general* clause or word designating the business which may be carried on under a lease, immediately following a specific designation of the business permitted, will be construed, if such is the intent, as including only a business of the like kind and nature as that specifically designated. So held where premises were leased "for Film Exchange and film and *theater supplies* purposes only," it being held that the clause "theater supplies" was limited to supplies incidental to the film exchange business.

**CONTRACTS: Construction—Mutual Construction—Effect.**

- 3 **Principle** recognized that the mutual and harmonious construction of a contract by the parties thereto, prior to litigation, is very persuasive evidence of its true meaning.

*Appeal from Scott District Court.—A. J. HOUSE, Judge.*

FRIDAY, NOVEMBER 16, 1917.

ACTION at law to recover rent alleged to be due plaintiff for property situated in the city of Davenport, Iowa, by virtue of a written lease. There was a trial to a jury. The execution of the lease was admitted, and defendant assumed the burden of proof and offered its testimony. Plaintiff moved for a directed verdict, which motion was overruled. Plaintiff offered no testimony, and thereupon defendant moved for a directed verdict in its favor, and the motion was sustained. The plaintiff appeals.—*Affirmed.*

*Cook & Balluff*, for appellant.

*Carl Lambach*, for appellee.



1. LANDLORD  
AND TENANT:  
rent: change  
in law ren-  
dering busi-  
ness unlawful:  
effect.

PRESTON, J.—The facts are not in dispute, though plaintiff claims the case should have gone to the jury as to one proposition, if its theory of the case be adopted. The action is upon a written lease, one provision of which is:

“Said premises are leased for Film Exchange and film and theater supplies purposes only, and are not to be used for any unlawful or offensive purposes whatever.”

The lease further provides that the lessee should not assign or sublet the premises, or any part thereof, without the written consent of lessor. The lease was to run from December 15, 1914, to May 15, 1916. Defendant went into possession and paid rent for nine months. In May, 1915, the city council of the city of Davenport passed an ordinance known as the Building Code, which made it unlawful to manufacture, keep, store, handle or repair any inflammable motion picture films in buildings which are not fireproof, etc., which ordinance was to take effect 60 days after its passage. It is conceded that the building in question is within the prohibition of the ordinance.

By its answer, defendant pleaded the ordinance, and that the further conduct of its business, as contemplated by the lease and as restricted thereby, was entirely forbidden by the ordinance, where the same had been lawful prior to the passage of the ordinance; that, pursuant to the ordinance, notice was duly served upon defendant by the city, requiring it to vacate the premises; that plaintiff caused to be prepared and introduced before the city council an ordinance substantially the same as that afterwards incorporated in the Building Code; and that, by reason of the activities of plaintiff and its agent, the ordinance was passed by the council; that it was importuning the council to pass said ordinance and was actively engaged in securing its passage for the sole purpose of compelling defendant to va-

cate; that, shortly after the passage of the Building Code, plaintiff orally notified defendant to vacate the premises, and was informed by defendant that it would vacate as soon as required by the ordinance, or sooner if a suitable location could be found; that defendant thereafter did vacate and complied with the order of plaintiff and the city; that, by reason of the facts stated, defendant was deprived of the entire beneficial use of the premises.

It is shown by the testimony that the handling of films is 99 per cent of the business of a film exchange; that an office is maintained for film purposes only, and that the films cannot be kept at one place and the office at another; that supplies sold by a film exchange are incidentals carried for the accommodation of film users, and are not a source of direct profit, nor a substantial part of the business; that there are regularly established businesses, of separate and distinct character, that make and sell the different articles used about a theater, or for theatrical performances, and that these are distinct from the film exchange business.

Appellant contends that the principal point in the case is as to whether defendant was deprived of the beneficial use of the premises, and appellee in its argument relies upon this proposition for affirmance. Appellant argues that defendant was not deprived of such use, while appellee contends that it was. There is little, if any, dispute between counsel as to the law of the case. Appellant's legal propositions are: that a partial destruction of the subject matter of the lease does not excuse the payment of rent (citing *In re Bradley*, 225 Fed. 307); and that lessees are not released from liability for rent by the passage of a city ordinance restricting uses of the leased property, if they are not deprived of the beneficial use of the premises, and if the premises may be used for other purposes (citing 24 Cyc. 1148, *Kerley v. Mayer*, 31 N. Y. Supp. 818, *Coffin v. United*

*Mfg. Tr. Co.*, 147 N. Y. Supp. 463). Appellant also cites cases to the effect that a lessee of premises destroyed during the term by fire or by unavoidable accident is not relieved from an express covenant to pay rent unless the destruction is of the entire subject matter of the lease, so that nothing remains capable of being held or enjoyed; and argues that the same rule applies here. On the other hand, it is contended by appellee that, where the lessee is deprived of the beneficial use of the premises by a subsequent change of law, the obligation to pay rent terminates (citing *Hooper v. Mueller*, [Mich.] 123 N. W. 24, *Heart v. East Tenn. B. Co.*, [Tenn.] 113 S. W. 364, *Hart v. City Theaters Co.*, 128 N. Y. Supp. 678); and further, that the term "theater supplies" is ambiguous and of uncertain meaning, and therefore the subject of construction, and that language having a meaning understood by trade can be explained, and such meaning will be adopted (citing *Louis Cook Mfg. Co. v. Randall & Dickey*, 62 Iowa 244); that general words are restrained by the subject matter—the rule of *ejusdem generis* (citing *Mahaffy v. Mahaffy*, 63 Iowa 55, *Easterbrook v. Hebrew L. O. Society*, 85 Conn. 289 [82 Atl. 561], *Jewel Tea Co. v. Watkins*, 26 Colo. App. 494 [145 Pac. 719], *Hawkins v. Great Western R. Co.*, 17 Mich. 57, 9 Cyc. 584); that the objects in view and the purpose of contracting are to be considered (9 Cyc. 587, H, *Chamberlain v. Brown*, 141 Iowa 540, 549); that the conduct of the parties and their practical construction of the agreement will be adopted (*Chamberlain v. Brown*, supra); and that, of two constructions of a lease, that which is most favorable to the lessee will be adopted (*Chamberlain v. Brown*, supra). Appellee contends that the *Bradley* and *Kerley* cases cited by appellant are not in point, because, in the first case, the decision turns on the question of whether a saloon means a place for the sale of intoxicating liquors, and in the *Kerley* case, the question was as to the

kind of a saloon conducted; and that the other cases cited by appellant are not contrary to the holding of the lower court, and appellee's claim.

It is thought by appellant that the premises were used in part only for purposes prohibited by the ordinance, and that, in addition to handling and storage of films, defendant used the premises as an office, which was required for filing appliances and correspondence, and that there was other work done in the office besides handling of films; also that defendant carried other theater supplies outside of films, which it could continue to handle after the passage of the ordinance. It is conceded, however, by appellant that the handling of these incidental supplies was a small part of the business. Appellant contends that the clause in the lease permitting the use of the premises for film exchange and film and theater supplies purposes permits defendants to handle, in addition to the films themselves, film supplies and theater supplies, and that the language should be so construed. And they say that, therefore, the entire beneficial use of the leased premises was not prevented by the ordinance.

2. LANDLORD  
AND TENANT:  
leases: business permitted:  
specific and general  
clauses:  
*ejusdem generis*: construction.

But we think that, under the record made, appellee's contention ought to be sustained. The lease ought to be construed in the light of all its provisions, and the term "theater supplies," as used in the lease, is to be construed in the light of the words and phrases in connection with which it is found. The specific purpose for which the premises were leased is set out; that is, for the conduct of a film exchange, wherein films are to be kept, stored and distributed. This is a particularized line of business, and, concededly, the principal part of the business,—indeed, substantially the entire business. The specific purpose is supplemented by the addition of the general term "theater supplies." Under the undisputed testimony,

the last phrase, as understood in the film business, includes those minor incidentals which are kept by a film exchange for the accommodation of the trade, but necessary to conduct the business: small matters, such as cement, lugs, and other parts which are broken occasionally in moving picture machines and have to be quickly replaced. As said, it is appellee's contention that, under the authorities before cited, the rule in construction of contracts is that a general term, or sweeping clause, following a specific term, is to be construed in the light of the specific term which it follows, and is to include only matters of like kind or nature, and, further, that the general term must be read in the light of the particular business about which the parties were concerned when the lease was made, and they cite *Jewel Tea Co. v. Watkins*, supra, and other cases. See, also, *Emery & Co. v. American Ins. Co.*, 177 Iowa 4. This being so, it would seem that, under the evidence, the entire beneficial use of the leased premises was prevented by the ordinance, for the reason that, under the testimony, the theater supplies which were sold as incidental to the film exchange business were only items of insignificant consequence, and were sold only as incidental to the conduct of the business of a film exchange. They do not constitute a line of business, as conducted by defendant. When the business of conducting a film exchange was prohibited, these incidental items necessarily went with the business. Defendant would have no use for the building as an office if it was prohibited from conducting its business. Appellee puts it this way: that it is a case of nothing for dinner and water for dessert.

Furthermore, it would seem from the

3. CONTRACTS :  
 construction :  
 mutual con-  
 struction :  
 effect.

record that plaintiff itself, by its officers, construed the lease as we do, although it seems that defendant in the lower court claimed that, by the conduct of plaintiff, defendant was

evicted; but they say they do not now make such a claim. They do claim, however, that the conduct of plaintiff in attempting to obtain the passage of the ordinance, or Building Code, and in ordering defendant out of the premises, indicates that plaintiff construed the lease as defendant does. The evidence is undisputed that, when the proposed ordinance came up, the president of the plaintiff company told defendant's officers that they would not be able to occupy the building and would have to make arrangements in some other place, on account of the increased rate of insurance, and that, after the passage of the ordinance, plaintiff's president said to defendant, "I see the ordinance was passed; you people will have to get out of here about the first of July;" and was informed by defendant that that was impossible; that defendant understood it had 60 days after notice from the city; that it would get out after notice from the city; so that it appears that all parties understood that the lease was for a film exchange, and that the clause referred to meant the business that defendants were carrying on. Plaintiff seems to have recognized that, when the Building Code was passed, that ended defendant's business in the building.

Without further discussion, it is our conclusion that the trial court rightly determined the matter, and the judgment is, therefore,—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

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ELIZABETH MITCHELL, Administratrix, Appellant, v. PHILLIPS  
MINING COMPANY, Appellee.

**MASTER AND SERVANT: Workmen's Compensation Act—Rejection of Act—Presumption of Master's Negligence—Force and Effect.** The declaration of the Workmen's Compensation Act that a master who has elected to reject the provisions of the act shall be presumed to have been proximately negligent in

case the servant is injured, has the force and effect of substantive evidence, and makes a prima-facie case for the servant on the question of the master's negligence—a case which is not, *as a matter of law*, overcome by any amount of evidence of care on the part of the master, except, perhaps, in cases revealing a quite exceptional state of facts. (Sec. 2477-m, Code Supp., 1913.)

**NEGLIGENCE: Acts Constituting—Mines and Mining—Failure to**  
**2 Timber Roof or Take Down Same.** Failure to timber the roof of a known dangerous haulageway, or to take down known dangerous portions thereof, may amply justify the jury in finding negligence on the part of the master.

**MASTER AND SERANT: Place of Work—Mines and Mining—**  
**3 Shifting Duty.** In the progress of mining, that which today may constitute the miner's place of work, with consequent duty on his part to prop and timber, may tomorrow constitute a haulageway, with consequent duty on the master to prop and timber.

**EVIDENCE: Custom—Mines and Mining—Propping and Timber-**  
**4 ing Roof.** Evidence is admissible to show that the master's failure to prop and timber the roof of a mine was contrary to the custom prevailing in the mine.

*Appeal from Monroe District Court.—*SENECA CORNELL,  
 Judge.

NOVEMBER 16, 1917.

ACTION to recover damages for the death of intestate, which resulted from a fall of slate in defendant's mine. Trial to a jury, and at the close of all the testimony, the trial court sustained defendant's motion for a directed verdict. Plaintiff appeals.—*Reversed.*

*John T. Clarkson*, for appellant.

*F. G. Orelup*, *F. D. Everett* and *J. C. Mabry*, for appellee.

1. MASTER AND  
SERVANT:  
Workmen's  
Compensation  
Act: rejection  
of act:  
presumption  
of master's  
negligence:  
force and  
effect.

PRESTON, J.—It is alleged in the petition that plaintiff's intestate was an employee of the defendant as a coal miner, and, while in the performance of his work in the mine, he sustained an injury by a fall of slate, causing injuries which resulted in his death; that the defendant company had, prior to the injury, rejected the terms of the Iowa Workmen's Compensation Law. The answer alleges that the injuries sustained by deceased were not caused by any negligence or fault on the part of defendant, and that there was no negligence on its part which was the proximate cause of the injury.

Plaintiff introduced evidence to sustain the allegations of her petition, but did not, in the first instance, attempt to show negligence of the defendant, and in proving the allegations of her petition, no additional facts were developed tending to show that defendant was negligent, nor that it was free from negligence. Plaintiff relied upon the presumption arising from the injury, as provided in the Workmen's Compensation Act. Had the case stopped there, plaintiff would have been entitled to a verdict at the hands of the jury. Thereupon, the defendant assumed the burden, and introduced its testimony, tending to show—and, as it claims, it did show—that defendant was not guilty of negligence. Plaintiff then introduced evidence in rebuttal, tending to show, as she claims, that defendant was negligent; and defendant introduced surrebuttal evidence.

The case is presented in this court by plaintiff, appellant, on two theories: First, that the fact of plaintiff's intestate's having sustained an injury arising out of and in the course of his employment, aided by the presumption, which counsel contends has the force of evidence, established the fact of negligence, and that evidence introduced by the defendant tending to show that it was free from negligence



would raise a conflict in the evidence, and that it was a question for the jury to determine whether the evidence introduced by the defendant was sufficient to overcome the presumption; and second, that there was evidence, aside from the presumption, tending to show negligence on the part of defendant, and therefore the case should have been submitted to the jury for a determination of the disputed facts.

1. As to the presumption. The statute (Section 2477-m, Paragraph 4, Code Supplement, 1913,) provides:

"In actions by an employee against an employer for personal injury sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employee was the direct result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence."

One of the questions presented involves the construction of the statute before quoted, and a determination of the office and force of such presumption. Appellee's contention is, substantially, that the office or function of the presumption in question is to fix the burden of proof, and determine the order in which the evidence shall be introduced; that all the statute does is to cast upon the defendant the burden of affirmatively showing that it was not guilty of any negligence which was the proximate cause of the injury, and that here the statutory presumption ends; that at the most it raises only an inference. It is said by appellant that almost countless presumptions are met with throughout the domain of jurisprudence; that some are so strong as to be conclusive and cannot be rebutted, others so slight as to disappear in the presence of the truth established against them, and between these two extremes are many others of varying de-

grees of strength and weakness; that the countless definitions and the many divisions of presumptions which have been formulated afford but little aid in determining the character, the strength or office of a presumption in legal procedure. In Jones' Commentaries on Evidence, Vol. 1, Sec. 9, we find this language:

"When we set out to define a word like 'presumption,' as used in the law of evidence, we are weighted with the responsibility not only of furnishing kaleidoscopic definitions of the term so frequently used, but also by the knowledge that the word so used is frequently the wrong word. Presumption, assumption and inference are indiscriminately made use of. To attempt to coin a new word would be to throw out of gear the machinery of a host of text-books and a myriad of judicial decisions."

In the same work and volume, Sec. 9a, the author states that "there seems no excuse for regarding presumption and inference as synonymous," and "the difference is that a presumption is a mandatory deduction, while an inference is a permissible deduction which the reason of the jury makes without an express direction of law to that effect." And in the same connection, to illustrate this distinction, referring to a certain presumption, he quotes from a court decision as follows:

"The presumption has a technical force or weight, and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption; but, in the case of a mere inference, there is no technical force attached to it."

The author, in the same volume, Sec. 9c *et seq.*, gives a classification of the different presumptions. Some of the cases state it thus: That evidential presumptions rest on rules making a known set of facts the legal equivalent of an unknown fact, in the absence of evidence to the contrary; that this is their primary effect, but that incidentally they

cast the burden of adducing evidence in rebuttal on the party against whom they operate, requiring him to go forward with the trial, and if he fails to do this, then the presumption stands for absolute proof; and that non-evidential presumptions may be regarded as making a prima-facie case as to the fact assumed, thus casting on the opposite party the burden of adducing evidence to the contrary. They do this, not by virtue of a rule of law making certain facts of which evidence has been adduced the equivalent of the fact assumed, as is the case with evidential presumptions, but by virtue of their influence as rules of positive law on trial procedure. Their effect in this respect is, however, the same as that of evidential presumptions. They stand for proof of the fact assumed, but only until contradicted; and, when evidence in rebuttal is adduced, the presumption is dispelled, the prima-facie case disappears, and all the evidence as to the fact formerly assumed is to be considered as a whole, and the jury is to find according to the truth.

Appellee cites Lawson on Presumptive Evidence, pp. 659, 661, Rules 119, 120, in regard to presumptions whose office is to fix the burden of proof, and that such presumption disappears in the presence of positive, uncontradicted testimony on the same subject, which shows that the presumption as applied to the state of facts appearing in evidence would be untrue. Also *Befay v. Wheeler*, (Wis.) 53 N. W. 1121, 1123; 16 Cyc. 1087, Par. D; *Seaboard Air Line R. Co. v. Thompson*, (Fla.) 21 Am. Neg. Rep. 62; Elliott on Evidence, Secs. 91, 92 and 93; Wigmore on Evidence, Secs. 2490 and 2491; and other cases. Also *Baker v. Chicago, R. I. & Pac. R. Co.*, 95 Iowa 163, 171; *Crawford v. Chicago G. W. R. Co.*, 109 Iowa 433; *Ames v. Waterloo & C. F. R. T. Co.*, 120 Iowa 640, 646.

The last three cases were railway crossing cases. The presumptions referred to are in regard to contributory

negligence, and, because of the instinct of self-preservation, the presumption is indulged that the party was in the exercise of due care for his own safety. But this is an entirely different proposition. The presumption arises because of the instinct of self-preservation, and arises only where there are no eyewitnesses. If there are eyewitnesses, the presumption does not obtain at all. The holdings are that the presumption is not conclusive, but rebuttable, and the evidence may be so clear and strong as to be indisputable, or the physical facts may be such that the court can say, as a matter of law, that the presumption has been overcome. This is so, too, in some cases where there is evidence on both sides, and, under the doctrine of the case of *Meyer & Bros. v. Houck*, 85 Iowa 319, and later cases, if the evidence is so overwhelming on one side, or so slight on the other, that the court would not permit a verdict to stand, then a verdict may be directed. And there may be exceptional cases where there is only the presumption on one side, instead of evidence, where the same rule would apply. It is true, of course, as appellee contends, that there are some presumptions the office of which is to fix the burden of proof and determine which party shall first go forward with the testimony, but we shall see later that the presumption in question has more force than that. If that was the intention of the legislature, it would only have been necessary to provide, as the later clause in the statute does, that the burden of proof is upon the defendant. But there is an additional clause preceding that, providing that it shall be presumed that the injury was the result of the negligence of the employer. Appellant argues that appellee's contention is illogical, for that, if the provision as to the presumption of negligence in the statute means no more than shifting the burden of proof, then the latter part of the statute would be simply rebutting that presumption; that is, that, accord-

ing to appellee's contention, the employer is required only to rebut the burden of proof.

The purpose of the Compensation Acts, as stated in some of the authorities, is, substantially, that they form a legislative response to a public demand that a system be afforded whereby employers and employed might escape the evils of personal injury litigation, and whereby employees not guilty of wilful misconduct or intoxication might receive at once reasonable compensation for injuries received in their employment, and on the theory that the more hazardous industries should be made to bear the financial losses sustained by the workmen engaged therein through personal injuries. The legislature, in passing the Iowa law, did not make it compulsory, but rather an elective plan. Before the passage of the law, an injured workman had the burden of proving negligence. In many instances, this was difficult or impossible. Ordinarily, the facts and conditions were within the knowledge of the employer, unless it was in the employee's working place. Under the act, the employer was given the right to elect whether he would reject the compensatory features of the law, and in that case he was deprived of the benefit of certain common-law defenses. In addition to this, a radical change was made with reference to the matter of evidence, and the injured party need do no more than prove the injury in the discharge of his duties, to make out a prima-facie case, and the act itself not only places the burden of proof upon the defendant, but provides, in addition, that the employer shall be presumed negligent. It would seem quite clear that the legislature did not intend that an employer who rejected the provisions of the act should be given an advantage thereby, over employers who accepted the provisions of the act. It is a reasonable inference that the legislature intended that the employer rejecting should pay damages, and that it should be reasonably certain that the employee could collect them,

unless through his own wilful act or intoxication, and that the provisions of the act should be an inducement to influence the employer to remain under the law and pay compensation in accordance with its terms. The act, and particularly the section now in question, should be construed so as to carry out the purposes and objects of the act. This being so, there is little room for doubt that the legislature intended that the evidence of the injury should be considered as evidence of negligence, and to prove the fact of negligence by operation of the presumption. The presumption is rebuttable, and the defendant may show by evidence that it was not guilty of negligence, or that the negligence was not the proximate cause of the injury. We shall see later that it is a question for the jury to say whether the presumption has been overcome. Ordinarily, this will be so, but there may be exceptional cases where the rule in *Meyer & Bros. v. Houck*, supra, will apply. In other words, the strength of the presumption will depend somewhat upon the facts of each case. As said, the evidence for defendant might be so convincing or indisputable as to show the defendant free from negligence, or that plaintiff was guilty of wilful misconduct or intoxication, or that, considering the presumption for plaintiff as evidence, a verdict ought not to stand. Or the physical facts might be such as to preclude a recovery. Or it might be possible in some cases that, in proving the accident, additional facts might appear which would exonerate the defendant. But such is not the case here, as we shall see when, later in the opinion, the evidence is referred to.

Plaintiff likens the statute in question to the fire statute and our decisions thereunder, and we are of opinion that such decisions are in point. Appellee contends that the fire statute is not applicable, because that statute creates a liability from the setting of the fire, and there is nothing said in the statute about any presumption. But the liability un-

der the fire statute is not absolute, as contended by appellee; for we have held that the railway company may show that its engines were in proper condition and properly operated, etc., and therefore that it was not guilty of negligence. And, though that statute does not use the word presumption, we have held that there is a presumption of negligence arising from the setting of the fire. Appellant cites *Stewart v. Iowa Central R. Co.*, 136 Iowa 182, 185. In that case it was shown that, under an earlier case, it was held that the effect of the statute was simply to change the burden of proof; but a rehearing was granted in that case, and on rehearing it was said:

"Under the statute, and the decisions of the court, the occurrence of the fire is prima-facie evidence of defendant's negligence. The fire itself is evidence of negligence. It is, however, only prima-facie evidence. But it establishes negligence, which must be regarded as a fact until contradictory evidence requires a different conclusion. There must of necessity be conflicting evidence in the case. The fire, under the law, is evidence of defendant's negligence; the good condition of the engine, the diligence of defendant's employees, and other facts, are evidence of defendant's care. Here is conflicting evidence which must be determined by the jury."

Quoting from another case, it was said in the *Stewart* case:

"Under the rule existing in this state, the mere happening of the fire not only shifts the burden of proof to defendant to show freedom from negligence, but stands as substantive evidence of neglect on the part of the company operating the train."

And the *Stewart* case approved the rule laid down in the prior cases, and said further:

"Considering that evidence of negligence is still necessary to a recovery, the unmistakable genius of the rule is

that the presumption arising from proof of the fire shall be given the effect of affirmative evidence, establishing *prima facie* the fact of negligence. If the defendant shall elect not to introduce any evidence, the presumption is to have the force of proof, affording warrant for the passing of judgment. If the defendant shall elect to proceed, the presumption continues, having all the force of substantive evidence of negligence, until overcome by the weight of the affirmative evidence introduced in proof of due care. It follows from this, and manifestly, that the office of the presumption is inadequately, if not incorrectly, expressed, in saying that its effect is simply to change or shift the burden of proof. From the practical viewpoint, the situation does not involve a shifting of the burden of proof. The plaintiff assumes the burden of proving negligence only as he is required to prove the fire, and that it was caused by defendant; whereas, from the beginning, the burden is on the defendant to make affirmative proof that it was in the exercise of due care."

See also *Hemmi v. Chicago, G. W. R. Co.*, 102 Iowa 25, 28.

In *Currie v. Seaboard Air Line R. Co.*, 156 N. C. 419, *Northwestern Mut. Fire Assn. v. Northern Pac. R. Co.*, 68 Wash. 292 (123 Pac. 468, Ann. Cas. 1913E, 968), and other cases cited in *Pennsylvania Fire Ins. Co. v. Ann Arbor R. Co.*, 11 Neg. & Comp. Cases, 193, 204, 210, the holdings were, in fire cases, that, where there is the presumption alone on one side, and evidence opposing it, it is a question for the jury to determine whether the presumption has been overcome by the evidence. In one case, the language used was that the defendant's showing which it made was nothing more than evidence opposed to evidence, and that it was for the jury to pass on the credibility of the witnesses, and determine whether its evidence was sufficient to rebut the case made by plaintiff.



So it is in the instant case. The injury to deceased was evidence of negligence. We think the statute in question is as strongly in favor of treating the presumption as having the force of evidence as is the fire statute, if indeed it does not more strongly favor such a construction, for the reason that the statute itself provides that there is a presumption of negligence. Though not cited, we think some of our passenger cases have a bearing. In *Larkin v. Chicago G. W. R. Co.*, 118 Iowa 652, 655, the point was not directly decided that a plaintiff might rely on the presumption from the happening of the accident only, and it was not necessary to determine that question, because there was other evidence in the case for plaintiff, proper for the jury to consider in aid of the presumption; but it was said, at page 657:

"To say the least, it should require a peculiarly strong and conclusive array of proof to justify the court in withdrawing such an issue from the jury. The question thus presented involves something more than burden of proof or order of trial."

We are of opinion that, under the record made, the case should have been submitted to the jury for its determination as to whether the statutory presumption of negligence had been overcome, and that the case should be reversed on this ground. We think, too, that there are some circumstances in the record which it would have been proper for the jury to consider in aid of the presumption, and, as before stated, appellant contends that, aside from the presumption, there was sufficient evidence to take the case to the jury.

In view of our conclusion that the case should be reversed on the first ground, we would not be justified, perhaps, in any lengthy discussion of the second proposition, and we shall refer to that as briefly as may be.

2. As to the second proposition relied upon by appellant, in view of the directed verdict for the defendant, the evidence should be construed in its most favorable light in favor of plaintiff. It is contended for appellant that, under the evidence, she was entitled to have the case submitted to the jury on questions of fact as to whether or not the defendant company was negligent in its failure to take down dangerous portions of the roof over the roadway, or properly support the same by placing cross timbers thereunder. There is a conflict in the evidence at some points, and at others there is no dispute. The jury could have found that deceased was injured while working in Room 34. Appellee's contention is that this was his room, or working place; while appellant contends that, under the circumstances shown, it was not his working place, or at least it was a question for the jury whether it was, or whether, under the custom which was shown, it was only a roadway, and a place over which deceased did not have control, and because of the fact that there was a slip at the point in question, it was the duty of the company to timber the roof or take down the defective parts of it. Deceased was loading a car of coal, and the car was located some 8 or 10 feet back from the end of the track in the room. The car was being loaded at that point because of coal scattered along the roadway by the shots that had been discharged the night previous. Ordinarily, the place of loading the car was at the end of the track, and this was 8 or 10 feet from the working face of the coal in the room, so that the car was about 20 feet back from the face of the room. The room at the place where the slate fell was 18 or 20 feet wide. At the side of the track, in the room, debris, or gob, as the miners call it, had been placed. The room had been driven in from the entry about 60 feet, and a wooden track laid into it about 50 feet. The roof at the

2. NEGLIGENCE:  
acts consti-  
tuting: mines  
and mining:  
failure to  
timber roof or  
take down  
same.

point where it fell was sounded by deceased and the mine foreman, and perhaps another workman, and it was thought to be safe. It appears, however, that there was a slip in the roof where the slate fell, which is ordinarily considered as a dangerous condition, as the portion of the roof where the slip is located is likely to fall at any time, even though it may sound solid when tested. It is shown that the only practical and reasonably safe method to pursue in such a case is to cause cross timbers to be placed, by placing a prop on each side of the track, with a cross timber over the props and underneath the roof to support it. This was not done. Because of the slip, the mine foreman was suspicious of the condition of the roof. He testified:

"My suspicion was naturally aroused as to that particular piece of slate because it had already been broken off."

So that the mine foreman had notice of the dangerous condition. Plaintiff was injured by a piece of slate falling from the roof. There were props and timbers at hand. The ordinary height of the coal in the room was  $4\frac{1}{2}$  feet, but at the place where the injury occurred, it was  $6\frac{1}{2}$  feet, because some of the roof at that point had fallen prior to that time. The piece of slate that fell was from what is termed by the miner a "jog" in the roof, and was in that portion of the roof regarded and termed by the miner as a part of the permanent roof. It was not draw slate.

Appellant contends, and there is evidence in support of the claim, that deceased had properly placed his timbers in the usual way to support the roof, in so far as the particular kind and character of timbering was concerned which the miner is ordinarily required to do in his working place, in the performance of his work. The mine foreman testifies that, when he was in the room, about an hour before the accident, he noticed the props of the room and noticed that the place was securely propped, and says:

"It was a part of my business when I went in there to see about the location of the props, and whether it was securely propped."

The defendant contends that it was the duty of deceased to look out for his roof and to prop and timber it because it was his working place. But the statute does not define or fix the limits of his working place.

As the work progresses in a mine, under some circumstances, there comes a time when it is a question as to what is the working place of the miner, and whether it has passed out of his control and the duty devolves upon the company to look after the roof; that is where the employer's duty begins and the employee's duty ceases.

We may not have referred to all the circumstances, but it is appellant's contention that, under the evidence shown, it was proper for it to show, by evidence of custom in this mine, that it was the duty of the company to place cross timbers over the place where the slate fell, which she says was a roadway, or to take down the defective roof, and that this is especially true where there is a slip in the roof. We think the evidence as to the custom was competent. Appellee's contention as to this evidence is that such evidence would violate the statute and the miner's agreement. But we think this is not so because, as already stated, neither the law nor the contract fixes his working place. The jury could have found that deceased had propped and cared for the roof over that part which was his working place. We think the evidence of custom was competent to show that it was the duty of the defendant, under the circumstances here shown, to look after the roof. *Thayer v. Smoky Hollow Coal Co.*, 121 Iowa 121, 125; *Taylor v. Star Coal Co.*, 110 Iowa 40; *Carnego v. Crescent Coal Co.*, 163 Iowa 194, 199.

3. MASTER AND  
SERVANT:  
place of work:  
mines and  
mining: shift-  
ing duty.

4. EVIDENCE:  
custom:  
mines and  
mining: prop-  
ping and tim-  
bering roof.

Appellant cites Code Supplement, 1913, Sections 2489-12a, 2489-13a and 2489-14a, as to the duties of a mine foreman, and Section 2489-16a, as to the duty of the miner. What has already been said is all that is necessary as to these provisions.

We are of opinion that there was a jury question as to this second proposition. The judgment of the district court is reversed, and the cause remanded for further proceedings in harmony with this opinion.—*Reversed.*

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

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W. H. REILLEY, Appellee, v. A. L. KINKEAD, Appellant.

**JUDGES:** Disqualification—Bias and Prejudice. Temporary irritations between counsel and the presiding judge are not sufficient to disqualify the judge.

**JUDGMENT:** Opening or Vacating—Defaults—Sufficiency of Showing—Negligence. A litigant is not *personally* negligent in relying upon a reputable attorney, whom he has duly employed, to take such action as will properly present his defense.

**JUDGMENT:** Opening and Vacating—Defaults—Negligence of Attorney. Accidental misplacement by an attorney's assistant of the files in a newly commenced cause, with consequent failure by the attorney to appear, and the entry of default judgment, should not be considered negligence on the part of the attorney, and such default should be set aside on prompt motion accompanied by a fair showing of meritorious and good-faith defense.

**APPEAL AND ERROR:** Notice—Specification of Judgment or Order—Sufficiency. An appeal "from the judgment," without further specification, is sufficient to bring up for review *the order overruling a motion to reopen the judgment by default.*

*Appeal from Woodbury District Court.*—GEORGE JEPSON, Judge.

FRIDAY, NOVEMBER 16, 1917.

FROM a judgment entered by default, and from the court's refusal to set the same aside and permit defendant to answer, he appeals.—*Reversed and remanded.*

*T. F. Bevington*, for appellant.

*D. H. Sullivan*, for appellee.

WEAVER, J.—On March 18, 1916, plaintiff caused original notice to be served upon defendant to the effect that, on or before April 28, 1916, a petition would be filed in the court below demanding a recovery of judgment upon an account for work and labor. The notice was made returnable on the second day of the May, 1916, term of the district court, beginning on the 8th day of that month. The petition was filed April 24, 1916. No appearance being entered or answer filed, the court, Hon. J. W. Anderson, Judge, presiding, entered the defendant's default, and rendered judgment against him on May 24, 1916. On May 25, 1916, defendant appeared by Mr. Bevington, his counsel, and moved to set aside the judgment and default, and for a recall of the execution which had been issued thereon. In the same connection, said counsel offered to pay the costs which had been made in the case, and asked leave to file a verified answer and counterclaim. He also tendered an answer, taking issue on the plaintiff's claim and setting up a counterclaim in an amount equal to or greater than the claim sued upon. The motion was also supported by Mr. Bevington's affidavit, as follows:

"I, T. F. Bevington, on oath depose and say that I was employed by the defendant just a few days prior to the commencement of the May term, 1916, of this court. That the defendant was sent to me, and that, prior to his appearance with the original notice and copy of the petition, I was entirely unacquainted with him; that, on the occasion of his calling at my office, I talked with him about ten

minutes and turned him over to Norman Lewis, my second assistant, for the purpose of having Mr. Lewis take down a statement of his defense and counterclaim, which Mr. Lewis did. That, just prior to the commencement of the May term of said court, and for ten days thereafter, an exceedingly large number of new cases were coming into my office, wherein I was employed in some instances for the plaintiff, and some for defendants; that, because of the exceedingly large office calendar kept and maintained by me as an attorney, I have for some time been obliged to have two assistants, a regular stenographer, and on many occasions an extra stenographer. That the stenographer at that time employed was one Kittie Gardner, who has recently come to my office from her home at Rock Rapids, Iowa; that, at the very beginning of the May term, I was making an effort, with the aid of my two assistants, to have Miss Gardner file in their proper order actions in which I was interested for plaintiffs, and also in their proper order actions in which I was interested for the defendants; that, according to my usual practice, I first prepare the matters and things coming up at the May term in actions where I represent the plaintiffs, and then look after the matter of appearance, making the motions, demurrers or filing answers in matters where I appear for defendants; that, in accordance with my usual custom, I had one basket on my desk wherein the papers in connection with the new causes of action in which I appeared for plaintiffs are kept, and one basket wherein the papers in actions where I appeared for the defendants are kept. That I had never met the defendant in the instant case before, and gave him such a short interview, that personally, in looking over the papers and pleadings, was not sufficiently advised with reference to the same to know whether it was the plaintiff, W. H. Reilly, or the defendant, A. L. Kinkead, that I had been employed to represent. That the original notice, copy of the petition, and all the papers connected

with this instant case were by some of my assistants put into the usual folder, but that the same, for some reason unknown to me, were filed under the name of W. H. Reilly, and with the causes of action in which I represented the plaintiffs. That for this reason I was not aware until yesterday, May 22d, while engaged in an argument in an important case before Judge Sears, that the interests of my client, A. L. Kinkead, had not been looked after, and that the appearance had not been made for him in said cause. That, about three o'clock in the afternoon of May 22d, Mr. Kinkead came to the north court room, where I was engaged in the argument as aforesaid, and in a few seconds' consultation advised me as to the situation. That, upon adjournment of court, I immediately took the matter up with my office force, and found the facts to be as hereinbefore stated. That in this action execution has been issued, and the sheriff has levied on the automobile belonging to the defendant. That the judgment entered by default is for the principal sum of \$129.29, and the costs of the action. That in all my practice a default has never been entered against one of my clients. That, unless the default and judgment entered thereon is set aside, I will feel it my duty to pay the judgment and costs out of my own pocket, for the reason that my client informs me that he has a complete defense, and in addition to that, a counterclaim against the plaintiff for the sum of \$——. That my client, the defendant, has signed and sworn to an answer and counterclaim verifying his former statements to Mr. Lewis of my office, which were by Mr. Lewis, at the time, reduced to writing. That my assistant, Mr. Lewis, is a lawyer who has been admitted to the bar in the state of South Dakota, but has not been admitted to the bar in the state of Iowa, and heretofore I have not directed him to, or intrusted him with making appearances, preparing, signing or filing papers of pleading in my stead. That I opened up my office here the last time on or



about December 1st, 1915, and my office force of necessity is under process of organization. That, under the foregoing circumstances, I am willing personally to pay the costs incurred by reason of the failure on my part to appear for the defendant, and file his answer and counterclaim. That I, therefore, join with my client, the defendant, in asking the court to sustain the motion herewith filed to set aside the judgment under the terms herein indicated."

To this motion plaintiff objected, on grounds to the effect that the failure of defendant to appear and answer was due to no unavoidable casualty or misfortune, but to the negligence of himself and his counsel.

This motion and resistance were submitted to the court, Judge Anderson presiding, on June 2, 1916. On the same day, Judge Anderson, for some reason, passed the matter of said motion over to Judge George Jepson, also holding court at the same term, who on the same day entered an order overruling it, the order, as we understand it, being entered in the absence of counsel. On the next day, Mr. Bevington recalled the attention of the court, Judge Jepson presiding, to the case, and was proceeding to make a statement of some sort when a colloquy developed between him and the court which excited an apparent display of feeling on both sides. The court finally dictated into the record its version of the circumstances under which the decision of the motion had been passed over to Judge Jepson by Judge Anderson, and announced to counsel that the ruling thereon was set aside, and the matter was open for counsel to be heard. Mr. Bevington, apparently desiring to have the matter heard before another judge, asked for time till Monday morning to counsel with his client, and his request was denied, but the court finally gave him ten minutes in which to present an affidavit for change of forum. The affidavit was filed, setting forth counsel's belief that Judge Jepson was so prejudiced against him that his client could not get a fair and impartial ruling

on the motion. The court, denying any feeling of partiality or prejudice in the matter, overruled the motion for a change. This was followed by further statements made of record by Mr. Bevington and by the court, which again overruled the motion to set aside the judgment and default. The defendant appeals.

I. We are not disposed to give much time or attention to the alleged error in refusing a change of forum. The motion seems to have had its impulse in the irritations of the moment, growing out of an unfortunate impression on the part of counsel that his motion to set aside the default which had been entered against defendant was not being given the consideration to which it was entitled, and upon the part of the court that counsel was unjustly imputing to it a lack of judicial fairness, with the result that the attitude taken and the language employed on both sides were marked with a considerable degree of asperity. We think, however, that no sufficient showing was made for a change of forum, and there was no error in the ruling in this respect.

II. A more serious question arises upon the overruling of the defendant's motion to set aside the default. Upon the showing made, it cannot be doubted that defendant and his counsel intended in good faith to appear and make defense to this action. So far as the defendant personally is concerned, we think he can be charged with no fault or neglect in depending upon his counsel, whom he had employed for that purpose, to take such action in court as was necessary to protect his interests. The one debatable question in the record is whether Mr. Bevington was negligent in such a sense or to such a degree that relief from the default should be denied his

1. JUDGES: dis-  
qualification:  
bias and  
prejudice.

2. JUDGMENT:  
opening or va-  
cating: de-  
faults: suffi-  
ciency of  
showing:  
negligence.

3. JUDGMENT:  
opening or  
vacating: de-  
faults: neg-  
ligence of  
attorney.

client. The courts are not disposed to be overtechnical in denying hearing to a party who, in good faith and without negligence, desires and intends to try his case upon its merits. It has been said by us that "a trial on the merits should be had in all cases where it is possible, and particularly where there is failure to show negligence on the part of the party in default." *Logan v. Southall*, 137 Iowa 372, 374. It has also been held that the mistake of the attorney, even though it relates to a matter of which he is required by law to take notice, may afford good ground for excusing a default. *Jean v. Hennessy*, 74 Iowa 348. Where, by mistake, the general attorney of a defendant failed to notify a local attorney to enter an appearance, and judgment was obtained by default, this court reversed the ruling of the trial court in refusing to set aside the judgment and open the default. In so doing, we said:

"On the record before us, we must hold that the failure of the telephone company to appear was due to an honest misunderstanding between the general manager, Smith, and the general counsel, Cook, as to who should employ the local attorneys at Sioux City. If this was due to negligence or want of ordinary care and attention, then, of course, the ruling of the trial court was correct, and should be sustained. But if, on the other hand, it was the result of mistake or misfortune, due to the limitations of the human mind, the infirmities of language, or other fortuitous circumstances, not contributed to by negligence or inattention to duty, then the default should have been set aside. \* \* \* Of course, mere forgetfulness of the party or his attorney will not excuse him, but misunderstanding or mistake undoubtedly will." *Barto v. Sioux City Elec. Co.*, 119 Iowa 179.

In a somewhat similar case, we said:

"The law exacts of attorneys diligence in their business, and will not relieve against negligence on their part;

but it regards attorneys as mere men, who, with the best of intentions, may be mistaken in the most important affairs. They are not required to be diligent and careful beyond the capacities of human nature. If an honest, diligent attorney misunderstands the extent of his employment, he ought not to be regarded as negligent when acting in good faith upon his belief as to his duty." *County of Buena Vista v. I. F. & S. C. R. Co.*, 49 Iowa 657.

It has often been said by this and other courts that courts should be disposed to give a party a trial on the merits of his case if application to set aside the default be promptly made and the party is not clearly shown to have been negligent. *McQuade v. Chicago, R. I. & P. R. Co.*, 78 Iowa 688. Very similar in its facts to the case at bar is *Ordway v. Suchard*, 31 Iowa 481, where it was shown that defendants retained a firm of lawyers to appear for them, but, by mistake on their part, a default and decree were rendered in favor of the plaintiff. The showing made to excuse the default was that the failure of the attorneys to appear was occasioned by the accidental misplacing of the papers in the case, with the result that, when counsel, at the opening of the term, examined their records to ascertain what cases required their attention, this one was overlooked, although they in good faith intended to make a defense. The trial court overruled the motion to set aside the default, and that ruling was reversed on appeal. The opinion, while recognizing the rule that the granting or denial of such motion is largely a matter of discretion in the trial court, says that the defendants "show that it was their intention to make defense to the action; that there was no negligence of either party or attorney; that their failure to put in an answer within the proper time was purely accidental; and that, upon the first discovery of the fact that such time had passed, they were prompt in making application to set aside

the default. The application also showed that they had a meritorious defense, and that it was made at the term at which the default was entered. Upon this showing, the default should have been set aside, and we are of the opinion that, in overruling the motion of defendants, the court exceeded the limits of its discretion."

See, to the same effect, *Krause v. Hobart*, 173 Iowa 330; *Klepfer v. City of Keokuk*, 126 Iowa 592, 595; *Jean v. Hennessy*, 74 Iowa 348, 350; *Peterson v. Koch*, 110 Iowa 19; *Mully v. Roberts*, 167 Iowa 523, 524; *Farmers Exch. Bank v. Trester*, 145 Iowa 665, 668; *Norman v. Iowa Cent. R. Co.*, 149 Iowa 246; *Ennis v. Fourth St. Bldg. Assn.*, 102 Iowa 520. In the *Peterson* case, it is distinctly held that, where the defendant in good faith desires to defend an action brought against him, and retains counsel who undertake to represent him for that purpose, and, without notice to or knowledge of their client, fail to enter an appearance or make any defense, and permit the case to go by default, the negligence or failure of counsel, under such circumstances, is an unavoidable casualty or misfortune, within the meaning of the statute, Code Section 4091, and entitles the client, on such showing, to have the default set aside.

Without extending these references, we think it very clearly appears that the present case comes well within the rule applied by this court on numerous occasions, and particularly in the several cases which we have cited. It may fairly be said to be shown without dispute that there was no negligence on the part of defendant or his counsel. It does show a mistake on part of counsel, but mistake or oversight is not necessarily negligence. While the law does exact diligence and attention on the part of the lawyer accepting employment in any case, it is only such as may reasonably be expected of a man acting in good faith and with the care and caution which may fairly be required of the average man who undertakes to perform such duty or ser-

vice. The lawyer who has a clientage of any considerable proportions and is engaged in a general practice may properly, and indeed must, depend to a large degree upon his office force to keep his work and his records systematized and his papers properly preserved and pigeonholed; and if, as a term of court approaches, and he lists the matters which require his attention therein, the misplacement of a paper or file leads him, without fault on his part, to overlook the necessity of an appearance in a new case with which he has not yet become thoroughly familiar, he ought not to be held chargeable with negligence, and his failure so caused is not to be imputed to his client as negligence. Such is the doctrine of the cases we have cited. It is, moreover, a rule of reason and fairness, and in perfect harmony with the purposes for which courts of justice are established and maintained.

The appellee made no attempt to discredit the truth of the showing made in support of the motion to reopen the case, and we have to deal with the case on the theory that the facts are as there stated. On a showing decidedly less persuasive, this court said, in the *Ordway* case, *supra*, that no negligence of either counsel or client was shown, and the ruling of the trial court to the contrary was reversed. So also in the *Barto* case, the *Ennis* case and the *Norman* case. The application was timely, the showing of a defense upon the merits was sufficient, and in our judgment the motion should have been sustained.

4. APPEAL AND ERROR: Notice: specification of judgment or order: summary. III. Appellee raises a question of the jurisdiction of this appeal, because the notice of appeal states that it is taken from the judgment, and makes no specification of the ruling to set aside the default.

We are of the opinion that the point is not well taken. It is well settled that a ruling upon a

motion for new trial, though itself appealable, may also be reviewed upon an appeal from the judgment, if taken within the time prescribed by law (*Mueller Lbr. Co. v. McCaffrey*, 141 Iowa 730, *Powers v. Des Moines City R. Co.*, 143 Iowa 427, 430); and, if a denial of a motion for new trial may be reviewed on appeal from the judgment, we can see no good reason why the denial of a motion to reopen a judgment entered by default, which is, in effect, an application for new trial, may not also be so reviewed. Judgments are usually entered at once upon return of verdict or entry of default, and motions made in due time to set them aside may, for many purposes, be treated as if made at the same time, and ruling thereon be, in legal effect, as if then made, or as inhering in the judgment entry; although, under our peculiar statute, the aggrieved party may, if he choose, appeal from the judgment or from the denial of his motion for new trial, and in either form secure a review of the alleged errors.

The objection to the jurisdiction of this court is overruled and the judgment below is reversed. The cause will be remanded to the district court, with directions to set aside the judgment and default and permit the defendant to answer.—*Reversed and remanded.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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STATE OF IOWA, Appellee, v. I. LAZARUS, Appellant.

**PERJURY:** Evidence—Willfulness and Corruptness—Belief—Understanding—Knowledge, Etc. Howsoever false a statement under oath may be, it will not constitute perjury unless it is made corruptly and willfully. It follows of necessity that the defendant's belief, knowledge and understanding, and freedom from any tempting circumstances, may be quite material on the issue of guilt or innocence.

**PRINCIPLE APPLIED:** Defendant, without receiving any consideration therefor, took oath on a \$300 bond that he was the absolute owner of a lot. This was false. Long prior to taking said oath, a decree, to which he was a party, had been entered, quieting the title to one half of the lot in defendant's wife, and the other half in a person other than defendant. On the east side of this lot stood two houses. Defendant lived in one; the other was rented.

*Held*, defendant was entitled to testify:

1. That he did not *understand* that a decree had been entered excluding him from all title to said lot.
2. That it was his *understanding* that the rented portion of the lot was no part of his homestead.
3. That the value of the lot was far in excess of the bond.
4. That he received nothing whatever for signing the bond.

*Appeal from Polk District Court.*—HUBERT UTTERBACK,  
Judge.

FRIDAY, NOVEMBER 16, 1917.

DEFENDANT was indicted for perjury and convicted, and appeals. Opinion states the facts.—*Reversed and remanded.*

*Parsons & Mills*, for appellant.

*H. M. Havner*, Attorney General, and *Ward C. Henry*,  
for appellee.

PERJURY:  
evidence:  
wilfulness  
and corrupt-  
ness; belief:  
understand-  
ing; knowl-  
edge, etc.

GAYNOR, C. J.—The defendant was indicted by the grand jury of Polk County on the charge of perjury. The indictment rests upon the following facts set out therein:

One Scott McClure was regularly cited by the judge of the district court to appear and show cause why he should not be punished for contempt of court in the violation of a liquor injunction. The citation was regularly



filed in said court on the 14th day of August, 1916. Upon the appearance of said Scott McClure in response to said citation, the court ordered that he be admitted to bail in the sum of \$300. In order to secure the release of the said Scott McClure, it became necessary in said proceedings that he file a bond, with proper securities, with the clerk of the court in which the suit was pending. The said Scott McClure appeared with defendant for the purpose of furnishing said bond, and securing the release of the said McClure. An appearance bond was thereupon prepared by the clerk in the usual form, conditioned that the said Scott McClure appear and submit to the judgment of the court in said proceedings. The bond was in the sum of \$300. The defendant herein signed the same as surety, and, to make said bond effectual and secure the release of the said Scott McClure, the defendant made the following affidavit, subscribed and swore to the same before the clerk of the district court:

"The undersigned, whose name is signed to the foregoing bond as bail for said defendant, being duly sworn, depose and say: I, I. Lazarus, as a resident of the state of Iowa, and a freeholder therein; that I own absolutely in my own name and right the following described real estate in Polk County, Iowa, not claimed or occupied by me as a homestead, to wit: Lot 5, Block 4, E. Ft. Des Moines, Iowa, which is reasonably worth \$3,000, encumbered \$400, and that I am worth in real estate the sum of \$600 exclusive of property exempt from execution.

"(Signed) I. Lazarus.

"Subscribed and sworn to by said I. Lazarus before me this 14th day of August, A. D. 1916."

The contention of the State is that the defendant was not, at the time, the owner of the property described in said affidavit; that he well knew that he was not; that he wilfully, falsely and corruptly swore that he was the owner

of said property, for the purpose of having the clerk believe that he was a resident and freeholder in said county, and owned said property as therein stated, and that said bond was good for the amount therein sought to be secured. The defendant pleaded not guilty, was tried to a jury, convicted, and appeals.

The undisputed evidence shows that, prior to the making of said bond and the taking of said oath, and on May 20, 1915, the defendant conveyed to one Goldberg the property described in his affidavit; that said deed contained the following provision: "This conveyance is made subject to a mortgage to the Capital City State Bank for \$1,300 and interest," and subject to this defendant's homestead right in and to the same. It appears that the defendant had a homestead right in the east half of this lot conveyed to Goldberg. It fairly appears from the record that, as between Goldberg and this defendant, it was understood that the deed conveyed only the west half of Lot 5, and that the east half, the homestead part, was reserved to defendant therein; at least they seem to have acted upon this supposition. We may assume, for the purposes of this case, that this deed to Goldberg reserved the east half of the lot; that the east half of the lot was not conveyed to Goldberg in this deed. But it appears without dispute that subsequently a suit was commenced by one Palumsky against one Tobis, to which this defendant and his wife and Goldberg were made parties; that this defendant was duly served with notice of the pendency of said suit; that, on the 21st day of March, 1916, about five months before this bond was signed, the court, having jurisdiction of the subject matter of the parties, entered a decree in which the court found that Goldberg was the owner of an undivided one-half interest in the property described in the affidavit. and that Mrs. Clara Lazarus, wife of defendant, was the owner of the other undivided half of said property, free

and clear of the mortgage debt of the Capital City State Bank; and the title was accordingly quieted in Goldberg and in the defendant's wife, and title in said land quieted against the plaintiff in said suit, and against this defendant, Isaac Lazarus, and all persons claiming by, through or under them.

So it appears from the undisputed evidence that, at the time this affidavit was made, the defendant had no title to the property described in his affidavit; that all the right he had in said property was a right of homestead. There is no evidence that he was the owner of any other property at the time he made the affidavit. It is apparent that the defendant swore falsely when he said in his affidavit:

"I own absolutely and in my own name and right Lot 5, Block 4, E. Fort Des Moines, Iowa, not claimed or occupied by me as a homestead."

Upon the trial of the cause, the defendant, recognizing this fact, sought to show that he did not know of the existence of this decree, and he was permitted to say, in substance, that he did not know there was a decree entered on the 21st day of March, 1915, in the district court of Polk County, by the terms of which his wife was declared to be the owner of an undivided one-half interest in Lot 5, Block 4, E. Fort Des Moines, and that Goldberg was declared to be the owner of the other undivided one half. He testified:

"I knew there was something filed, but I didn't know just how it was, and I never read it, and I never looked at it."

The statute (Section 4872, Code of 1897) provides:

"If any person, on oath \* \* \* lawfully administered, wilfully and corruptly swear \* \* \* falsely \* \* \*, he is guilty of perjury."

This evidence was admitted rightly, as tending to

negative the thought that he wilfully and corruptly swore that he was, at the time of the making of the affidavit, the owner of the property described in his affidavit, and as tending to show that he in good faith believed that he was the owner of the east half of this lot at that time.

It appears that on this lot there were four houses, two on the east half and two on the west half. There is a driveway between the two on the east and the two on the west, a brick driveway, supposed to divide the lots into two equal parts, facing 60 feet on Des Moines Street. This driveway, of course, makes it 30 feet on each side. One of the houses on the east side was occupied by the defendant as a homestead. The other was rented and occupied. These houses were on opposite ends of this east half. After the defendant had testified that he did not know of this decree, he testified that only one of the two houses on the east side was occupied as a home, and that he understood the homestead to cover the ground only on which the house actually stood. He testified:

"I know what a homestead is. It is what a person lives in. I occupied one house, but did not live in both of them; I rented one, and do yet."

He was then asked this question:

"Now I will ask you to state what your understanding was as to whether or not that property (meaning the property on the east half occupied by a tenant) was a part of the homestead?"

Objection to this was sustained on the ground that it was immaterial as to what his understanding was. The purpose of this was to show that the defendant in good faith believed that the portion of the east half of the lot occupied by the tenant was not a homestead, and was, therefore, not exempt. Thereupon the defendant sought to show, by competent evidence, what property in that vicinity was worth. Objection was interposed in the following language:

"We do not count on any allegation in regard to the value. The only question is whether the defendant was in truth and in fact the owner of Lot 5," etc.

Thereupon the court refused to hear any evidence as to the value of the land, on the ground that such proof was immaterial, saying:

"The question is not as to the value of the property, but as to the ownership of it according to the indictment."

The materiality of this question appears when we consider that the defendant was charged not only with misstating the facts under oath, but with misstating them wilfully and corruptly. To find the defendant guilty, it was necessary that the jury should be able to say from the record not only that the statements as to ownership were untrue, but that such statements were made wilfully and corruptly.

The defendant said in the affidavit that he owned the entire lot. There is no question in this record that, as to the west half, the statement was not true. In the light of the decree, we are justified in saying that the statement was not true as to the east half, but does this meet the whole situation? The fact that he stated what was not true does not necessarily involve him in criminality. It must appear further that he wilfully and corruptly stated what was not true. He sought to avoid the effect of the misstatement, and to meet the charge that he misstated wilfully and corruptly, by showing—and this he was permitted to do—that he didn't know that the decree relied upon divested him of his former interest in the east half; that he still believed he was the owner of the east half. He was then met by the proposition that, even if he did not know that the decree had divested him of his rights in this east half, yet he did know that the east half was occupied as a homestead, and therefore exempt. To meet this, he under-

took to show that, at the time he made the affidavit, he believed that at least one half of this east half, or one fourth of the whole, was not a part of the homestead. This was denied him. He then sought to show that this half of the east half, which he thought was not a part of the homestead, was worth a sum far in excess of the obligation that he assumed in the bond. This was denied him. There is no claim that this east half was encumbered. It is apparent then, that, if the jury could find from a record made, that the defendant honestly believed that he had an interest in Lot 5—though his interest was confined to the east half—and could further find that he honestly believed that the homestead character that attached to this east half covered only a small portion of the east half, and that the portion not affected by the homestead right was, in value, far in excess of the obligation which he assumed in making the bond, the jury would be justified in saying that he was not actuated by a wilful and corrupt motive in making the affidavit in question. It would at least have some probative force upon that issue, and the defendant was entitled to have it go to the jury for what it was worth. Suppose the defendant had been able to make it appear that the interest that he honestly believed he had in that property, at the time he made the oath in question, several times exceeded the obligation which he assumed, could it be said that he wilfully and corruptly made the statement complained of?

In *State v. McKinney*, 42 Iowa 205, the defendant was charged with perjury, in that he falsely swore that, in 1872, he had no partner in the business of farming and tilling certain land. It appeared that this was not true; that he had in fact a partner. For the purpose of showing that he made the statement in good faith, believing it to be true, although it was false, he called a certain attorney to the stand for the purpose of showing, through this at-

torney, that he was advised by him that no partnership existed. The court said:

"The matter inquired about, the existence of a partnership, is a mixed question of law and fact. If it could be shown that defendant was advised by his counsel that the relation existing between him and Lineback [the alleged partner] was not a partnership, such testimony would be entitled to consideration, in determining whether or not the defendant made oath to what he knew or believed to be untrue."

A man cannot be said to have falsely and corruptly sworn to a fact, if he in good faith believed the fact stated by him to be true. Knowledge and belief are material in a prosecution for perjury, and the party charged is entitled to state in his defense what his belief in respect to the matter was, and it is for the jury to say whether or not he did honestly believe, at the time he made the oath, the fact to be other than it was shown to be. The court erred, therefore, in not allowing defendant to say that he did not understand that the house occupied by the tenant, situated on the east half, was a part of the homestead, and erred in not allowing defendant to show the actual value of the property which he claims he believed he owned, unaffected by the homestead.

If a man is honestly mistaken as to the existence of a fact which he affirms under oath to exist, he cannot be convicted of perjury upon a mere showing that the fact was other than was stated by him under oath. It must affirmatively appear that the statement was made wilfully and corruptly; for this is an essential element of the crime of perjury. Though the court denied the plaintiff a right to show his belief touching the ownership of this property, it defined the meaning of these words in its instructions to the jury, and told them that the word "wilfully" meant "intentionally, unlawfully, without legal right or lawful

authority, corruptly, with fraudulent intent, designedly, and with improper motives." So it follows that, if the jury were permitted to take this testimony which the court denied them, it could and should be considered by them in determining whether the defendant made the affidavit with fraudulent intent, designedly, and with improper motives. The court denied defendant the right to make proof which would negative, if believed by the jury, that he made the affidavit with fraudulent intent, designedly and with improper motives. This was clearly error.

The defendant offered to show that he received no consideration for signing this bond, as tending to negative the idea that he wilfully and corruptly signed it. We think this evidence should have gone to the jury as bearing upon the question considered above.

The attorneys who appeared in this court did not appear in the trial below. The record was not preserved as it should be under the rules, but we are satisfied that the defendant was denied a substantial right in the trial, and this justifies a reversal.—*Reversed and remanded.*

WEAVER, PRESTON and STEVENS, JJ., concur.

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JOHN A. BAKER, Appellee, v. AMERICAN SURETY COMPANY OF  
NEW YORK, Appellant, et al.

**SUBROGATION: Extent and Limitation of Right—Doctrine Inap-  
1 plicable to Primary Liability.** The right of subrogation never follows an actual primary liability. In other words, one who pays a debt in performance of his own covenants is not entitled to subrogation. In such case, payment is extinguishment.

**PRINCIPLE APPLIED:** The treasurer of a miners' union was under a fidelity bond wherein the surety agreed to hold the union harmless for any act of "fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or misapplication



on the part of said employe, directly or through connivance with others." The union had its money on deposit in a bank. On orders properly drawn, the said treasurer forged the names of the payees; the bank, without authority, paid the orders; and the treasurer wrongfully appropriated the money to his own use. The union brought action on the bond. The surety impleaded the bank, and prayed for judgment against said bank in a sum equal to any judgment which the union might obtain against it (the surety). *Held*, the surety was primarily liable for the treasurer's misappropriation, and was not entitled to be subrogated to any right of the union against the bank.

**PLEADING:** Demurrer—Motion as Demurrer. A motion to strike  
2 a pleading wholly bad may be treated as a demurrer.

*Appeal from Monroe District Court.*—D. M. ANDERSON,  
Judge.

FRIDAY, NOVEMBER 17, 1916.

REHEARING DENIED SATURDAY, NOVEMBER 17, 1917.

A defendant and cross-petitioner appeals from an order striking a cross-petition.—*Affirmed*.

*Samson & Steer* for appellant.

*J. C. Mabry* and *John T. Clarkson*, for appellees.

LADD, J.—This is an action by plaintiff  
1. SUBROGATION : in behalf of an association known as the  
extent and  
limitation of  
right: doctrine inappli- Buxton Local Union No. 1799, District No.  
cable to primary 13, a constituent part of an organization  
liability. known as the "United Mine Workers of  
America," against the defendant as surety  
on the bond of W. H. Brown, financial secretary and treasurer of said union from July 1, 1913, to July 1, 1914. The petition alleges that, during October, 1914, other officers discovered that "said W. H. Brown had misappropriated all or a part of the moneys coming into his hands as such financial secretary and treasurer," and immediately gave

notice to defendant that defendant has "failed, omitted and neglected to pay said Local Union No. 1799 the money so lost, although the same has been demanded," and judgment for \$800 was prayed. A copy of the bond in the usual form was attached, and also an itemized statement of the several sums alleged to have been embezzled. Thereupon defendant filed a cross-petition, making the Buxton Savings Bank defendant, alleging what plaintiff claims, and further that the "items set out in the said list were paid out by the said Buxton Savings Bank and charged against the checking account of said Local Union with the said bank. The claim of the said Local Union is that the said bank made such payments without authority therefor, upon checks or orders forged or the endorsements upon which were forged by said W. H. Brown, and charged the same to said checking account, and that thus the alleged loss accrued to the said Local Union. This defendant says that, if such claims of said Local Union be true, that then and in that event the primary liability for such loss is that of the said bank, and not of this defendant; and that, if it be true the defendant is under liability herein, then defendant should be allowed to recover herein against the said bank all sums for which this defendant shall be adjudged to be liable to plaintiff, and for costs. The said checks or orders are not in possession nor under the control of this defendant, and this defendant is unable to set out copies of them. Wherefore, this defendant prays that, if judgment should be rendered against this defendant herein, that the defendant have judgment for the same amount against the Buxton Savings Bank and for costs."

The Buxton Savings Bank moved that cross-petition be stricken from the files, for that: (1) The facts recited did not justify the filing of a cross-petition; (2) the savings bank might not be joined as defendant in this manner; (3) the cross-petition is not material to the issue raised by

the petition; (4) there is no privity of contract between defendant and the savings bank requiring the bringing in of said bank as a party to the action; and (5) the savings bank is not a necessary party to any adjudication between the original parties to the suit. The motion was sustained. The appeal is from this ruling.

In reviewing the ruling on the motion, the allegations of the cross-petition must be assumed to be true. If so, we have this situation: The American Surety Company bound itself to pay "such pecuniary loss, not exceeding \$1,000, as said employer shall have sustained of money or other personal property (including that for which employer is responsible) by any act or acts of fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or misapplication on the part of said employee, directly or through connivance with others, while in any position or at any location in the employ of said employer." The Local Union deposited its funds in the Buxton Savings Bank, and, as is alleged, Brown forged checks or orders of the Local Union, or endorsements thereon, and the bank paid these from the funds of said Local Union. As we understand it, the orders were properly drawn payable to persons entitled to the amounts named therein; but Brown, as is alleged, forged the payee's name thereon and drew the money, which he appropriated to his own use. If so, this is within the averments of the cross-petition quoted, and the loss therefrom, if any, was occasioned by the dishonesty of Brown, as much as though he had forged the checks or orders. Because of the dishonesty of Brown, the funds of the Local Union have been paid out by the bank, and the theory of the plaintiff is that said union may look to the Surety Company and Brown, instead of the bank, to recoup the loss. The contention of the surety is that the bank paid the money on the forged checks, orders or endorsements, and, upon paying the Local Union the loss suffered by it

through Brown's dishonesty, it is entitled to be subrogated to the claim the Local Union held against the bank because of paying out its money without its authority on the forged instruments. The bank, through its motion to strike, denied that the surety company has the right to subrogation, under the circumstances disclosed, and raised several other questions not necessary to be considered, in view of our conclusion.

Subrogation is defined by Bispham as the equity by which a person who is secondarily liable for a debt, and has paid the same, is put in the place of the creditor, so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration as against the principal debtor, or of contribution against others who are liable in the same rank with himself. Bispham's principles of Equity (9th Ed.), Section 335.

Subrogation is said, in Section 1 of Sheldon on Subrogation, to be:

"The creature of equity, and is so administered as to secure real and essential justice without regard to form, independently of any contractual relations between the parties to be affected by it. It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter; but it is not to be applied in favor of one who has, officiously and as a mere volunteer, paid a debt of another, for which neither he nor his property was answerable, and it is not allowed where it would work any injustice to the rights of others."

The doctrine was derived from the civil law, but was early engrafted into the equity jurisprudence of England, and in this country its principles have been more widely applied than in England. Originally, it was exclusively of

equitable cognizance, but in recent years, seems to have been exercised in the common-law courts. Harris on Subrogation, Section 1. Wherever the doctrine is made use of, it is always for the promotion of justice and the prevention of inequitable results. It will never be enforced when doing so would be inequitable, or where it would work injustice to others having equal equities. *Makeel v. Hotchkiss*, 190 Ill. 311 (83 Am. St. 131); 37 Cyc. 370. It necessarily follows that the equities of one seeking subrogation must be greater than those of him against whom subrogation is sought. *Fort Dodge B. & L. Assn. v. Scott*, 86 Iowa 431.

"The doctrine of subrogation never interferes with equal or superior rights of others." *Vaughan v. Jeffreys*, 119 N. C. 135 (26 S. E. 94).

See *Musgrave v. Dickson*, 172 Pa. St. 629 (51 Am. St. 765). As remarked in *Acer v. Hotchkiss*, 97 N. Y. 395:

"The doctrine of subrogation is a device to promote justice. We shall never handle it unwisely if that purpose controls the effort, and the resultant equity is steadily kept in view."

Subject to these principles, the rule is well established that:

"Where one person or his property is surety or stands in the position of a surety for the payment of a debt, for the payment of which another is primarily liable, the one who is only secondarily liable, upon payment of the debt to the original creditor, is entitled to be subrogated to all the rights, remedies, liens and securities held by the original creditor, as they existed at the time of such payment, as against the principal debtor and his property, or against any other person who may be liable for the payment of such debt. And this doctrine applies as well between co-sureties, co-debtors and co-obligors as between principal and surety, with the single exception that, as between the

paying surety and the principal debtor, there is no question of contribution." Harris on Subrogation, Section 197.

The surety company, then, is entitled to subrogation, if at all, to any claim the Local Union may have against the principal on the bond, Brown, or against any security said union may have on his property. But it had none, and the surety company is praying for no relief as against Brown or his property. Its cross-petition is based on the bank's liability to said union for the amount paid out by it on the forged checks, orders or endorsements, and it prays therein for subrogation to the claim of the Local Union on the theory that the bank's liability is primary and its liability secondary thereto. Of course, the bank necessarily assumed the risk in paying others than those to whom genuine instruments were payable, and in paying to others it acted without authority, and might not charge sums so paid to the account of the Local Union. The Local Union could have insisted that the bank account for all moneys on deposit, including those wrongfully applied on the forged checks, orders or endorsements, and on refusal maintain an action therefor. *German Sav. Bank v. Citizens Nat. Bank*, 101 Iowa 530. But the wrongful diversion of these moneys was induced by the dishonest conduct of Brown, to whom the money was paid, and, were the bank held for the payment of the funds dissipated, it would have a cause of action against Brown therefor. The plain difference in the situation of the two is that, were recovery had by the Local Union against Brown, he could not recoup in an action against the bank, whereas the bank, if compelled to restore to the union the moneys paid on the forged instruments, might demand reimbursement from Brown, and upon refusal, recover judgment against him. The Local Union has elected to sue the surety on the bond of Brown, rather than the bank. If the surety is adjudged

liable thereon, and pays the alleged loss occasioned by Brown's dishonesty, it will merely pay Brown's indebtedness, and not that of another, even though the other may also be liable therefor. At the most, it is a case where each of two parties may be held for the dissipation of the same moneys, the bank because of paying out without authority, and the other because of fraudulently inducing the bank so to do. In such a case, both are absolutely liable, and neither entitled to subrogation; for either, in paying, is satisfying his own indebtedness. But the bank, on payment, undoubtedly could recover over from the wrongdoer. Moreover, the equities of the surety, upon payment, would be measured by those, if any, existing in behalf of its principal, Brown; and, as between Brown and the bank, all are in favor of the bank, and under the rules stated, subrogation must be denied. Otherwise, the forger or his surety would be preferred to the one swindled by his forgeries.

As, on the allegations of the cross-petition, the surety would not be entitled to relief, there was no error in striking it from the files. Probably the point might more appropriately have been raised by demurrer, but if so, this portion of the motion may be treated as a demurrer, and the ruling be made accordingly. It is not to be inferred from anything said that we express any opinion as to the liability of either Brown or the American Surety Company to the Local Union. We merely rule that the allegations of the cross-petition do not entitle the defendant and cross-petitioner to subrogation in event it is required to pay the loss of said union.—*Affirmed.*

2. PLEADING:  
demurrer:  
motion as de-  
murrer.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

JOHN BEEMER, Administrator, Appellant, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellee.

**RAILROADS: Accidents at Crossings—Unobstructed View—Con-**

- 1 tributary Negligence. One who, though quite aged, is possessed of the ordinary senses of sight and hearing, and who, in clear daytime, and under no distracting circumstances, knowingly goes upon a railway crossing, the approaches to which from a point at least 90 feet from the crossing and continuously thereafter are wholly unobstructed for a distance ranging from 800 feet to an indefinite distance, is, in case of injury, *conclusively* guilty of contributory negligence.

**NEGLIGENCE: Evidence—"No Eyewitness" Rule—Non-Applica-**

- 2 bility. The principle that, where a party is dead and there is no eyewitness as to the manner in which he conducted himself *at and immediately preceding the time of the injury*, a presumption prevails that he exercised due care, has no application to a case where the testimony of eyewitnesses fully accounted for the conduct of the deceased *while passing over the last 40 feet* leading to a known railway crossing which (and the approaches thereto) was then wholly unobstructed.

**NEGLIGENCE: Imputed Negligence—Driver and Mere Occupant**

- 3 with Equal Knowledge of Danger. Equal knowledge by a husband and wife of the surroundings, of the possible danger, and of the ways to discover and avoid it, imposes on each the *same measure of care*, notwithstanding the doctrine that the negligence of the husband, as driver of the conveyance, may not be imputed to the wife.

*Appeal from Iowa District Court.*—R. P. HOWELL,  
Judge.

TUESDAY, APRIL 3, 1917.

REHEARING DENIED SATURDAY, NOVEMBER 17, 1917.

ACTION by the administrator for damages for personal injuries resulting in the death of plaintiff's intestate. The injuries resulted from a collision at a railway crossing with-



in the village of Ladora. There was a directed verdict for the defendant, and the plaintiff appeals.—*Affirmed*.

*Dutcher, Davis & Hambrecht*, for appellant.

*F. W. Sargent, Robt. J. Bannister, J. G. Gamble and Jno. F. Cronin*, for appellee.

EVANS, J.—The decedent was Julia Beemer, wife of John Beemer. The husband and wife were riding in an automobile, the husband driving, and the wife seated beside him on the front seat. The automobile passed upon the railway crossing immediately in front of an oncoming passenger train. A collision resulted, and both occupants were injured so that they died. Both occupants were 68 years of age, and both were in the possession of their ordinary senses and faculties. The time of the accident was 10:30 A. M., on Sunday morning, August 17, 1913. The day was clear and the weather pleasant, and no distracting circumstances appeared. The Beemers had driven from Marengo to Ladora for the purpose of visiting with their children. Previously, they had lived for some years in Ladora, and were familiar with the crossing and its surroundings. The railway runs easterly through the town upon a straight track in each direction. The train involved in the collision was running east one hour late, and at 50 miles an hour. The Beemers came into the village from the east along Pacific Street, which was a short distance south of the railroad right of way and parallel thereto. At the intersection of Pine Street, they turned north thereon toward the crossing in question. Moving north on Pine Street, it was slightly up hill up to a point about 40 feet from the railway track, from which point the street was level over the crossing. They were

1. RAILROADS :  
accidents at  
crossings : un-  
obstructed  
view : contribu-  
tory negli-  
gence.

driving at about 6 miles an hour. At a point 90 to 100 feet south of the railway track, a view thereof could be had for a distance of from 800 to 1,100 feet toward the west, and such distance increased with the approach toward the track. At a point 40 feet or more from the track, there was a clear view thereof in both directions for an indefinite distance. From this point, the occupants were under the observation of witnesses. The evidence of these is conclusive that neither of the occupants was looking in either direction for a train, and that they gave no sign of discovering its approach until they were upon the crossing, at the very moment of collision. The trial court held that the occupants were conclusively negligent upon their own part in their failure to discover the approach of the train.

It is the contention of the appellant that the circumstances were such as to carry the question to the jury. The plaintiff's petition was predicated upon the theory that the speed of the train was in violation of an ordinance of the village, and his argument has been predicated upon that theory. It is now conceded that no ordinance was introduced, and that that question is not involved. We shall, therefore, eliminate it from our consideration.

The appellant also contends for a presumption of due care on the part of the Beemers, on the theory that they were not under observation of witnesses until they had reached a point 40 feet from the track.

The argument is that they will be presumed to have exercised due care before reaching this point, and that they were, therefore, under no necessity of looking and listening again. We do not think the argument can be sustained. It may be assumed that it would have been due care upon the part of these occupants not to have looked and listened at all until they had come to the point 40 feet distant, where the view was best. They were under a continuing obliga-

2. NEGLIGENCE:  
evidence:  
"no eyewitness"  
rule:  
non-applicability.

tion to exercise due care, even though it be true that they might be excused from looking and listening at one point by the fact that they had already looked and listened at an appropriate point, or were intending to look and listen at a better point. The oncoming train being in plain view when the driver was 40 feet distant from the track, he was bound to see it, in the absence of extraordinary circumstances, and we have so held in numerous cases. In this case, no extraordinary circumstances appear, except the awful accident itself. The automobile was in good condition and moving slowly, and, according to the undisputed testimony, could have been stopped in a mere moment. The automobile has greatly increased the mortality of the railway crossing. The auto driver has had his full share of responsibility therefor. We ought not to relax the strictness of duty which the law enjoins upon him in its ordinary application. The last chance to prevent the accident is nearly always with him.

A careful examination of this record leads us to the conclusion that the trial court rightly held this driver to have been guilty of contributory negligence in failing to discover the approach of the train. In *Crawford v. Chicago, G. W. R. Co.*, 109 Iowa 433, we said:

"A person possessing the ordinary powers of seeing and hearing cannot, without negligence on his part, knowingly approach a railway crossing, and fail to discover an approaching train which he can readily see or hear a sufficient length of time to enable him, with reasonable effort, to avoid danger."

In the recent case of *Landis v. Interurban R. Co.*, 166 Iowa 20, at 31, we said:

"Plaintiff was perfectly familiar with the crossing, and said that he knew it was a dangerous one. He was driving an unusually quiet team, and, aside from the storm and the condition of the weather, there was nothing to divert his attention. He had nothing to do but to look out for

his own safety, and he said that, although he looked at various places, and that he knew the crossing was dangerous, he at no time saw the car until his horses were upon the track, and that then it was too late to do anything, going as he was at the rate of from two to two and one-half miles per hour, even if the car had not been running at a high rate of speed. Consequently he was at no time misled by the high speed of the car. The final and ultimate question is this: Suppose we take plaintiff at his word, and say that he both looked and listened, and heard or saw no car; is this enough, in view of the other circumstances shown, to establish freedom from contributory negligence? It is well settled that, if one drives upon a railway crossing, which is a known place of danger, in front of an approaching train, the view of which is substantially unobstructed, without looking and listening, or if he looks and listens, and does not see a car which he should have seen, had he exercised reasonable care to see, or to hear, but says that he neither saw nor heard, he is guilty of contributory negligence as a matter of law. *Artz v. Railroad*, 34 Iowa 153; *Pence v. Railroad*, 63 Iowa 746; *Moore v. Railroad*, 89 Iowa 223; *Crawford v. Railroad*, 109 Iowa 433; *Hinken v. Railroad*, 97 Iowa 603; *Swanger v. Railroad*, 132 Iowa 32; *Williams v. Railroad*, 139 Iowa 552; *Wilson v. Railroad*, 150 Iowa 33; *Powers v. Iowa Cent. R. Co.*, 157 Iowa 347; *Ring v. Railroad*, 75 N. W. 492; *Bloomfield v. Railroad*, 74 Iowa 607; *Sala v. Railroad*, 85 Iowa 679."

In *Williams v. Chicago, M. & St. P. R. Co.*, 139 Iowa 552, we said:

"The case before us is barren of such modifying circumstances. During the last twelve rods of his approach to the crossing, plaintiff could have discovered the train bearing down upon him for a distance of at least a quarter of a mile. He looked when at a distance of four rods and saw nothing. From that point there was nothing to distract

his attention. He was driving a tractable team, at a walk, over a crossing with which he was very familiar. There was nothing to obstruct his view, no other noises to drown the sound of the moving train or of the signals, if any; and, without further thought of the dangers incident to such crossing, he turned his eyes and his hands to the business of gathering up the mail for the next delivery. \* \* \* If, after satisfying himself with the look at a distance of four rods from the crossing, plaintiff had given his attention to reading a newspaper while his horses walked along to a collision with a train which he could have seen and avoided at any point of the intervening distance, counsel would hardly deny the justice of a ruling that such conduct amounts to negligence *per se*. We are unable to see that the case before us presents any less flagrant want of care. The slightest attention to his surroundings would have saved him from injury, and, failing in this, he is not in a position to recover damages."

Applying the foregoing to the case before us, they are conclusive, at least as regards the negligence of the driver of the auto. To the same effect is *Powers v. Iowa Central R. Co.*, 157 Iowa 347.

It is urged by the appellant, however, that the negligence of the husband, if any, could not be imputed to the wife, and this may be conceded. The fact remains, however, that the wife, seated beside her husband on the front seat, and with the same knowledge of the approach to the crossing and the danger thereof, was as much under the duty of lookout and discovery as he was. In *Willfong v. Omaha & St. L. R. Co.*, 116 Iowa 548, we said:

"Where a husband and wife, traveling together in a conveyance which the former is driving, are injured in a collision on a railroad crossing, the court cannot properly instruct that, if the wife relied on her husband to look and to listen and to exercise reasonable care, she was relieved

from so doing herself, since she was bound to the same degree of care as her husband."

To the same effect, see *Hajsek v. Chicago, B. & Q. R. Co.*, (Neb.) 97 N. W. 327; *Toledo & Ohio Cent. R. Co. v. Eather-ton*, 20 Ohio C. C. 297; *Galveston, N. & S. A. R. Co. v. Kutac*, (Tex.) 11 S. W. 127; *Davis v. Chicago, R. I. & P. R. Co.*, 159 Fed. 10; *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577; *Cotton v. Willmar & S. F. R. Co.*, (Minn.) 8 L. R. A. (N. S.) 643.

The judgment of the trial court must accordingly be—*Affirmed.*

GAYNOR, C. J., LADD and SALINGER, JJ., CONCUR.

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A. H. BLANK, Appellant, v. NATIONAL SURETY COMPANY,  
Appellee.

**INSURANCE: Burglary Insurance**—"Entry by Use of Tools or  
1 **Explosives**"—Construction. A policy of insurance against loss by burglary, provided entrance into the safe is effected "by means of the use of tools or explosives directly thereupon," does not cover a loss by burglary when entrance into the safe is effected "by successfully working the combination or lock on the outer door and by then applying tools to break the inner money drawers."

**CONTRACTS: Construction—Construction Against Party Using**  
2 **Words**. The rule that construction of an ambiguous contract will be most strongly against the party using the words, is, by its very terms, not applicable to clear and definite terms. So held as to a policy of insurance against loss by burglary.

*Appeal from Polk District Court.*—W. H. MCHENRY, Judge.

SATURDAY, NOVEMBER 17, 1917.

ACTION on a policy for loss by burglary. The jury, by direction of the court, at the close of plaintiff's testimony

returned a verdict for defendant. Plaintiff appeals. The facts are stated in the opinion.—*Affirmed.*

*Miller & Wallingford* and *Oliver H. Miller*, for appellant.

*Dunshee, Haines & Brody*, for appellee.

1. INSURANCE:                    STEVENS, J.—On or about March 4, 1914,  
burglary in-                    the defendant issued and delivered to plain-  
surance: "en-                    tiff a policy containing provisions indemni-  
try by use of                    fying plaintiff against loss by burglary and  
tools or ex-                    robbery committed by means therein speci-  
plosives;"                    fied. It is claimed that, on the night of  
construction.                    October 6, 1914, burglars entered the room in which appel-  
lant kept a small Diebold safe with a combination lock on  
the outer door. On one side of the inner chamber of the  
safe were two small wooden boxes or drawers, which were  
locked with a key. The room in which the safe was lo-  
cated was entered by breaking the glass in a transom; the  
safe was entered by working the combination or lock on  
the outer door, thereby opening same without the use of  
tools or explosives. After entry into the safe was effected,  
the ends of each of the wooden boxes or drawers were  
broken off, and money and checks contained therein taken  
by the burglars. It is conceded by defendant that \$462.84  
in cash, the amount claimed, was thus taken, but it appears  
that payment of the checks, aggregating in amount \$63,  
was stopped, so that no loss resulted on account of the tak-  
ing thereof.

The petition of plaintiff alleges the burglarious entry of the room in which the safe was located, the entry into said safe, and the abstraction of the money and checks as above stated. The required proofs of loss were made by plaintiff to defendant. Defendant, in answer to plaintiff's petition, admits the execution of the policy, and pleads,

by way of special defense, that the same provides indemnity only against loss resulting from an entry into the safe effected by the use of tools or explosives directly thereupon, and that the entry into the safe in question was effected by working a combination or lock on the outer door, and without the use of tools, explosives, or violence of any kind. The provision of the policy which it is claimed directly covers the loss in question is as follows:

"For direct loss by burglary of any of the property described in paragraph 'A' from the safe or safes described in the schedule, located at the premises of the assured, by any person or persons who shall have made entry into such safe or safes by the use of tools or explosives directly thereupon."

The evidence satisfactorily shows that the outer door of the safe was locked, and that same was opened by working the combination or lock thereof. The theory upon which the trial court sustained defendant's motion to direct a verdict was that the policy provided indemnity only against loss resulting from an entry made into the safe by the use of tools or explosives directly thereupon, and that, where same was effected by working the combination or lock on the outer door, and only the wooden box or drawer on the inside was broken, no liability existed.

It is argued on behalf of appellant that the above provision of the policy is ambiguous, and that same must be construed most strongly against the insurer, and that, if properly interpreted and applied, it must be held to provide indemnity if the room or building in which the safe was located was burglariously entered, and access to the money box, or drawer, obtained without the use of tools or explosives, and the box or drawer containing the money was broken into by prying open or breaking the end thereof. The rule which requires doubtful or am-

2. CONTRACTS :  
construction :  
construction  
against party  
using words.



biguous language found in a policy of insurance to be construed most strongly against the insurer is so universally known and recognized that reference to authorities to sustain the same is unnecessary.

It is also the duty of the court, in construing a policy of insurance, to seek to ascertain and determine the exact obligation intended to be assumed by the insurer, and, in doing so, language must be given its usual and ordinary meaning, and a construction that is strained or forced should be avoided. *Riley v. Interstate B. M. A. Assn.*, 177 Iowa 449. There is no apparent ambiguity in the language of the policy. The language of the clause above quoted excludes the idea suggested by counsel. The indemnity provided is against loss resulting from an entry made into the safe by the use of tools or explosives directly thereupon. This necessarily means the door or outer part thereof. The risk assumed by the insurer contemplates that the door of the safe shall be securely locked, and that entrance therein can be made only by the use of tools or explosives for that purpose. This secures the insurer against loss resulting from carelessness in leaving the safe door unlocked by persons having access thereto. The policy is not a general policy providing indemnity against all losses resulting from burglary, but only such loss as results from means employed according to the terms of the policy. The language of the policy certainly does not contemplate indemnity in a case where access is gained to the inner chamber of the safe without the use of tools or explosives, nor against loss resulting from breaking or destroying a wooden drawer, which would offer but indifferent resistance to the simplest tools after the outer door had been opened by working the combination to the lock thereon. The policy does not purport to cover all losses resulting from a burglarious entry of the building in which the safe is kept, but only losses resulting from an entry made into the safe by the

use of tools or explosives directly thereupon. To give the policy the meaning contended for by counsel would deprive the language used of its usual and ordinary meaning, and distort the provision above quoted to mean something evidently not intended by the parties to the contract.

Appellant relies upon the holding of the Supreme Court of Indiana in *Fidelity & Cas. Co. v. Sanders*, (Ind.) 70 N. E. 167, in which a similar policy was construed by that court. The conclusion announced in this case tends to support the theory of appellant, and holds that, where an entry into the safe was made by working the combination or lock on the outer door, and the money drawer on the inside of said safe was opened by breaking the lock and extracting the drawer from the safe and taking the money therefrom, the insurance company was liable. So far as we have been able to find, the above is the only case so holding.

The language of the policy under consideration is identical with that in *Maryland Casualty Co. v. Ballard County Bank*, (Ky.) 120 S. W. 301. In that case, robbers entered the bank and compelled the cashier to unlock the outer door to the safe, whereupon they took therefrom a sum of money. The court held that the responsibility assumed by the insurer was the payment of money feloniously abstracted from the safe by persons gaining access thereto by the use of tools or explosives directly thereupon, and that the company was not liable under the above facts.

The language of the policy construed in *Brill v. Metropolitan Surety Co.*, 113 N. Y. Supp. 478, was, in effect, the same as the language in the policy in question. Entry appears to have been made into the safe by unlocking the outer door without the use of tools or explosives, but the cash box was broken into and money stolen therefrom. The court held that the defendant was not liable.

The Supreme Court of California, in *First National*

*Bank v. Maryland Cas. Co.*, 121 Pac. 321, had before it a policy containing the following provision:

" 'The company shall not be liable: (5) for the loss of money, bullion, bank notes \* \* \* from a combination fire and burglar-proof safe or from a burglar-proof safe containing an inner steel burglar-proof chest, unless the same shall have been abstracted from the chest after entry also into the said chest effected by the use of tools or explosives directly thereupon.' "

It appears that the safe referred to in that case contained an inner burglar-proof chest; that the outer door and also the door to the inner chest were opened by working the combination or lock thereon. The court held that, as the entry to the contents of the safe was not effected by the use of tools or explosives, there was no liability. No similar provision in a policy of this character has been previously construed by this court, but, in our opinion, there is nothing uncertain or doubtful in its terms or meaning. It provides indemnity against loss occasioned by burglars in entering a safe by the use of tools or explosives upon the same. It is immaterial whether the room in which the safe is located is reached by breaking and entering or not. It seems to us that the holding in the Indiana case perverts the plain language of the policy and ignores its real purpose and meaning. The conclusion reached in the other cases cited appears to be supported by the better reasoning, and is in harmony with the clear and unambiguous meaning of the contract involved.

The trial court, in our opinion, rightly sustained defendant's motion to direct the jury to return a verdict in its favor. If the plain language of the policy is given its usual and ordinary meaning, no other conclusion is possible. The judgment of the lower court is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

use of tools or explosives directly thereupon. To give the policy the meaning contended for by counsel would be to distort the language used of its usual and ordinary meaning. The provision above quoted to mean something distinctly not intended by the parties to the contract.

Appellant relies upon the holding of the Court of Indiana in *Fidelity & Cas. Co. v. Sams*, 70 N. E. 167, in which a similar policy was considered by that court. The conclusion announced in that case to support the theory of appellant, and holding that an entry into the safe was made by working the handle or lock on the outer door, and the money on the inside of said safe was opened by breaking the handle, extracting the drawer from the safe and taking the money therefrom, the insurance company was liable. We have been able to find, the above is the only case.

The language of the policy under consideration is identical with that in *Maryland Casualty Co. v. Bank*, (Ky.) 120 S. W. 301. In that case, the bank was compelled to open the door to the safe, whereupon they took the money. The court held that the responsibility of the insurer was the payment of money feloniously obtained from the safe by persons gaining access to the safe by the use of tools or explosives directly thereupon. The insurance company was not liable under the above facts.

The language of the policy construed in *Metropolitan Surety Co.*, 113 N. Y. Supp. 478, is the same as the language in the policy in question. It appears to have been made into the safe by working the handle or lock on the outer door without the use of tools or explosives. The safe was broken into and money stolen therefrom. The court held that the defendant was not liable.

The Supreme Court of California, in

*Bank v. Marvin* . . .  
policy contract . . .  
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ed the Kossuth County land  
ant's fraud, plaintiff was in-  
land as payment of \$4,000  
the Michigan land is worth-  
has not received payment for  
extent of \$4,000. An account-  
on of the contract, reconveyance  
way of alternative relief, in the  
to cancel the entire contract, that  
Michigan land be cancelled, and  
\$4,000 and interest.  
e fraud, and say that plaintiff  
Michigan land at an agreed valua-  
inducement to defendants to pur-  
y land at the agreed price of \$150  
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he parties failed to express such  
n contract, and ask a reformation;  
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is indebted to defendants there-  
did interest on a mortgage which  
d represented he had paid. De-  
tract be reformed to show that the  
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at defendants took possession of  
land and made improvements, made  
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decree said land should be re-  
these defendants are entitled to

HUGH BRONSON, Appellee, v. JOHN J. LYNCH et al.,  
Appellants.

**VENDOR AND PURCHASER: Rescission—Fraud—Laches—Effect.**

- 1 Delay, properly explained, of a year in discovering a fraud, will not deprive an injured party of the right to rescission, or, if rescission is impracticable, to alternative relief in the form of damages.

**EQUITY: Decree—Alternative Relief—Vendor and Purchaser—**

- 2 Fraud. The instigator of a fraud-induced contract of exchange of lands who has industriously so shaped conditions as to render rescission impracticable, may not object to the allowance of alternative relief in the form of damages to the injured party.

*Appeal from Kossuth District Court.—D. F. COYLE, Judge.*

SATURDAY, NOVEMBER 17, 1917.

ACTION in equity for rescission and for alternative relief. There was a decree for plaintiff, and defendants appeal.—*Affirmed.*

*Harrington & Dickinson and Maurice O'Connor, for appellants.*

*Sullivan & McMahon and E. A. Morling, for appellee.*

PRESTON, J.—On October 1, 1913, the parties entered into a written contract, whereby plaintiff agreed to sell to defendants a fractional 200 acres of land in Kossuth County, Iowa, for \$28,200, \$4,000 of which was to be paid by the conveyance by defendants to plaintiff of a quarter section of land in Michigan. Plaintiff alleges that defendants made certain false representations in regard to the Michigan land, which were relied upon by him and induced the sale; the lands were conveyed pursuant to the contract; defendants took possession of the land sold them by plaintiff on the

date of the contract, and have ever since been in possession; plaintiff discovered the falsity of the statements in September, 1914, and elected to rescind; since obtaining title, defendants have mortgaged the Kossuth County land for \$3,000; by reason of defendant's fraud, plaintiff was induced to accept the Michigan land as payment of \$4,000 of the purchase money; that the Michigan land is worthless, and therefore plaintiff has not received payment for the land sold by him, to the extent of \$4,000. An accounting is asked, and cancellation of the contract, reconveyance to the plaintiff, and, by way of alternative relief, in the event the court is not able to cancel the entire contract, that the conveyance of the Michigan land be cancelled, and plaintiff have decree for \$4,000 and interest.

Defendants deny the fraud, and say that plaintiff agreed to accept the Michigan land at an agreed valuation of \$4,000, and as an inducement to defendants to purchase the Kossuth County land at the agreed price of \$150 per acre, which was more than it was then worth, and say that, by mistake, the parties failed to express such agreement in the written contract, and ask a reformation; allege that there was a shortage in the Kossuth County land, and that plaintiff is indebted to defendants therefore; that defendants paid interest on a mortgage which plaintiff was to pay, and represented he had paid. Defendants ask that the contract be reformed to show that the Michigan land was taken as part payment, and in respect to the agreement to pay interest and for shortage. The answer further alleged that defendants took possession of the Kossuth County land and made improvements, made payments upon the mortgage and the taxes, and that, by reason of the improvements, the land has been enhanced in value, and, further:

"If this court should decree said land should be reconveyed to the plaintiff, these defendants are entitled to

be made whole by the payment of all sums which they have paid upon said premises for all purposes, and for the full amount which they have enhanced the value of said premises."

Defendants further claimed that plaintiff made no claim to rescind the contract during the time defendants were making improvements, and that thereby plaintiff is estopped from claiming the right to rescind and to receive back the land. The evidence shows that plaintiff did not discover the fraud for nearly a year, and that defendants were making some of the improvements during this time, and others while this action was pending. Plaintiff admits in his reply that the purchase price agreed upon for his land was \$150 per acre, and that there was a shortage in the acreage.

The trial court found that the defendants were guilty of the fraud alleged, and that plaintiff was entitled to the relief demanded, but that rescission was impracticable, because defendants had made improvements, the value and extent of which were uncertain and impossible of satisfactory ascertainment, and, further, that it was impracticable to ascertain the rental value of the land with which defendants ought to be charged; that, after the beginning of the action, defendants remained in possession, planted crops, which, at the time of the decree (in July, 1915), were growing, and the value whereof was not capable of ascertainment; that it would be impracticable at that season to remove defendants from the premises, or for plaintiff to go upon the land or find tenants; that it was inadvisable to create a relationship of landlord and tenant between the parties, or give the defendants the right to occupy the premises as tenants; that the decree ought to terminate all relations between the parties growing out of the transaction, and, because of the impracticability of rescission, rescission ought to be denied, and compensation awarded to plaintiff. The court found and decreed that the actual value



of the Michigan land was \$160, and the compensation to which plaintiff was entitled was \$3,840 and interest; that defendants were entitled to an abatement of the purchase price of the Kossuth County land for the deficiency, amounting to \$432, and interest, leaving the amount plaintiff was entitled to recover, \$3,782.32, with interest. The decree further provided that the defendants should have the option to pay the plaintiff the value of the Michigan land, \$160, and the amount of taxes paid by plaintiff, and that, on paying said sums within six months, defendants should be entitled to a reconveyance of the Michigan land.

The principal fact question is as to the representations, and the record is a large one. Appellant concedes that there is a serious conflict in the evidence respecting the more important questions of fact. Five witnesses testified for plaintiff: the plaintiff himself and three sons, and another witness, apparently disinterested, except that defendants say he was unfriendly to one of the defendants. The evidence for defendants consists of that of the three defendants themselves. Counsel for defendants say that their witnesses should be believed; that plaintiff has trained himself and his boys into the execution of a maze of untruths. On the other hand, counsel for plaintiff urge that their witnesses should be believed, and that defendants were clearly guilty of fraud, and that one of them as a witness practically admitted all of plaintiff's claims. Our experience is that counsel on either side occasionally take a similar view of the evidence of their adversary's witnesses.

We shall not go into the evidence. It is enough to say that, after a careful reading of it, we are satisfied with the conclusions of the trial court, not only as to the false representations, but as to the value of the land, and the other issues; that plaintiff's land was at that time worth \$150 per acre, and that the Michigan land was worth not to exceed the amount found by the trial court. The evidence as to

the value of plaintiff's land ranges from \$125 an acre, given by defendants' witnesses, to \$175, by plaintiff's. Plaintiff has a larger number of witnesses on value, and they appear to be of equal credibility with those testifying for defendants. There seems to be no serious claim that the Michigan land was worth more than the amount found by the trial court.

1. It is contended by appellants that, because of the plaintiff's delay in investigating the Michigan land for nearly a year, with knowledge that defendants were expending money in improving the land, plaintiff was guilty of such laches as to defeat his right to recover. But the Michigan land was in a distant state, and there are other circumstances in the record showing that plaintiff did not discover the fraud until shortly before the action was brought, and that he was excusable for the delay. Under the record, defendants could not have been misled by any conduct of plaintiff into believing that plaintiff had become aware of the fraud and had affirmed the transaction. Under the authorities, we think the action is not barred by laches. See *O'Connor v. O'Connor*, 100 Iowa 476; *McIntire v. Pryor*, 173 U. S. 38, 53; *Keller v. Harrison*, 151 Iowa 320; *Campbell v. Spears*, 120 Iowa 670; *Rohr v. Shaffer*, 178 Iowa 943; 9 C. J. 1205.

2. It is thought by appellants that the contract was not severable, and if the whole could not be rescinded, no part can be rescinded; that plaintiff's only remedy was an allowance of damages—citing *Owens Co. v. Doughty*, (N. D.) 110 N. W. 78, 80; *Higham v. Harris*, (Ind.) 8 N. E. 255, 259; *Grymes v. Sanders*, 23 L. Ed. 798, 802; *Bell v. Keepers*, (Kan.) 17 Pac. 785, 786; *Neal v. Reynolds*, (Kan.) 16 Pac. 785; *Morrow v. Moore*, (Me.) 99 Am. St.

1. VENDOR AND  
PURCHASER:  
rescission:  
fraud: laches:  
effect.

2. EQUITY: de-  
cree: alterna-  
tive relief:  
vendor and  
purchaser:  
fraud.

Rep. 410, 413; *Fay v. Oliver*, (Vt.) 49 Am. Dec. 764.

But, under the record, plaintiff would have been entitled to a complete rescission for defendants' fraud, had it been practicable. The defendants went into possession of plaintiff's land at the time the contract was made, and made considerable improvement. The suit was brought in the fall of 1914. Defendants remained in possession and made the improvements during the pendency of the suit. They were not only guilty of fraud, but persisted in their efforts to make rescission impracticable,—at least such was the effect of their conduct. The defendants could not well be removed from the premises in the middle of the summer, with growing crops. It should have been said that, at the time of the trial, a consent drain, 1,600 feet of the main and 600 feet of the lateral, on the farm, was still being constructed, and it had not been figured up or paid for. The fair rental value of the land under such circumstances could not well be fixed; it would not be just to the plaintiff, under the circumstances, to permit defendants to remain in possession as tenants. The defendants asked for reformation of the contract, and asked damages in the abatement of the purchase price, and obtained it. Under the evidence, defendants did not want a total rescission. As before stated, defendants in their answer pleaded that, by reason of the improvements and the increase in the value of the land, plaintiff was not entitled to rescind as to the Kossuth County land, and that plaintiff had waived the right to object to receiving and retaining the land in Michigan. Under all the circumstances, it seems to us that defendants are in no position to say that the court should not allow the plaintiff the damages which he has sustained. Under such circumstances, the court did complete justice between the parties by awarding compensation for the Michigan land. See *Howard v. National F. D. H. Assn.*, 169 Iowa 719; *Fish-*

the abutting property only, while it is the contention of the plaintiff that the directions of the act above mentioned should have been observed, and the levy made, not upon the abutting property alone, but upon one half of all the privately owned property between Seventeenth Street and the next street, whether such property abut upon the street or not, but not to exceed 300 feet from Seventeenth Street. The statute to which appellant refers, and on which she relies, was approved April 19, 1913, and became a law July 4, 1913. Its provisions, so far as pertinent to this case, are as follows:

"Section 1. Whenever, after January 1, 1914, any city or town council, including the councils of cities acting under special charter, levies any special assessment for street improvement, as provided by Section 792 of the Code and amendments thereto and supplementary thereof, the same shall be made in accordance with the provisions of Section 792-a of the Supplement to the Code, 1907, and shall be limited to the amount to be assessed against private property, against all lots and parcels of land according to area, so as to include one half of the privately owned property between the street improved and the next street, whether such privately owned property abut upon said street or not, but in no case shall privately owned property situated more than 300 feet from the street so improved be so assessed."

The proceedings in the city council looking to the paving of Seventeenth Street were initiated by the usual resolution of necessity, which was introduced December 22, 1913. The resolution included a statement to the effect that the expense of the improvement would be assessed against the "private property abutting thereon to the extent that the same is assessable by law, said assessments to be made in accordance with the law governing the same." This resolution was published four times in a city newspaper, the last

publication being December 26, 1913. The published resolution also gave notice that the matter would come on for hearing before the city council on January 15, 1914. On the day last named, the council adopted the resolution and ordered publication of notice to contractors and provided that work upon the improvements should be begun on or before April 1, 1914, and be completed on or before July 31, 1914, payment therefor to be made "in special assessment certificates issued in accordance with law to the extent that the cost of the same is assessable against the property abutting on said improvement and in proportion to the special benefits conferred upon said property by said improvements." The contract was let February 24, 1914, and the work was completed and accepted by the city on July 16, 1914. On or about the same date, the engineer's plat and schedule of proposed assessments were filed, and twenty days' notice was given for presentation of objections thereto. In due time, plaintiff appeared and filed objection to the proposed assessment upon her property on the ground already indicated, that the cost of the improvement should be levied pursuant to the later statute to which we have referred. The objection was overruled, and the levy was made upon the abutting property, including plaintiff's lot, according to the statute as it stood before the above mentioned act of the thirty-fifth general assembly. Plaintiff took a timely appeal from this ruling to the district court, and, as we have already said, the assessment as made was there upheld.

When the appeal from the ruling of the city council was heard below, this court had but recently decided the case of *Benshoof v. Iowa Falls*, 175 Iowa 30, concerning the application of the same statute to an assessment for street paving, and, under the circumstances there shown, it was held that such assessment, though not made until after January 1, 1914, should have been levied according to the terms of the old statute, and it is quite possible that the trial court

in this case regarded that precedent as controlling. But the two cases differ very widely in their material facts. In the *Benshoof* case, the resolution of necessity, its final adoption, the preparation of the plans and specifications, the letting of the contract, its approval and the acceptance of the contractor's bond, had all taken place before Chapter 76 of the Acts of the Thirty-fifth General Assembly became a law, on July 4, 1913. By the terms of the contract, the work was to be completed during the year 1913, and before the date fixed in that statute after which assessments must be made under the new law. Though the council, late in that year, extended the time for completion for a period ending in the year 1914, it is said in the opinion in that case that "substantially all the pavement was laid prior to January 1, 1914, and practically all the grading and all the curbing was done in 1913." Quite in contrast with such showing, it appears in the present case that no part of the proceedings was had before the law went into effect, on July 4, 1913, nor was any step taken therein before January 1, 1914, except the introduction of the resolution of necessity in the closing days of December, 1913, and the naming of a day in 1914 on which objections to the resolution would be heard. To a case of this character, we are satisfied that the very exceptional rule applied in *Benshoof v. Iowa Falls* has no application, and that the plaintiff's objection that the assessments should have been levied under the new statute was improperly overruled. It is well suggested in the *Benshoof* case that the legislative purpose in permitting the levy of assessments under the old law for a period of six months after the date when the later statute went into effect was "to postpone its operation until all street improvements then under way might be disposed of under the laws *under which they were instituted*," and it is very clear that the scope of such purpose did not include cases where proceedings were instituted after the law went into effect, for an

improvement to be made or work to be done after the date when it is expressly provided that assessments must be made according to the new plan. To say that, after the law had gone into effect providing that, "after January 1, 1914," a specified plan of levying assessments for street improvements must be followed, the city council could avoid its effect by the expedient of introducing a "resolution of necessity" on perhaps the last day of December, 1913, thus initiating proceedings for paving a street in 1914, and have the expense taxed according to the law which the present statute repeals, would seem to be not only unreasonable but also clearly out of harmony with both the letter and the spirit of the legislative language embodied in the act. It follows of necessity that the judgment of the district court confirming the assessment made by the council must be reversed, and such assessment set aside.

Counsel for appellant in his argument

2. MUNICIPAL CORPORATIONS: here asks us to declare the whole proceeding  
public im- for the street improvement void, and to hold  
provements: that plaintiff's property cannot be held liable  
assessments: for any part of the cost of the paving. This  
invalid as- power to  
sessment: correct.

we are not disposed to do. Plaintiff should

not be permitted to have and enjoy the benefits to her property arising from the improvement without contributing her just and proper share of its cost, unless, of course, the law be such that she is clearly entitled to such immunity. The paving was not done without notice to her, nor was the assessment levied without notice. The city council had jurisdiction of the subject matter, and, while the assessment actually made was, as to plaintiff's property, erroneous, it was not void in the sense that, when overruled and set aside on appeal, a proper assessment may not yet be made. If it be said that notice should have been given to owners of non-abutting property within the district which ought to have

been assessed for the pavement, and that special assessments cannot be laid upon such property without notice, it is a sufficient answer to say that this does not concern the plaintiff or in any manner affect her right, so long as her property is taxed for no more than its proper share under the statutory plan. It is inevitable that proceedings of this nature by officers, boards or

3. MUNICIPAL  
CORPORATIONS:  
public im-  
provements:  
informalities  
tolerated.

councils, made up, as they often are, or perhaps generally are, of men unfamiliar with legal forms or requirements, will be marked with more or less informality and irregularity; and to hold every such departure fatal to the validity of the action taken, without affording opportunity to correct errors, if correction be needed, would be to paralyze the work of municipal improvements. Recognizing this truth, the legislature has provided that, where a special assessment has been set aside or rendered ineffectual because of irregularity in the proceedings, the same may be relieved. Code Section 836, and amendment thereto in the Supplemental Supplement, 1915. Whatever may be the case as between the city and owners of non-abutting property affected by this decision, the error which affects the plaintiff's property is, as we have before noted, at most a remediable irregularity. Moreover, in her objections before the city council, plaintiff's claim was not that her property was not liable to be assessed, but simply that it was assessed for more than its share, because of the council's failure to levy the assessment under the new law, and the sole relief asked by her was that the assessment be made according to that plan. Such also was the prayer of her petition filed in the district court upon her appeal from the action of the council.

The cause will, therefore, be remanded to the district court, with instructions to enter a decree sustaining plaintiff's objection to the assessment laid upon her property. And, as it appears that the error of the city council in this



respect is one which involves a re-assessment which may affect the entire schedule, and a re-examination of the benefits derived from the improvement by all the several tracts of land within the assessment district, the trial court is further instructed to remand the proceedings to the city council, with directions to so amend its schedule and levy as to impose upon plaintiff's premises only so much as is properly chargeable thereto under the plan of assessment provided for in Chapter 76 of the Laws of the Thirty-fifth General Assembly.—*Reversed and remanded.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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DAN COLEMAN, Appellee, v. JAMES TIERNEY, Appellant.

**TRIAL: Verdict—Disregard of Instructions—False Imprisonment.**

Verdicts clearly contrary to the instructions will be reversed.  
So held in an action for damages for false arrest.

*Appeal from Clinton District Court.*—F. D. LETTS, Judge.

SATURDAY, NOVEMBER 17, 1917.

ACTION by plaintiff to recover damages alleged to have been sustained by reason of the false arrest and imprisonment of the plaintiff by defendant. Trial to a jury, and verdict and judgment for plaintiff for \$175. Defendant appeals.—*Reversed.*

H. M. Havner, Attorney General, and C. A. Robbins, Assistant Attorney General, for appellant.

No appearance for appellee.

TRIAL: verdict: disregard of instructions: false imprisonment.

PRESTON, J.—Defendant is a deputy game warden of the state, and arrested plaintiff August 26, 1915, without a warrant. At the time of plaintiff's arrest, he was in company with one Dynes, both being on the shore of Daley's Lake, a part of the

public waters of the state, and emptying into or connecting with the Mississippi River. Two seines of considerable length, one, according to the testimony of plaintiff, about 175 to 200 yards long and 10 to 14 feet deep, were, at the time of or shortly before the arrest, being handled by the plaintiff and Dynes on the shore of the lake, within a few feet of the water's edge. At this time, one witness says, the plaintiff and Dynes were so handling the nets within 16 feet of the edge of the water,—according to the testimony of another witness, within 5 or 6 feet. Plaintiff and Dynes had also a boat. At the time of plaintiff's arrest, according to defendant's witnesses, both he and Dynes admitted that they were fishing, and, when asked by defendant what they were doing, said "Fishing a little."

Plaintiff testified that he had been fishing in this lake with a seine, the night before and the night before that, and that, on one of these nights, they caught 150 pounds of fish, and the other night, about 100 pounds. Plaintiff denies that he had been fishing, the night in question.

Plaintiff and Dynes were discovered in the situation before described, and the arrest was made in the nighttime. Defendant had discovered the seines in a wet condition, about one o'clock in the afternoon prior to the arrest. On the morning of the day following the arrest, the county attorney was informed thereof, and advised that no information be filed, and advised the justice before whom plaintiff had been taken that no information would be filed. Under this evidence, it seems to be undisputed that plaintiff and Dynes were in possession of the seines within 10 rods of the water's edge, contrary to Section 2540, Supplement to the Code, 1913. The nets were seized and destroyed by the defendant. Other officers were with him. Defendant cites Section 2539, Code Supplement, 1913, also, as authority for defendant's doing what he did do without a warrant, for a

violation of the fish laws committed in his presence. It is true, doubtless, that, under the evidence, plaintiff was not fishing at the exact time of the arrest, but he had been, not long before, and was there for the purpose of again unlawfully using the seine, and would have done so had he not been arrested. The evidence before referred to is not, of course, all the evidence, but is the substance of it.

The trial court instructed the jury:

"5. You are instructed that, since the defendant arrested the plaintiff without a warrant, that such arrest was wrongful, unless the defendant had authority of the law for making the arrest. For this reason the burden of proof is placed upon the defendant in this case to prove by the preponderance,—that is, the greater weight,—of the evidence, he was justified in doing what he did in arresting the plaintiff. To do this he must establish by the preponderance of the evidence that the plaintiff, at the time of his arrest, was found in the act of violating some law enacted for the propagation and protection of fish. If defendant has so established that the plaintiff, at the time of his arrest, was found in the act of violating some law of this state enacted for the propagation and protection of fish, he then had a right to arrest the plaintiff without a warrant, and the plaintiff cannot recover of him any damages because of such arrest or imprisonment following such arrest. If defendant has failed to prove that the plaintiff was found in the act of violating some law of the state enacted for the propagation and protection of fish, then the plaintiff will be entitled to recover of the defendant the damages which he has suffered because of his arrest, as will be later explained in these instructions.

"6. In determining whether or not the plaintiff was in the act of violating some law of the state enacted for the propagation and protection of fish, you should consider where he was at the time, who was with him, the size of the

seines which he was handling, who they belonged to and what plaintiff had to do with them, the presence of any boat or lantern, who they belonged to and why they were there, whether or not the plaintiff had recently violated any of the laws of this state for the propagation and protection of fish; and from these and all other facts and circumstances as shown by the evidence in the case, you should determine whether or not the defendant has justified his act in arresting the plaintiff as herein explained. Upon this question you are instructed that, if the defendant had, on two different nights shortly before his arrest, unlawfully used a seine in Daley's Lake, and if you further find from the evidence that he was on the banks of said lake on the evening of his arrest, with one or more seines and a boat, and was there for the purpose of again unlawfully using the seine, he, in law, is regarded as then doing the unlawful act, and if the defendant, as a reasonably prudent person, had reason to believe that plaintiff was in the act of using a seine unlawfully in said lake, or was about to so engage, he had a right and duty to then arrest plaintiff, and he cannot be held for any damage because thereof."

Appellant does not complain of either of these instructions. They are the law of the case.

Other errors are assigned, but the principal point is that the verdict is contrary to the evidence and is contrary to the instructions. It seems to us that, under this record, it needs no discussion to show that plaintiff did not make out a case, and that the verdict is contrary to the instructions.—*Reversed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

J. B. DEBOLT, Appellee, v. GERMAN AMERICAN INSURANCE  
COMPANY, Appellant.

**INSURANCE: Avoidance of Policy—Additional Insurance—Knowl-**

1 **edge of Agent.** A policy may not be avoided on the ground that the insured took out additional and concurrent insurance in violation of the policy, when, at the time the policy was issued, it was distinctly agreed between the soliciting agent and the insured that the insured might *immediately* secure additional insurance, and might increase such additional insurance *as the stock increased in value*.

**INSURANCE: Avoidance of Policy—Prohibited Additional Insur-**

2 **ance—Knowledge—Acceptance of Premiums.** A clause avoiding a policy in case the insured procures additional and concurrent insurance is waived by accepting subsequently maturing premiums, with knowledge on the part of the insurer that its soliciting agent had, when the policy was issued, agreed that the insured might *immediately* procure such additional insurance.

**EVIDENCE: Presumption—Mailing Letters.** The mailing of letters,

3 properly inclosed, stamped and addressed, furnishes substantive, but rebuttable, evidence that they were duly received.

*Appeal from Decatur District Court.*—THOS. L. MAXWELL,  
Judge.

NOVEMBER 17, 1917.

ACTION at law to recover on a fire insurance policy. Trial to a jury, and verdict and judgment for plaintiff. Defendant appeals.—*Affirmed*.

*Baker & Parrish and Barnes, Chamberlain & Hanzlik,*  
for appellant.

*McGinnis & Spence,* for appellee.

1. INSURANCE :  
avoidance of  
policy : addi-  
tional insur-  
ance : knowl-  
edge of agent.

PRESTON, J.—The policy in suit was issued by the Merchants & Bankers Fire Insurance Company, April 22, 1909, to run until April 22, 1915, and was afterwards assumed by the defendant. The policy was for \$2,000. The fire occurred August 2, 1914. The policy contained a provision that, unless otherwise provided by agreement of this company, the policy should be void if additional insurance was taken out by the insured on the same property, but provided that the insured might obtain \$500 additional insurance on the stock. The application provided that the company should not be bound by any verbal agreement with the agent.

It is claimed by plaintiff that a part of the contract between plaintiff and the company was that it was agreed between plaintiff and defendant's soliciting agent, at the time of the signing of the application, that plaintiff was to have the right and privilege of taking other concurrent additional insurance for the amount of three fourths of the value of his stock, and that the company and its agent failed and neglected to place the same in the application and the policy; that plaintiff contemplated increasing his stock of goods and did so, until, as he claims, it amounted to about \$7,000. Subsequently, plaintiff did take out two additional policies, one for \$2,000 and the other for \$1,000. Defendant's contention is that the policy in suit is void because of such additional or concurrent insurance. It is alleged that the defendant company knew of the taking of other insurance, both by granting insurance itself on the same property, and by being notified of other insurance at the time the same was taken, and accepted premiums on the policy in suit thereafter; and that defendant is estopped from claiming that the policy is void by reason of the provision in the policy as to the taking of other insurance. The

subsequent \$2,000 and \$1,000 policies have been paid by the other companies.

The parol agreement alleged by plaintiff was testified to by plaintiff and his wife, and not denied by the agent, who was present in court. Plaintiff and his wife further say that they told the agent, when he was soliciting the insurance, that it would be necessary to take other concurrent additional insurance, for the reason that the stock of merchandise of \$4,000 then on hand and the stock purchased would necessitate the immediate taking of other insurance for protection, and that, as the stock was increased, it would be necessary to have other insurance. It appears that, after the policy in suit was issued, and in 1910, plaintiff was acting as agent for the defendant, German American Insurance Company, and in that year as such agent took out for himself additional insurance of \$2,000 on this same stock for a period of two years, continuing to 1912. It is claimed by the plaintiff, and there is evidence to that effect, that the agent who wrote the subsequent \$2,000 and \$1,000 policies notified defendant by letter of the taking out of the subsequent \$2,000 policy, and that there would be another \$1,000 policy. There is a dispute as to whether defendant received this letter. Thereafter, plaintiff paid defendant company the annual premium on the policy in suit in April, 1914, about a month after he had taken out the additional \$2,000 policy.

The principal contention of defendant is that a soliciting agent has no authority to bind the company by contract of insurance, and that knowledge of a soliciting agent of the future intention of the insured as to violating some of the conditions of a policy as written is not binding upon the company. On the first proposition, they cite *Armstrong v. State Ins. Co.*, 61 Iowa 212, 215; *Dryer v. Security Fire Ins. Co.*, 94 Iowa 471, 477; *Dickinson County v. Miss. Valley Ins. Co.*, 41 Iowa 286; *Critchett v. American Ins. Co.*, 53

Iowa 404; *Ayres v. Home Ins. Co.*, 21 Iowa 185; and on the last proposition they cite *House v. Security Fire Ins. Co.*, 145 Iowa 462, 470.

It is also contended by defendant that a soliciting agent does not have authority to waive any conditions of the policy, citing *Elliott v. Farmers Ins. Co.*, 114 Iowa 153, 156; *Strickland v. Council Bluffs Ins. Co.*, 66 Iowa 466, 468; *Garretson v. Merchants & Bankers' Ins. Co.*, 81 Iowa 727, 729; *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa 216, 219; and *House v. Security Fire Ins. Co.*, *supra*.

On the other hand, it is contended by appellee that, under Section 1750, Code, 1897, and the decisions of this court thereunder, the soliciting agent had a right to agree that any conditions of the proposed policy might be waived, or other conditions inserted as a part of the contract; that, so far as this contract is concerned, the soliciting agent was representing the company, and that on his agreement with the insured the contract of insurance is based and issued. They cite *Liquid Carbonic Acid Mfg. Co. v. Phoenix Ins. Co.*, 126 Iowa 225, *Frane v. Burlington Ins. Co.*, 87 Iowa 288, May on Insurance (4th Ed.) Secs. 132, 133-A, and Secs. 368 to 372-B, *Hagan v. Merchants & Bankers' Ins. Co.*, 81 Iowa 321, *Erb v. Fidelity Ins. Co.*, 99 Iowa 727, *Funk v. Anchor Fire Ins. Co.*, 171 Iowa 331; and they cite *Fitchner v. Fidelity Mut. Fire Assn.*, 103 Iowa 276, to the point that the company is charged with the knowledge of its soliciting agent that the insured desired and was to obtain additional insurance, and cite, further, *Independent School Dist. v. Fidelity Ins. Co.*, 113 Iowa 65, *Rake & Son v. Century Fire Ins. Co.*, 148 Iowa 170, *Summers v. Alexander*, (Okla.) 38 L. R. A. (N. S.) 787, 790.

Appellant relies more particularly, we take it, upon the *House* case, which cites and quotes from *Wensel v. Ins. Co.*, 129 Iowa 295, as follows:



"After much controversy and doubt regarding the rule for such cases, we have settled these two propositions in some of our recent opinions: The first is that, if an agent of an insurance company has knowledge of past conditions or existing facts avoiding a policy which is secured by him, by reason of such facts' being within certain prohibitions which presently avoid the policy, the company issuing the policy with this knowledge on the part of its agent, cannot insist upon these facts for the purpose of avoiding liability. Second, knowledge of a soliciting agent of the future intentions of the insured as to violating some of the conditions of a policy as written is not binding upon the insured and cannot be relied upon for the purpose of avoiding the terms and conditions of the policy as issued."

But the *House* case was an action in equity to reform the policy and to recover the amount thereof. It was brought on two theories: First, that a policy was issued to plaintiff which would entitle him to recover; and, second, that no policy was issued, and plaintiff was entitled to recover under an oral contract of insurance. It was said that, under the record in that case, it was not very material whether a policy was or was not issued. But it was held that a policy did issue upon the application, and that it contained a condition that the policy became void because of the execution of a mortgage, unless plaintiff had shown a waiver by the company or an estoppel from setting up the breach. In that case, it was not pleaded that the agent knew when he took the application that it was contemplated by the plaintiff that he would presently make an additional loan upon his property. It was held that, under the evidence in that case, there was nothing to indicate that an additional loan was to be presently secured. The opinion in that case distinguishes the *Independent School District*, *Erb*, and *Fitchner* cases, *supra*, and states that, in each case, the assured was to presently take out additional and concurrent

insurance, to the knowledge of the agent. That is plaintiff's contention in the instant case.

2. INSURANCE:  
avoidance of  
policy: pro-  
hibited addi-  
tional insur-  
ance: knowl-  
edge: accept-  
ance of pre-  
miums.

It is contended by appellee that the cases cited by appellant in regard to the knowledge of the soliciting agent of the future intentions of the assured, and that he has no authority to bind the company by contract of insurance, are not in point in this case. He says that he is making no such claim, but that the taking of the additional concurrent insurance was then a present existing fact, and not a future intention; that it is a case where the agent was representing the company in the making of the contract, from which defendant received the benefits; that the company is charged with the knowledge of its soliciting agent that plaintiff desired additional insurance, and that plaintiff had a right to rely upon the statements and promises of the soliciting agent that he would properly set out the facts in the application; that his failure to do so is the fault of the defendant company. It is shown that plaintiff did not read the application, and put away his policy without reading it, and relied on the assurance that the real contract was expressed therein. As stated, there was evidence that defendant was noti-

3. EVIDENCE:  
presumption:  
mailing let-  
ters.

fied of the taking out of the concurrent insurance. There is a conflict in the evidence as to this, which was for the determination of the jury. The record shows that the additional insurance was to be taken out as plaintiff's stock of goods increased. As to the two policies of additional insurance, the court instructed as follows:

"It is further claimed by the defendant that, in violation of said clause, that the plaintiff, without the consent or agreement of the defendant or the Merchants & Bankers Fire Insurance Company, and without their knowledge, sub-

sequently obtained other policies of insurance on said property, and, by reason thereof, the policy sued on is void. As to this further defense, you are instructed: That, if the plaintiff obtained the additional insurance on said property without the agreement, knowledge, or consent, of the defendant, or the Merchants & Bankers Fire Insurance Company, this act would render the policy sued on void, and the plaintiff cannot recover in this action. But it is claimed by the plaintiff, with reference to said defense, that, at the time the application for the policy sued on was taken by the agent of the insurance company, one George H. Findlay, that said Findlay was then and there fully advised and understood that the plaintiff reserved the right to take additional insurance upon said property from time to time as his said stock increased in value, in proportion to such increase, and that the company issuing said policy and the defendant herein was charged with all of the knowledge that the said Findlay had with reference thereto, and that, notwithstanding such knowledge, the said insurance company continued to receive from plaintiff from year to year the annual premiums agreed upon in said application, and that the defendant is now estopped from pleading that said policy is void by reason of such additional insurance.

"As to this contention you are instructed: That, if you find from the evidence that it was agreed and understood by and between the plaintiff and Findlay, at the time said application was taken for said insurance, that the plaintiff was to have the right and privilege to take additional concurrent insurance on said stock of goods, in proportion to its increase in value, the defendant insurance company and its predecessor would be, as a matter of law, charged with all of the knowledge possessed by such agent, and if, having this knowledge, said companies thereafter received the annual payment on said policy, without making any objection in regard to additional insurance, it is now estopped

from claiming that the policy sued on is void on account of said additional insurance, and you should find for the plaintiff as to this issue. But if you fail to so find as to this issue, the plaintiff cannot recover. It was also claimed by the plaintiff that the defendant company was specifically notified by one Lilly that the additional insurance complained of by the defendant was placed upon said property on or about March, 1914, or would be placed thereon presently, and that, notwithstanding such express notice so given to the defendant company, the defendant thereafter, without objection on its part, received from the plaintiff one payment of premium on the said policy, and that by reason thereof the defendant is estopped from now claiming that said policy is void by reason of said additional insurance. Upon this issue you are instructed: That, if the defendant company was expressly notified or informed by Lilly that he had written \$2,000 additional insurance on said goods, and would presently place an additional thousand thereon, and that, after receiving such notice and knowledge of said additional insurance, the defendant without objection received from the plaintiff the last payment of premium on said policy, the defendant would be thereby estopped from now claiming that said policy became void by reason of said additional insurance. You are further instructed that, if Lilly wrote a letter to the defendant, in which he expressly notified the defendant that he had written \$2,000 additional insurance on said stock, and would presently write an additional \$1,000 thereon, and that said letter was enclosed in an envelope, which was properly addressed and stamped, to the Merchants & Bankers Insurance Company, at Des Moines, Iowa, to its post-office address, and deposited in the post office at Kellerton, Iowa, that the presumption would be that such notice, so mailed, was received by the Merchants & Bankers Insurance Company. But such presumption is not conclusive, and the same may be overcome by evidence

that the same was not received by said company."

Without entering into an extended discussion of the cases cited, it is our conclusion that the instructions are in accord with our holdings. It is not a question of the soliciting agent's changing the policy. If he had put the agreement, as made, in the application, and it had appeared in the policy as agreed, no question could be made. This, the agent failed to do. No complaint is made as to the form of the instructions. The questions discussed are controlling, and decisive of the case. The judgment is—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

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L. R. ELLER, Appellee, v. NATIONAL MOTOR VEHICLE COMPANY,  
Appellee, PEGAU AUTO. COMPANY et al., Appellants.

**GARNISHMENT: Liability of Garnishee—Future Dealings with**  
1 **Defendant.** A garnishee, after garnishment and prior to the determination thereof, may continue, without liability to the plaintiff in execution, to deal with the execution defendant and carry out contract obligations existing prior to and after the garnishment, so long as such continued dealings do not render him indebted to the defendant in execution, or place the property of the execution defendant in his possession.

**PRINCIPLE APPLIED:** A garnishee, at the time of garnishment, neither owed nor had in his possession any property belonging to the execution defendant. At said time, however, a contract existed between the garnishee and the defendant in execution, under which said defendant agreed to sell, from time to time, certain automobiles to said garnishee, and garnishee agreed to pay therefor "on sight draft with bill of lading attached, delivery f. o. b. Indianapolis, Ind." After the garnishment, and before answer, the garnishee continued to make large purchases under the contract, and was necessarily compelled to pay the sight draft on each purchase and secure possession of the bill of lading, in order to get possession of the automobiles. *Held*, garnishee was not liable to the execution plaintiff.

**GARNISHMENT:** Property Subject—Debt "To Become Due."

2 Principle recognized that a debt which is not in existence when the garnishment is made is not a debt "to become due," within the meaning of Section 3935, Code, 1897.

*Appeal from Polk District Court.*—LAWRENCE DEGRAFF,  
Judge.

NOVEMBER 17, 1917.

THE opinion states the case.—*Reversed.*

*Brammer, Lehmann & Seevers*, for appellants.

*C. J. Eller*, for appellee.

WEAVER, J.—The petition states that, in the spring of 1913, plaintiff purchased an automobile from the defendant, through the Iowa Automobile & Supply Company of Des Moines; that the purchase was made in reliance upon representations by the defendant that the car was well made and of good material and workmanship; but that, upon receipt and use of said car, it proved to be inferior and defective in material and workmanship, and thereby was made worth materially less than it would have been if it had been of the quality and character represented, by reason of which he has been damaged in the sum of \$1,200, for which he asks recovery. In an amendment, he further alleges that the defendant, though a corporation with its principal offices at Indianapolis, Indiana, has branch offices at Des Moines, through which it does business in Iowa. Original notice of the action was returned as having been served on the defendant by reading the same to John H. Gibson, president of the Iowa Automobile & Supply Company, as agent of the defendant; also by reading the same to C. A. Pegau, member of the Pegau Auto Company, as agent of the defendant. The defendant made no appearance to the action, and judgment was rendered

1. GARNISHMENT:  
liability of  
garnishee:  
future deal-  
ings with  
defendant.

against it by default for \$500, under date of October 26, 1915. On January 13, 1916, under a general execution issued upon the judgment, notice of garnishment was served on the Pegau Auto Company. Responding to the notice, the garnishee thereafter filed written answer, denying that it was in any manner indebted to the defendant on the date of the garnishment or any date thereafter, down to and including the date of the answer. Further answering, the garnishee alleged that the judgment upon which the execution issued was void, because no notice of the pendency of the suit had ever been served. Still further answering, the garnishee says that it is a dealer in automobiles, buying its cars at wholesale and selling them at retail, and that, while it has bought cars under a certain written contract hereinafter mentioned, it has never been or acted as defendant's agent, and has neither had nor sustained any other relation therewith than is shown by said contract. He further shows that the contract was entered into on July 15, 1915, for the period of one year. By this contract, the National Motor Vehicle Company agrees to sell to the Pegau Auto Company, which company also agrees to purchase, a number of cars at different dates during the period of the contract, at a stated rate of discount from the list prices, on the following terms: The Pegau Auto Company thereafter agreed to make a deposit with the defendant company of \$200, and "that the balance on all cars shall be paid on sight draft, with bill of lading attached, delivery f. o. b. Indianapolis, Ind." Other stipulations have no material bearing upon this controversy, except, perhaps, as they may be considered evidence on the question of the garnishee's alleged agency and the sufficiency of the service of plaintiff's original notice. But we reach our conclusion, hereinafter stated, without reference to the latter question, and shall, therefore, not encumber our opinion with further recitation of the agreement.

On trial of the issue joined by plaintiff upon the garnishee's answer, no evidence was offered tending to show that, at the time notice of garnishment was served, the garnishee was in any manner indebted to the judgment defendant or had any property of said defendant in its possession; but the garnishee admitted that, after the notice was served, and before the answer thereto was filed, it had received several cars from the defendant and had paid for the same according to the terms of the written agreement. Mr. Pegau, who is in fact the "Pegau Auto Company," testifies as follows:

"I simply buy my automobiles at wholesale and sell them at retail. The cars are shipped with draft attached to bill of lading, and, in order to get possession of these cars, we have to pay the draft: we have to pay the draft in order to get the bill of lading before we unload them or even inspect them. The bill of lading is sent to the bank. \* \* \* I never have any cars in my possession belonging to the National Motor Vehicle Company. I never get possession of any cars before I pay full price for them. \* \* \* I have received some cars from this concern after this garnishment was made. I received and paid for on February 6th two Nationals, two on February 8th, two on March 26th, and two on March 28th. In round numbers, I have paid \$9,600 since the garnishment was served. They were delivered to the railroad company and not released to us until we paid the draft attached to the bill of lading at the bank. I paid the draft before I got the bill of lading, and could not get the cars into my possession without paying for them. \* \* \* At the time this notice was served, I did not have any cars which were not paid for."

Upon the showing thus made, the trial court found for the plaintiff and entered judgment against the garnishee for \$500, with interest and costs, and in addition thereto "ordered, adjudged and decreed that the garnishee



shall not pay the National Motor Vehicle Company any further sum upon the contract until the judgment against said defendant with interest and all costs are all paid." From this judgment the garnishee appeals.

Reversing the order of counsel's argument, we first take up the question whether, assuming for the purposes of this case the entire validity of the judgment recovered by the plaintiff against the National Motor Vehicle Company, he has shown himself entitled to recover from the garnishee.

For two or three very sufficient reasons, this question must be answered in the negative. Garnishment, as the word is used in this state, is a proceeding by which an attachment or execution plaintiff seeks to subject to his writ the property, rights and credits of his debtor by calling into court and requiring answer of some third person who has either property, credits or effects of the debtor in his possession, or who is himself indebted to such defendant. It is not the purpose or intent of the law to require more of the garnishee than that he turn over to the officer or to the court any property or effects of the debtor in his possession or control, and pay to the officer or into court any debt he may owe to the plaintiff's debtor. In this state, also, it is doubtless true that, if the garnishee's answer discloses that, at the time of the garnishment, he owed the defendant a debt which was not and is not yet due and payable, the court may continue the hearing for the maturity of such debt, or possibly may enter judgment therefor payable when it falls due. But nothing is better settled than that the garnishee will not be held to any other or greater obligation for the benefit of the plaintiff than he was already under to the debtor. The court cannot do any more than put the plaintiff in the shoes of the debtor, so far as relates to the claim against the garnishee. The notice to the garnishee

serves to impound in his hands whatever he may then owe the debtor or may have in his hands or in his control for the debtor. It does not inhibit him from all future dealings with the debtor nor place him under obligation to withhold payment of any debt he may thereafter contract. If the debtor himself has no right of action against the garnishee, the attaching or execution creditor can acquire none under his writ. If no relation of debtor and creditor exists between the garnishee and the judgment debtor, then no ground exists for recovery by the judgment creditor against the garnishee.

Turning, then, to the showing in this particular case, there is an entire absence of evidence showing or tending to show that, when the garnishment was served, the garnishee was indebted to the judgment debtor in any amount or sum. Indeed, the only evidence on the subject expressly negatives such conclusion. The garnishee had no car of the defendant's in his possession, and he had paid in full for all cars bought up to that date. The written contract between them was not a contract of sale upon which the garnishee became indebted in any sum. It was a contract or agreement to make certain sales in the future, such sales to be made and consummated on the basis of cash payment before the delivering to the garnishee of the bill of lading, which delivery must precede the right to demand and take possession of the cars purchased. The delivery of the property purchased and the payment of the price under such circumstances are to be regarded as simultaneous, or as a single act. No credit was extended, and there was never an instant when the relation of debtor and cred-

itor existed. Moreover, all this occurred after the garnishment was served, and would not, in any event, render the garnishee liable in this proceeding. See Code Sections 3935 and 3946; *Victor v. Hartford Fire Ins. Co.*, 33 Iowa 210; *Cox v. Russell*,

2. GARNISHMENT:  
property sub-  
ject: debt "to  
become due."

44 Iowa 556; *Huntington v. Risdon*, 43 Iowa 517; *Thomas v. Gibbons*, 61 Iowa 50.

It is not material that there was a contract for future sales not yet in fact made or consummated at the time of the garnishment; the seller might yet refuse to make the sales or the buyer to make the purchases, or they might mutually agree to waive further performance of their agreement. They were under no obligation to proceed any further unless they chose to do so, and quite certainly the execution creditor could not compel them to proceed for his benefit.

There was an entire absence of evidence to show any indebtedness of the garnishee to the judgment defendant when the notice was served or at any other time, and the proceedings should have been dismissed. This conclusion renders it unnecessary for us to consider or decide the question of the validity of the original judgment.

The judgment of the district court is—*Reversed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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ROY GILBERT, Appellee, v. W. M. VANDERWAAL, Appellant.

**NEGLIGENCE: Contributory Negligence—Automobile Accident.**

1 Evidence relating to the conduct of plaintiff in crossing a street between intersecting streets, with resulting collision with an automobile, reviewed, and held to present a jury question on the issue of plaintiff's contributory negligence.

**TRIAL: Verdict—\$5,000—Excessiveness.** Verdict of \$5,000 ordered

2 reduced to \$3,500, or new trial granted. Plaintiff, a young man of moderate earnings, suffered a broken limb, was confined to the hospital for some eleven weeks, suffered at the time much pain, and an actual pecuniary loss of \$1,200, but had apparently fully and permanently recovered from the injury and all suffering therefrom.

*Appeal from Polk District Court.*—W. S. AYRES, Judge.

NOVEMBER 17, 1917.

ACTION for damages resulting from an automobile collision. Verdict and judgment in favor of plaintiff for \$5,000. Defendant appeals.—*Affirmed on condition.*

*Coffin & Rippey*, for appellant.

*Stipp, Perry, Bannister & Starzinger*, for appellee.

1. NEGLIGENCE: STEVENS, J.—I. Walnut Street extends  
contributory east and west, and is intersected and crossed  
negligence: by Fifth and Sixth Streets, near the center  
automobile of the main retail business district in the  
accident. city of Des Moines. The center of the street  
is occupied by double street car tracks. About 160 feet  
west of the west line of the intersection of Fifth and Walnut Streets is an alley, running north and south. The White Shoe Store is on the south side of Walnut Street, the door thereof being 88 feet west of the west intersection of Fifth and Walnut Streets. The Good Block is directly across Walnut Street on the north side, the entrance to which is at the extreme west side, a distance of 81 feet and 8 inches from the west line of Fifth Street at its intersection with Walnut. The distance from the north edge of the north rail of the south street car track to the south curb line of Walnut Street is 20 feet, and the distance between the north and south rails of the south street car track is 5 feet and 1 inch.

Shortly after 9 o'clock A. M., May 6, 1914, plaintiff was struck by defendant's automobile, knocked down, and the right wheel ran upon his left leg, fracturing the femur near the junction of the lower and middle third. Plaintiff testified concerning the matter as follows:

"I started across the street, I think, about half way between the alley and the street intersection of Fifth and Walnut. That was on the south side of the street where I

started over and along about the White's Shoe Store, and I started across and I got about somewhere near the center of the street, and the street car cut me off there. The street car came a way, and it stopped. I was crossing right where the street car stopped to let off passengers, and I was about the center of the street car, and this street car stopped to discharge passengers; and I raised to my tiptoes and looked to see, to take notice whether it was going to move on quick, or stop to discharge a number of passengers. If it was going to move right away, I would have waited, because the entrance to the Good Block was right in my line; but I seen it was going to discharge a number of passengers, so I started going east, coming around the car where I got passed, and I must have been near the back end of the car, and I was struck in the back of both of my limbs with the fender of an automobile, and I realized my danger, and I attempted to throw my body and roll as much as possible to get out of the way. I did throw my body clear of the automobile to the south, which was about on the street car track where I was struck, and I threw myself, and my head was lying to the south and my limbs to the north, and the automobile ran up on this limb right here. It was my left limb. It struck me about half way between the knee and hip. I presume on the left limb. The automobile did not go over the limb, it ran just up to the limb. Anyway, he backed off of me, clear of me, but I am not sure it ran upon the limb, but part of the way on it; anyway, when he ran up on the limb, the bone held up the weight of the car for an instant, and then after it stopped there, the bone gave way and it cracked. I could hear it plainly. \* \* \* I felt the pressure of the automobile as it struck me on the back of both limbs, and I went over on the pavement. I presume it was the fender struck me. I did not notice it, but there was a sore spot. The first thing I felt was the automobile striking me below the hips. Then I threw myself sidewise

and landed on the pavement, face up. I imagine I jumped when I threw my body 6, 8 or 10 feet. I jumped east and south. When I was picked up, my body was south of his automobile."

Plaintiff further testified that he looked and did not see defendant's car, and that defendant gave him no warning, and, in answer to a question, stated that the reason therefor was that he did not see him. Plaintiff further testified that there were two automobiles standing near the south curb about 30 feet apart, when he started to cross the street; that he stepped off the curb near the west automobile, and started across the street from a point near the center of the distance between them; that the east automobile was about 20 or 25 feet from the alley; that he noticed but one street car.

Dr. Hanson, a dentist occupying rooms in the Good Block, testified that he was at the time in his office, at a point about 22 feet west of Fifth Street and 25 or 30 feet above the sidewalk; that he saw plaintiff attempt to cross the street and defendant's car collide with him; did not hear defendant sound warning as his car approached plaintiff; did not remember definitely whether there was a street car standing near the place of the accident or not, but testified that, if the center of the street car was directly south of the entrance to the Good Block, he could not have seen the accident, but if the rear end was near the entrance, he could see it. Witness saw the automobile coming down the street, and testified that at the time of the collision defendant was looking north.

It is conceded in the testimony that there were two automobiles at the time standing near the south curb of Walnut Street, the only conflict in the testimony upon this point being as to the exact location thereof. Dr. Hanson was the only witness called who saw the accident. Several other witnesses testified that they arrived on the scene im-

mediately after it occurred.

W. B. Emerson testified that he was standing on the corner of Fifth and Walnut, and, upon hearing a man make a noise, turned, saw him reel and fall; went at once to him and found plaintiff lying on the pavement, with the automobile close to him and his feet over the south rail; the north wheels of the automobile were about the center of the track; heard defendant say that the reason he did not give plaintiff warning was that he did not see him. Witness and defendant put plaintiff in the car and took him to the hospital

A. U. Coates testified that he saw a west-bound street car standing on the north side of the street, and plaintiff lying at or near the south rail of the south street car track; that the rear end of the street car was about the opening or entrance to the Good Block; that there were no automobiles or vehicles at the curbing immediately south of the place where the accident occurred; that the nearest automobile was about 12 feet west of the accident; did not know how far west the second car was; that the accident happened about in front of Field's or White's Shoe Store; heard defendant say that he did not see plaintiff in time to give warning of his approach.

W. E. Evans testified that his attention was attracted by the appearance of defendant's car; that the defendant was driving at the rate of 5 or 6 miles an hour; saw defendant suddenly rise up in the car and thought he had struck something; could not see the front wheels of the automobile; that he went to the scene of the accident; that the automobile was astride the south rail of the street car track; that he saw two street cars standing on the north side of the street; that the accident happened a little bit east of the entrance of the White Shoe Store; that, on account of the noise, could not say whether defendant sounded a warning of his approach or not. Witness was about 30 feet west and 24 feet south

of the place of the accident. This witness further testified :

“Q. It [the automobile] was going directly east? A. Well he was going a little bit catacornered, from the north side of the street, I think. The car was, I think, astraddle of the south rail of the four tracks. Q. He was going, then, in a southeasterly direction? A. Angling a little to the southeast. I think he came from the north side of the street. I don't know whether he was clear over in front of the cars that were standing there or not. Q. You noticed street cars on the north side? A. There were two street cars standing there. I couldn't say whether more or not. Q. You think Vanderwaal came down in front of these in crossing, or almost in front? A. Yes, sir; angling a little bit more to the south. Q. When he came to these cars, he turned to the south? A. I just saw him about the time he came to the front end of the car standing in front, passing west.”

Defendant, called as a witness in his own behalf, testified as follows:

“I live in Des Moines, and am the defendant in this case. On or about May 6th, I was driving a 1914 model Chalmers-Six automobile down Walnut Street in an easterly direction, between Fifth and Sixth on the south side of the street. I was going down Walnut Street from Sixth to Fifth, and I just passed the alley, and a man came out of the alley and started across the street ahead of me. He came from the south out of the alley from the south, and was going across Walnut Street. He was going across north. He started across the street, and the street car pulled in front of him, and he couldn't get across; so he started walking up alongside of the street car, and I blew my horn several times. I know of three times at least I blew it, and he looked around, and I knew he had seen me; so I started around him, and of course he would be naturally on my left side, and then as I went around him I watched him, and my fender stuck out, because there was not much room, and



there was a car at the curb here on this side and I would not have much room to drive through, and just as I went around him I watched to see that my fender did not hit him, and I looked up, and just as I did, Mr. Gilbert stepped from behind an automobile, and it was his first or second step from the automobile when my right fender caught him right across there (showing), and pushed him over.

"I had a large-sized Klaxon horn on that automobile at that time. I blew that horn when I saw the man walk out of the alley. I blew it three times I know, and he did not turn around and signify that he saw me, and I did not want to pass him until he knew I was going by him, because he was between the street car and me. The Klaxon horn has a large bell, or funnel, that the sound comes out of, and inside there is a motor there and a ratchet welded on its diaphragm, and every time it hits the diaphragm it makes a noise, and hits it probably several times a minute. It is a continuous noise as long as you press down on the button.

"There were two street cars standing on the north track there. The street car farthest west pulled just up to the middle of the alley, I should say. I would not say for sure, because I was right at the side of it, and I don't know whether the front end was opposite the alley or the back end was opposite the alley, but the front end was very near the alley. I couldn't say for certain the approximate distance between that car and the car immediately following, but they were pulled up close, probably only the fender in between, and may be a foot or two more. Mr. Gilbert bumped into my automobile when it was very near the back end of the first car. That would be about in front of White's Shoe Store." \* \* \*

"Q. Now, immediately after you saw or you felt the car bump into Mr. Gilbert, what did you then do? A. Well I was stopping the car at that time. I started to stop it just before it bumped into him. Q. How soon before you struck

him did you observe Mr. Gilbert in your path? A. I would say it was approximately the fraction of a second. I was only about a foot and a half from him, I should say, when I saw him. Q. State to the court and jury what you observed about Mr. Gilbert at the time you first saw him. A. When he stepped out, as he stepped out from behind the car, he was looking up at the Good Block. Q. And was there any obstruction between Mr. Gilbert and yourself, or did he do anything which would obstruct the possibility of his observing you coming? A. I don't understand your question. Q. Was there any reason why Mr. Gilbert couldn't see you coming? A. I do not see why there should be any. There was nothing between he and I in the street. Q. Was there any automobile ahead of you which had preceded you down the street in the same direction? A. Not one,—not very close. That is, I did not see any close. Q. What did you do when you first saw this other party coming out of the alley and heading across the street? A. I was blowing the horn for him to get out of the way, and while I had slowed down to almost a crawl, I would not have to completely stop before he heard me. Q. When did you stop the car finally,—what, as far as you know, was the position of the front of the car in relation to Mr. Gilbert? A. He yelled 'Get off,' and I backed up. I supposed I was upon his foot. Q. You say he yelled 'Get off?' A. Yes, sir. Q. Did you immediately proceed to back up? A. Yes, sir, sure. \* \* \*

"At the time of the collision, I was going in a slightly southern direction, but mostly east. I have had considerable experience in driving automobiles. Going at 5 miles an hour, I would say you could stop in possibly 7 to 10 feet, according to circumstances. When I observed Gilbert that day, I put on the brake and threw out the clutch. I stopped my car that day in from 7 to 9 feet. Gilbert stepped out into the street from between these two automobiles, and when he stepped out, he was looking up at the Good Block. The only

time I saw Gilbert was just before the accident happened, and that was after I had avoided a collision with the man that came out of the alley. Gilbert had his head in the air, and was looking up towards the Good Block. He said he was looking for Dr. Hanson's sign, which is in the Good Block. He said this when we were going to the hospital. He was looking up to locate Hanson's office in the building. When I saw him looking there, it was too late to give a warning. I did not have time to give a warning before I struck him, after he stepped from behind the car. These two street cars were standing on the north side of the street when this accident happened. The distance from the place where I struck Gilbert to the south curb line of Walnut Street would be about the width of an automobile. He was just outside of those automobiles that were standing on the south side of the street. He was going about due north. My fender first struck Gilbert. Just as he stepped out from behind the automobile, he started to take another step, and hit the corner of my car and went down. He did not jump, because the wheel carried his left leg right down under."

S. M. Block, called on behalf of defendant, testified that he came out of the alley and started across the street to the east immediately before the accident; that he was intercepted by a street car, and started to go around the east end of it, when another car pulled up so close that he could not do so; that he then started east around the second car, when he heard an automobile approach; heard the driver blow the horn, whereupon he moved closer to the street car; that he saw the automobile pass on his right side going east; heard the driver apply the brakes, and saw the automobile stop within a distance of one half of its full length; saw plaintiff lying on the track in about the same position as described by the other witnesses; that the automobile was traveling from 5 to 8 miles an hour; that it was not going

very fast. The accident occurred near the rear end of the rear street car.

H. P. Daly testified that, immediately preceding the accident, he had been standing at the front window of his office in the Clapp Block, at the southwest corner of Fifth and Walnut; that he saw defendant driving east at about 5 or 6 miles per hour; that he moved from the window a moment, when he returned to the window and saw defendant and another man picking up somebody from the pavement; that he heard a noise made by the application of the brakes; thought there were two large automobiles and a Ford near the south curb of Walnut Street, and that the top of the Ford was up.

Richard Howard testified that, when he arrived at the scene of the accident, plaintiff had been picked up; that the front wheel was north of the south rail of the south track; that a car stood by the curbing, immediately south of, and within a foot or two of, defendant's car.

The foregoing is a substantial statement of the material points in the testimony respecting the injury. Six grounds of negligence were alleged in plaintiff's petition, as follows:

(1) That defendant negligently operated his automobile in a crowded street at such a high rate of speed that he was unable to stop the same in time to avert the collision; (2) that he failed to exercise ordinary care in approaching the intersection of Walnut and Fifth Streets at a high rate of speed at a point where the street car was standing to let off passengers, and at a point where pedestrians were apt to be; (3) in approaching the crossing without sounding his horn or warning plaintiff of the approach of his automobile; (4) in failing to maintain a lookout in front of his car for plaintiff and pedestrians in said street; (5) in failing to have his car under control so that he could stop same in time to avert the collision with plaintiff; (6) in failing

to stop or divert the course of his automobile, and thereby prevent the same from colliding with plaintiff.

The defendant for answer denies the allegations of plaintiff's petition, and avers that whatever injury plaintiff received was due to his own negligence directly contributing thereto, and without any negligence on the part of the defendant.

The two principal questions argued by counsel upon this appeal are that plaintiff's injuries were due to his own negligence, and that the verdict of the jury is excessive.

The rate of speed at which the automobile was at the time being operated was not necessarily negligent, although defendant was approaching close to a crossing of a busy street, and was in the immediate vicinity of two street cars probably discharging passengers on the opposite side, and was bound to operate his automobile at such a rate of speed and in such a manner as to have the same under such control that it could be stopped within a reasonable distance, in order to prevent danger of colliding with pedestrians. His view on Walnut Street from the alley east to the intersection of Fifth Street was unobstructed, and a pedestrian coming upon the street at any point between the automobile and Fifth Street could have been readily seen by defendant, if looking in that direction. The testimony as to whether defendant sounded a warning of his approach close to defendant is not wholly without conflict. Defendant, according to the testimony of plaintiff and two witnesses, admitted that he did not see plaintiff in time to give him warning. Dr. Hanson and another witness testified that they did not hear defendant sound his horn, but they do not appear to have been observing or listening closely as to whether the same was sounded or not, and one witness testified that he might not have heard it because the noise was so great at that point.

The witness who testified that he came out of the alley

and started to cross the street when intercepted by a street car, said that defendant did sound his horn, which he plainly heard, in time for him to get out of the way. At this time, this witness and plaintiff were apparently not very far apart, but defendant had not then seen plaintiff. Plaintiff testified that he looked while crossing the street, and did not see the approach of defendant's automobile, and one witness testified that defendant came, apparently, from the north side of the street in front of the street car; so that the jury might have found that defendant's automobile was not in view at the time plaintiff claims to have stood by the car for the purpose of observing whether it would pass on quickly, or be delayed a sufficient length of time to discharge several passengers.

The evidence shows that plaintiff's automobile was proceeding at a rate of from 5 to 8 miles per hour, and that, after defendant applied the brakes, it traveled a distance equal approximately to its length. According to the testimony of defendant, he turned his car slightly to the southeast, to avoid a collision with the witness who came from the alley, and in doing so ran very close to another car standing on the south side of the curb; that he was looking to see whether the left fender of his car had struck the witness, and therefore did not see plaintiff in time to avoid the injury. Defendant, however, claimed that plaintiff stepped in front of his car from the south side of the street from behind an automobile, and had taken not to exceed two steps when he struck him. The automobile, when the witnesses arrived, was astride the south rail of the south street car track, and plaintiff was lying with his head to the west and his feet over the south rail.

There was evidence from which the jury might have found that plaintiff was 15 feet east of the automobile when he started to cross the street, and that there was ample room for defendant to turn his car to the south and avoid the col-

lision. Dr. Hanson said defendant was looking north, and he admits that he was looking, immediately before the collision, to see whether he had struck the other man. And there was some evidence which, if believed by the jury, would indicate that defendant may not have been in view of plaintiff when he started across the street, or before he turned to go east. Defendant claimed, as above stated, that plaintiff was, at the time, looking up toward the sign of Dr. Hanson on the Good Block, and could have seen defendant approaching, had he been in the exercise of ordinary care. Plaintiff denies this, and testified that he knew where Dr. Hanson's office was, and that he was walking east, which brought his back to defendant, for the purpose of going around the rear end of the street car and thence to Dr. Hanson's office.

We do not feel warranted in this case in saying that the evidence so clearly establishes negligence upon the part of plaintiff that there is no room for difference of opinion among fair-minded men in relation thereto, and that the cause was not properly submitted to the jury. *Perjue v. Citizens' Electric Light & Gas Co.*, 131 Iowa 710; *Delfs v. Dunshee*, 143 Iowa 381; *Holderman v. Witmer*, 166 Iowa 406; *Bell v. Incorporated Town of Clarion*, 113 Iowa 126; *Clay v. Iowa Telephone Co.*, 178 Iowa 67.

What is said above practically disposes of every question suggested by counsel, except the contention that the verdict was excessive. We think there was sufficient evidence to require the submission of the case to the jury.

II. Plaintiff was taken to a hospital in the city of Des Moines immediately after the injury complained of, where three physicians attended him. His injuries are described as an oblique fracture of the femur at the junction of the lower and middle third. The morning after the fracture was reduced, the physicians found that the broken parts were not in apposi-

2. TRIAL: verdict: \$5,000: excessiveness.

tion. An anesthetic was administered to plaintiff, the bones placed in proper position, and fastened by means of a Lane plate. The limb was placed in a plaster cast; and he remained in the hospital for about 8 weeks, when he returned home. He returned to the hospital again in about a week, when it was discovered that the Lane plate was broken, and the broken bone had not united. A second operation was performed, and two large-sized Lane plates were applied. The plates used were long, thin plates of steel, and were screwed tightly to the bone for the purpose of holding it in place. These plates have not been removed, but, as the broken parts of the bone have fully united, these plates are not now necessary, but the removal thereof would require an operation, which is not advised. Plaintiff stated that he suffers no inconvenience on account thereof. Plaintiff claims, and his physicians also testified, that he suffered a great deal of pain, was given an anesthetic when each operation was performed, was confined in the hospital about 11 weeks altogether, and walked with the aid of a crutch after he finally left the hospital, until about the month of October.

At the time of the trial, according to the testimony of medical witnesses, there was an excess of callous about the fractured place, and they testify that same is being absorbed to some extent, but may not all ultimately disappear; that, while some friction results therefrom, and the free movement of the muscles is, to a slight extent, impaired, the callous will eventually become solid bone, smooth, and no inconvenience will be felt on account thereof. The bone is not perfectly straight, but the extent of this imperfection is not shown. Plaintiff claimed to still, occasionally, feel some pain as the result of the fracture; that he cannot walk as fast as formerly, or stand on the limb for a considerable length of time without inconvenience; that the movement of his leg is impaired to some extent, and he is



unable to assume some positions in his work that he could before the injury. The union of the broken parts of the bone is sound and secure. It does not appear that he is lame, or that he will in the future suffer any material inconvenience or discomfort on account of his injury.

He was 29 years of age at the time of his injury, and had a life expectancy of 30 years. He was earning \$3 per day at his trade, which was that of a marble cutter. After he was able, he returned to work for his former employer at slightly reduced wages. It is not shown, however, that the reduction in wages was due to his injury. Shortly thereafter, he engaged in the business of repairing furniture in the city of Des Moines, and continued therein until the time of the trial.

He expended for medical and hospital services about \$500, and was unable to work for about 10 months, making his actual loss in the neighborhood of \$1,200. Plaintiff is entitled to compensation for the injury suffered, so far as that is possible, payment of his medical and hospital expenses, for loss of time, pain and suffering, past and future, and some other elements of recovery. The jury returned a verdict of \$5,000 in his favor. In our opinion, in view of the nature of the injuries, the substantial recovery therefrom, the earning capacity of plaintiff at the time of the injury, his present earning capacity and ability to carry on the business in which he is now engaged, this sum is excessive. Plaintiff does not claim to have suffered very great inconvenience while working at his former trade, and claims to have abandoned the same because his employer did not pay him satisfactory wages, and not because he could not do the work.

We are reluctant to reverse this case on account of an excessive verdict, and if plaintiff will remit \$1,500 of the verdict within 60 days from the date of filing this opinion, the judgment for the balance will be allowed to stand. In

the absence of such election within said time, the judgment of the lower court will be deemed reversed, and the defendant granted a new trial.—*Affirmed on condition.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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J. H. HISE, Appellant, v. G. G. THOMAS et al., Appellees.

**FRAUD: Acts Constituting—Opinions and Value.** A positive assertion of value, made by one who knows the value, for the purpose of being relied on *as a fact* by one who does not know the value, *may be relied on*, and a recovery of damages had if the assertion be knowingly false, even though the property was open to the *free inspection* of the one so relying.

**FRAUD: Acts Constituting—Assertion of Value—Reliance—Jury 2, 4 Question.** Record reviewed, and held to present a jury question on the issues: (a) Whether certain assertions of value were made for the purpose of inducing reliance thereon; and (b) whether the purchaser did rely thereon.

**FRAUD: Acts Constituting—Value of Good Will of Business.** 3 Naked assertions of the value of the "good will" of a business are matters of opinion, and may not be relied on.

**FRAUD: Acts Constituting—Assertion of Value—Reliance—Jury 2, 4 Question.**

*Appeal from Polk District Court.*—LAWRENCE DEGRAFF, Judge.

NOVEMBER 17, 1917.

ACTION for damages on account of alleged deceit in the exchange of property. Motion to withdraw some of the issues from the jury was sustained. Verdict for plaintiff for \$700. Plaintiff appeals.—*Reversed.*

John McLennan and George E. Hise, for appellant.

C. W. Lyon, for appellees.

1. FRAUD: acts  
constituting:  
opinions and  
value.

STEVENS, J.—Plaintiff, who was the owner of 480 acres of land in Woolworth County, South Dakota, encumbered by a mortgage of \$8,000, on or about May 5, 1915, entered into a contract in writing with the defendants, by the terms of which he agreed to convey said real estate, subject to said mortgage, to the G. G. Thomas Company, in consideration of the sale and delivery to him of a certain stock of hardware, barber supplies, tools, office and stock fixtures, good will, trademarks, patents, book accounts, insurance policies, and everything in connection with the said business, which was located in the city of Des Moines. Plaintiff traded the real estate upon a net value of \$20,000. He alleges in his petition and amendment thereto that defendant stated and represented to him that the stock of goods and other property above mentioned were of the reasonable value of \$20,000; that the hardware and barber supplies were of the value of \$8,000, book accounts, \$3,500, store front, \$1,000, furniture and fixtures, \$2,500, patents, trademarks and good will, \$5,000; but that, in truth and fact, said statements were false, and that the stock of merchandise and barber supply goods were not worth to exceed the sum of \$5,300; that the value of the furniture and fixtures did not exceed \$1,000; that the patents, trademarks and good will were of no value; and that the book accounts were old, some of the accounts barred by the statute of limitations, and a large part uncollectible. As to this item, it is claimed that defendant represented that they were all current accounts, collectible, and worth within 10 per cent of their face value. Plaintiff asked damages in the sum of \$12,000. The answer of defendant was a general denial.

The court withdrew all the issues from the jury except the allegations of plaintiff's petition relative to the store front and the book accounts, upon the grounds that the remaining allegations of plaintiff's petition were statements

only of opinions on the part of defendant; that the evidence wholly failed to show that defendant was actuated by fraudulent purposes or design in making the statements; and that, if false, the falsity thereof was unknown to him.

The plaintiff claimed, in his testimony, that he had always been a farmer, had no knowledge or information whatever concerning the character or value of the stock of barber supply goods or hardware; that he knew nothing about bookkeeping, and that he believed and relied upon the statements and representations of defendant as to the value of all the property above referred to; that the defendant Thomas was in charge of the store and business, the books of account, patents, copyrights and all other property purchased; that his statements as to the value thereof were positive; and that plaintiff could not, by a personal investigation and examination of the stock, have informed himself as to the truth of defendant's statements. Evidence was offered tending to show that defendant had rearranged the accounts in question upon his books, for the purpose of deceiving at least an inexperienced person in the examination thereof. The defendant denied absolutely that he made any statements or misrepresentations of any kind or character to the plaintiff as an inducement to the exchange of properties, and asserted that plaintiff visited the store, and had ample opportunity to examine the stock and fully determine its value for himself. The plaintiff did employ a hardware merchant, with whom he was well acquainted, to examine the stock of hardware, but made no examination of the barber supply stock, patents or trademarks. The fixtures were in the room and in no wise concealed from plaintiff, but he claims to have had no knowledge as to the value thereof.

The only question presented for decision upon this appeal is whether there were other issues that should have been submitted to the jury by the court. The well known rule of permitting the vendor to indulge in extravagant praise

of his wares as an inducement to the buyer to purchase has been greatly restricted by the more recent decisions of courts throughout the country, and expressions and representations of value are not always treated as matters of opinion only. The opportunity of each of the parties to know the facts, the information actually possessed by the seller and the lack thereof upon the part of the buyer must be taken into consideration. If the parties have equal opportunity to know the facts, and the circumstances are such that the buyer could not reasonably have relied upon the statements and representations of the seller as to value, he will not have a right to rely thereon; but if statements or representations of value are positive and as of a fact, and are so understood and received by the buyer, the same will be so treated, and, if false, may support an action for fraud. The rule was stated by this court in *Hetland v. Bilstad*, 140 Iowa 411, as follows:

"But, as was observed in the case last cited, causes may arise where such representations will be regarded as statements of fact. Parties in negotiating deals have the right to exalt the value or quality of their own property to the highest point credulity will bear, provided their efforts in this line go no further than puffing or praise which the vendor may properly indulge in; but statements of value or of quality may be made with the purpose of having them accepted as of fact, and, if this is done and so relied on, they are to be treated as the parties designed they should be, namely, representations of fact."

This statement of the law has been repeatedly approved by this court. *Shuttlefield v. Neil*, 163 Iowa 470; *Fulton v. Fisher*, 151 Iowa 429; *New York Brokerage Co. v. Wharton*, 143 Iowa 61; *Evans v. Palmer*, 137 Iowa 425; *McDowell v. Caldwell*, 116 Iowa 475; *Gardner v. Trenary*, 65 Iowa 646; *Bennett Sav. Bank v. Smith*, 171 Iowa 405; *Van Vliet Fletcher Auto. Co. v. Crowell*, 171 Iowa 64; *Ross*

*v. Bolte*, 165 Iowa 499. See also *Wilson v. Carpenter's Admr.*, (Va.) 21 S. E. 243; *Whiting v. Price*, (Mass.) 51 N. E. 1084; *Crompton v. Beedle*, (Vt.) 75 Atl. 331.

Some of the cases cited involve representations respecting the value of real estate situated at a distance, and where the seller had a much better opportunity to know the truth than the buyer; but the rule is not applicable to transactions of this character alone. In the case at bar, the value of the Dakota land was apparently fixed by the contract and accepted as \$28,000, subject to the encumbrance thereon. It is claimed by plaintiff that defendant made a detailed statement of the value of the stock to his agent in Des Moines, who had in turn repeated the same to plaintiff, for whom he was also agent for the purpose of disposing of the Dakota land. The agent testified that the statements made by him to plaintiff were obtained from the defendant. Defendant was in possession of the stock of goods and the management of the business, and necessarily knew and understood the character and value thereof much better than the plaintiff; but it is claimed, on behalf of defendant, that plaintiff had an opportunity to fully inspect and examine the stock and all of the property described, and that defendant did nothing to prevent him from doing so. It was a question of fact for the jury to say whether the statements and representations of defendant which plaintiff claims were made were false and known at the time to be false; whether they were made with the intention of having the plaintiff believe them; and whether he did believe and rely thereon, as above stated. Defendant must have known whether the statements made by him as to the character, quality and value of the property in question were true. Plaintiff was not required to disregard the representations of de

2. FRAUD: acts constituting: assertion of value: reliance: jury question.

fendant or seek other means of ascertaining the truth of positive statements of fact made by him.

Mr. Justice Caldwell, in *Strand v. Griffith*, 97 Fed. 854, said:

"There is no rule of law which requires men in their business transactions to act upon the presumption that all men are knaves and liars, and which declares them guilty of negligence and refuses them redress whenever they fail to act on that presumption. The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity."

The rule, as stated in *Maxfield v. Schwartz*, (Minn.) 47 N. W. 448, is as follows:

"While, in the ordinary business transactions of life, men are expected to exercise reasonable prudence and not to rely upon others with whom they deal to care for and protect their interests, this requirement is not to be carried so far that the law shall ignore or protect positive, intentional fraud successfully practiced upon the simple-minded or unwary. As between the original parties, one who has intentionally deceived the other to his prejudice is not to be heard to say, in defense of the charge of fraud, that the innocent party ought not to have trusted him."

This court, speaking through Mr. Justice Beck, in *Hale v. Philbrick*, 42 Iowa 81, said:

"We are not inclined to encourage falsehood and dishonesty by protecting one who is guilty of such fraud, on the ground that his victim had faith in his word, and for that reason did not pursue inquiries that would have disclosed the falsehood."

*Hale v. Philbrick*, supra, is cited with approval in *Holmes v. Rivers*, 145 Iowa 702. See also *Mt. Hope Nurseries Co. v. Jackson*, (Okla.) 128 Pac. 250; *Whiting v. Price*, supra; *Mabardy v. McHugh*, (Mass.) 88 N. E. 894; *Crane v. Elder*, (Kans.) 29 Pac. 151; *Westerman v. Corder*, (Kans.)

119 Pac. 868; *Handy v. Waldron*, (R. I.) 29 Atl. 143; *Cottrill v. Crum*, (Mo.) 13 S. W. 753; *Bowe v. Gage*, (Wis.) 106 N. W. 1074; *Crompton v. Beedle*, (Vt.) 75 Atl. 331.

Without expressing an opinion upon the merits of any of the matters of fact involved in this case, it may be said that the good will of a business has been defined to be merely a hope grounded on the probability that old customers will resort to the old place and continue their patronage. *Kennebec Water Dist. v. City of Waterville*, (Me.) 54 Atl. 6; *Didlake v. Roden Grocery Co.*, (Ala.) 49 So. 384; *Bloom v. Home Ins. Agency*, (Ark.) 121 S. W. 293; *Haugen v. Sundseth*, (Minn.) 118 N. W. 666.

Expressions of the value of the good will of a business, without statements or representations of other matters of fact necessarily included therein and going to make up the good will thereof, are of a character so indefinite and uncertain that same must necessarily usually be regarded by any man of business experience as largely matter of opinion, and not of fact. *Pigott v. Graham*, (Wash.) 93 Pac. 435.

We think that the court withdrew issues from the jury that should have been submitted. It cannot be said, as a matter of law, that alleged statements and representations in fact made by the defendant were not intended to be received, believed and acted upon by the plaintiff as the statement of facts, or that the plaintiff did not so receive the same and act thereon. These were matters of fact, and should have been submitted to the jury under proper instructions. *Shuttlefield v. Neil*, *supra*; *Evans v. Palmer*, 137 Iowa 425; *Gee v. Moss*, 68 Iowa 318.

For the reasons pointed out, the judgment of the lower

3. FRAUD: acts  
constituting:  
value of good  
will of business.
4. FRAUD: acts  
constituting:  
assertion of  
value: reli-  
ance: jury  
question.



court is reversed and the cause remanded.—*Reversed and remanded.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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JAMES MCCOY COMPANY, Appellant, v. M. H. SMITH,  
Appellee.

**TRUSTS: Execution of Trust—Assignment for Benefit of Creditors**

1 —**Personal Liability of Trustee.** A privately appointed trustee for the benefit of creditors, with full title to and management over the property of the debtor, is *personally* liable for the debts incurred by him, either personally or through his agent, *in the execution of the trust*, unless he provides against such personal liability by agreement with the holders of such debts.

**TRUSTS: Execution of Trust—Assignment for Benefit of Creditors—Terms of Trust.**

2 The terms of a trust deed exempting the trustee from all personal liability in the execution of the trust becomes quite immaterial when it appears that the claim sued upon accrued during the execution of the trust and such terms were never brought to the attention of such creditor.

**TRUSTS: Execution of Trust—Trustee as Agent of Trustmaker.**

3 A privately appointed trustee to whom the title to the debtor's property passes for the benefit of creditors is not the agent of the debtor, the trustmaker.

**ACCOUNT, ACTION ON: Evidence—Sufficiency.**

4 Sufficient proof of an account appears from the fact that defendant (a) admitted the account in his letters, (b) ratified the account by making partial payments thereon, and (c) in portions of his argument treated the account as genuine.

**ACCORD AND SATISFACTION: Nature and Requisites—Unconditional Payments.**

5 Payments neither tendered nor received in full satisfaction of a claim fall short of an accord and satisfaction.

*Appeal from Scott District Court.*—WILLIAM THEOPHILUS,  
Judge.

NOVEMBER 17, 1917.

ACTION on account for goods sold and delivered to the defendant as trustee. The cause was tried to the court without a jury, and judgment entered for the defendant, dismissing plaintiff's petition. Plaintiff appeals.—*Reversed and remanded.*

*Cook & Balluff*, for appellant.

*Isaac Petersberger*, for appellee.

GAYNOR, C. J.—This is an action at law to recover for goods sold to the defendant as trustee of the Cash Mercantile Company of Wapello, Iowa, or as trustee of J. B. Cecil, trading under that name. The action is in two counts. One count seeks to recover on an express contract, and the other on a *quantum meruit*. The plaintiff claims that defendant was conducting a store at Wapello as trustee, and for the benefit of the creditors of the Cash Mercantile Company; that, at his instance and request, plaintiff sold and delivered to him the articles herein sued for. The defendant filed a general denial, and stated that, on May 22, 1912, one J. B. Cecil, trading as the Cash Mercantile Company, of Wapello, was financially involved, and, in order to straighten and adjust his affairs, appointed defendant as trustee of his property, the terms of the trust providing that defendant was not liable for any omissions or neglect so long as he performed his duties as trustee in good faith; that J. B. Cecil was left in charge of said business pending final settlement; that the defendant never did any business personally with the plaintiff; that, shortly before April 24, 1914, when arrangements were made to liquidate the affairs of Cecil, defendant was advised that plaintiff, without defendant's knowledge or consent, had sold to Cecil, in the name of the defendant as trustee, a bill of merchandise in the sum set forth in plaintiff's peti-

1. TRUSTS: execution of trust: assignment for benefit of creditors: personal liability of trustee.

tion; that the defendant included plaintiff's claim with other claims due from him as trustee for goods furnished under said trusteeship; that thereupon the funds on hand were prorated on the basis of 24 per cent., and plaintiff received and accepted the sum of \$175.62 as a settlement in accord and satisfaction of any claim held by it against the defendant. In an amendment to his answer after the submission of the case, the defendant, to conform the pleadings to the proof, as he claims, alleged that the terms of the trusteeship under which he was acting, especially stipulated that he should not be individually liable in the execution of said trust, and that all persons transacting business with the defendant as trustee were to look solely to the trust estate; all of which was denied by the plaintiff. Many of the allegations of defendant's answer were unproven, as will hereafter appear. Upon the issues thus tendered, the cause was tried to the court. The plaintiff introduced his testimony and rested. The defendant introduced no testimony. The court found for defendant.

It appears from the evidence and the admissions of the parties that, in May, 1912, defendant was appointed trustee for one J. B. Cecil, trading under the name of the Cash Mercantile Company of Wapello; that his appointment was for the benefit of a number of creditors; that after his appointment he continued the business, and left Cecil in charge of it; that, in the middle of June, 1913, the first sale of goods was made by the plaintiff through a traveling salesman; that this salesman was told by Cecil, at the time of the purchase, of the trusteeship, and was directed by Cecil, who was in charge of the business, to bill the goods to M. H. Smith, trustee, and was assured that Smith would pay the bills; that plaintiff then continued to sell goods to J. B. Cecil, in the name of Smith, as trustee, until the bill amounted to \$731.76; that, after the account had accrued, plaintiff informed defendant, Smith, of the fact that it had furnished

the goods. This was about October 18, 1913. In response to such notice, defendant wrote, on October 18, 1913:

"Your letter of the 16th received, and in reply beg to advise that the writer (defendant) is acting in the capacity of trustee of the Cash Mercantile Co. of Wapello, Iowa, and mail addressed to me in care of this firm will be received. If your inquiry is in connection with the Cash Mercantile Co. of Wapello, Iowa, perhaps I can save you time in saying that, unless Mr. Cecil's parents come to his rescue next week, by advancing sufficient money to put him on his feet, I shall proceed to close out this business, either by sale of everything in a lump, or, if necessary, piecemeal, and will take care of your account against this concern at the earliest possible moment."

On November 21, 1913, defendant wrote:

"More than a year ago, this business was turned over to me as trustee in a practically bankrupt condition. \* \* \* The business has been continued along the most conservative lines, \* \* \* and very little headway has been made since the writer's appointment as trustee. \* \* \* With reference to the payment of your account, will say that at this time I am working, endeavoring to effect a settlement whereby Mr. Cecil's parents come to his assistance. If I am unable to arrange this matter, the business will be shortly closed out, and, of course, the *current* bills will be paid as promptly as possible, and the balance distributed among the *old* creditors. For your own good, I would strongly recommend that you discontinue shipping any goods to the Cash Mercantile Company until further advice, and as above stated, will take care of your account just as soon as possible."

On April 24, 1914, the defendant sent a circular letter to the creditors of the company, among whom was this plaintiff, in which it was recited:

"The present condition of the business is as follows:

Cash in bank.....	\$ 855.69
Book accounts in bank for collection.....	792.92
Book accounts with local lawyer.....	1,377.06
Fixtures, estimated sale price, exclusive of auto-	
mobile .....	375.00
Remaining mdse. on hand, estimated sale price.	125.00
International Delivery Auto, estimated sale	
price .....	75.00
Total	<hr/> \$3,600.67

"Incurred since trusteeship for merchandise .. 3,533.76

"The present available funds, \$855.69, are being pro-rated today on the amount incurred since trusteeship, on the basis of 24 per cent. As fast as the remaining assets can be turned into money, further distributions will be made on the same accounts."

Among these accounts is plaintiff's account now in suit.

At this time, the defendant sent the following draft, presumably with this circular letter:

"Wapello, Iowa, April 24, 1914.

"The Citizens Bank: Pay to the order of James McCoy & Company One Hundred Seventy-five and 62-100 Dollars.

"(Signed by Defendant, Trustee.)"

This sum apparently is the 24 per cent. referred to in this circular letter.

On May 25, 1914, the defendant wrote the plaintiff, in substance, that he was in receipt of a letter from Burlington creditors, which led him to believe that within the next two or three days he would receive the acceptance of all the creditors of the company, and would do his best to close affairs as promptly as possible, and would advise the plaintiff what the deficiency might be, so that the plaintiff might reach a decision as to whether or not it would take

Cecil's notes for whatever deficiency might remain, and said that the note proposition might be a short one, for the reason that Cecil's mother was, right at that time, "critically ill." To this letter, on May 29, 1914, the plaintiff wrote:

"The settlement of the affairs of the Cash Mercantile Company is a matter about which we have no concern. Our account is with you, and, of course, we hold you for the payment of the same."

Other letters passed between the parties, but their contents are not material to this controversy.

2. TRUSTS: execution of trust; assignment for benefit of creditors; terms of trust. This is substantially all the material evidence in the record. From this record it appears that the defendant, as trustee for the creditors of this bankrupt company, placed Cecil in charge, and Cecil bought these goods from the plaintiff; that these goods were sold by the defendant through Cecil and their proceeds taken possession of by the defendant; that the defendant had full control and management of all the property turned over to him as trustee, managed and controlled the business, directed the disposition of the property. He now claims that he is not liable to the plaintiff because of the provision in the deed under which he assumed his duties as trustee, hereinbefore set out. The fact is, however, that the record does not disclose any such exemption as contended for, available to the plaintiff. The trust deed was not in evidence. The only place where it appears that such provision was in the trust deed is the statement made by the defendant in his pleading, and in letters written by him to the plaintiff. But whether that provision existed in the trust deed or not, it is immaterial, for the reason that it nowhere appears to have been brought to the attention of these plaintiffs before the goods were sold to the defendant, or that

3. Trusts: execution of trust: trustee as agent of trustmaker.

plaintiff consented thereto. A trustee to whom the title to the property passes, and who assumes to act in the conduct of the business transferred to him by the trust deed, is in no sense the agent of the trust maker in contracting as trustee. The assets in his hands are held in trust for the creditors of the insolvent concern, with, of course, an obligation to account to the trust maker for any balance that remains after settlement with the creditors. Debts contracted by the trustee in the management of the business are not the debts of the insolvent concern, nor are they the debts of the trust maker as between him and the creditors. Upon delivery of the trust deed and of the property covered by the trust deed, the title to the property passed to the trustee, with power to manage and control the same, to carry on the business if he should so elect; but in the carrying on of the business, he became the principal as to subsequent creditors, whether he acted by himself or through one entrusted by him with the management and control of the affairs covered by the trust deed. We are not without authority for what we have said. In *Hackman v. Maguire*, 20 Mo. App. 286, it was held that a trustee to whom the legal title of the trust property passed, is liable personally to creditors for debts contracted by him in the management of the business; this whether he acted as an individual or as trustee in creating the debt. In *Koken Iron Works v. Kinealy*, 86 Mo. App. 199, it was held that, if a trustee contracting debts for the benefit of a trust wants to protect himself from individual liability upon contracts made by him, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate; otherwise he will be liable, although he contracts as trustee. In *New v. Nicoll*, 73 N. Y. 127, in discussing the same question, that court said:

"The general rule undoubtedly is that a trustee cannot

charge the trust estate by his executory contracts unless authorized to do so by the terms of the instrument creating the trust. Upon such contracts he is personally liable, and the remedy is against him personally. But there are exceptions to this general rule. When a trustee is authorized to make an expenditure and he has no trust funds, and the expenditure is necessary for the protection, reparation or safety of the trust estate, and he is not willing to make himself personally liable, he may by express agreement make the expenditure a charge upon the trust estate. In such a case he could himself advance the money to make the expenditure, and he would have a lien upon the trust estate, and he can by express contract transfer this lien to any other party who may upon the faith of the trust estate make the expenditure. \* \* \* If he was authorized to make any contract about them, it was simply the ordinary contract in such cases, which would bind the trustee personally, and not the trust estate."

In *Blewitt v. Olin*, 14 Daly (N. Y.) 351, the court said:

"The liability of the defendant does not at all depend upon his having trust funds in his hands. If, in person or by an agent, he orders work to be done upon the trust property, he is personally liable, whether he has trust money in hand or not. It is no answer to a debt that he has incurred, and for which he is by law personally liable, that he has paid out all the trust funds that he has received."

The same doctrine is recognized by this court in *Gates v. McClenahan*, 124 Iowa 593. In *Connally v. Lyons*, 82 Texas 664 (27 Am. St. Rep. 935), the Texas court, discussing this question, said:

"As we are of the opinion that a trust estate was created, \* \* \* it remains only to consider \* \* \* whether or not the trustee (the defendant) was personally liable for the goods purchased by him for the trust estate. \* \* \*



That such trustees should be held personally liable is reasonable, because they have in their own hands the means wherewith to reimburse themselves, and should not assume a debt for the benefit of an estate of which they have the sole management and control without prospect of funds for payment thereof. \* \* \* Purchases by trustees, when made in obedience to the trust, impose upon them a personal liability; the seller must look to them for payment, and they must look to the trust estate for reimbursement."

In *McIntyre v. Williamson*, (Vt.) 47 Atl. 786, the Vermont court said:

"The action is general *assumpsit*. The court directed a verdict for the defendant on a motion which assigned as grounds therefor that the plaintiffs dealt with the defendant in his capacity as trustee, and that the plaintiffs' testimony disclosed no cause of action under the pleadings. \* \* \* The dealings upon which the suit is based were had by and with the defendant as 'trustee.' He could become personally holden notwithstanding the use of this term. The legal estate was in him, and he was acting for himself in managing it. His official title served only as a personal description, and to separate the dealings from those pertaining to his personal matters. If he dealt in behalf of the trust estate, and within the limits prescribed by law, he can secure reimbursement from the fund. But the parties with whom he dealt can hold him personally liable, whatever his situation as regards the trust estate. The fact that they knew of the trust, and that he was dealing on its account, will not protect him. He could relieve himself from personal liability only by a definite understanding that the transactions were had upon some other responsibility."

The court erred in directing a verdict for the defendant. See also *Knipp v. Bagby*, (Md.) 95 Atl. 60.

In *Taylor v. Mayo* (*Taylor v. Davis*), 110 U. S. 330 (28 L. Ed. 163), that court said:

"A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. The mere use by the promisor of the name of trustee or any other name of office or employment will not discharge him. Of course when a trustee acts in good faith for the benefit of the trust, he is entitled to indemnify himself for his engagements out of the estate in his hands, and for this purpose a credit for his expenditures will be allowed in his accounts by the court having jurisdiction thereof. If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate. There are, no doubt, cases where persons occupy the position of quasi trustees, under the appointment of a court, such as receivers charged with the performance of active duties, in which it would involve much hardship to make them personally liable. But in such cases, as the parties have the right to prove their claims against the common fund, and have them allowed by the court, the officer may have the protection of the court by which he is appointed, restraining parties from bringing

suits against him, except where leave is given for the purpose of fixing the amount due."

In *Hussey v. Arnold*, (Mass.) 70 N. E. 87, that court said:

"If the trustees contracted in the usual way, without referring to anything which would limit the liability resulting from an ordinary contract, they are personally liable, \* \* \* and judgment can be obtained and enforced against them individually."

*Mitchell v. Whitlock*, (N. C.) 28 S. E. 292. This was a civil action to recover the value of goods sold and delivered by the plaintiff to the defendant. In disposing of the case, the court said:

"A trustee purchasing goods or incurring any other liability on account of his trust is personally liable for the payment thereof, unless his liability is limited by an agreement, expressed or implied, with the creditor."

Though the deed creating the trust is not before us, and there is no competent evidence in the record as to its contents, the whole record discloses with reasonable certainty that there was in fact an instrument executed in which the estate of Cecil, or the Cash Mercantile Company, passed to this defendant as trustee, with full power to operate the business carried on by said Cash Mercantile Company, and to dispose of all its assets for the benefit of the existing creditors. There is no question from this record that the defendant assumed to act as trustee of the property, and carried on the business as such, and as such purchased the goods now sued for in this action.

Some contention is made that the account is not proven. The account is admitted by the defendant in his letters, and ratified in the payment of the amount shown to have been paid by him, and in his promise to take care of the balance. It comes to us with rather poor grace for

4. ACCOUNT,  
ACTION ON:  
evidence:  
sufficiency.

the defendant now to assert that the account was not established, while at the same time stating in his written argument:

"Between the dates June 13, 1913, and January 13, 1914, the appellant, through their salesman, sold and delivered to J. B. Cecil, at Wapello, who remained in full charge of the Cash Mercantile Company after May 22, 1912, certain merchandise on credit to the amount of \$731.76."

Giving the record the most liberal construction possible for the appellant, it would seem that the invoices for this amount were mailed to the appellee, defendant herein, as trustee, addressed to him at Wapello. There is no question that Cecil was left in possession of the assets of the Cash Mercantile Company by the defendant after his appointment as trustee, with power to represent the defendant as trustee in the conduct of the business. We are in no doubt that, under the record made in this case, plaintiff was entitled to a judgment against the defendant personally for the full

5. ACCORD AND  
SATISFACTION:  
nature and  
requisites:  
unconditional  
payments.

amount of its claim, less the amount received. There could be no accord and satisfaction by the receipt of this partial payment under the record herein made. It was not tendered in full satisfaction of debt, nor was it received in full satisfaction of debt. At the very time it was sent with the circular letter, defendant said:

"As fast as the remaining assets can be turned into money, further distribution will be made on the same account."

We think the court erred in finding for the defendant in this suit, and the cause is therefore—*Reversed and remanded.*

WEAVER, PRESTON and STEVENS, JJ., concur.

MARGARET MORGAN, Appellee, v. F. J. MUENCH, Appellant.

**MARRIAGE: Promise to Marry—Breach—Evidence—Sufficiency.**

- 1 Evidence reviewed, and held sufficient to establish a promise of marriage, the seduction of the promisee, and the subsequent breach of said promise.

**APPEAL AND ERROR: Review—Denial of New Trial—Deference**

- 2 To Judgment of Trial Court. It is often as important to see a witness as to hear what he says; hence the reluctance of the appellate court to overrule the trial court in denying a new trial. Applied where the lower court, in denying a new trial, characterized the defendant's testimony, in part, as rank perjury.

**MARRIAGE: Promise to Marry—Valid as Affected by Invalid**

- 3 Promise. A promise of marriage made by the promisor at a time when he is already married, does not relate forward and work a nullification of a like promise by the promisor after he had secured a divorce, especially in view of the principle of law that an implied promise to marry may exist from the conduct of parties.

**MARRIAGE: Promise to Marry—Breach—Evidence—History of**

- 4, 10, 11 Case—Relation of Parties. In an action for breach of promise to marry, the mutual conduct of the parties is admissible to show (a) the history of the case, (b) the relations of the parties, and (c) the malice of the defendant, even though such conduct occurred at a time when no valid promise of marriage could be entered into because the promisor was already married, the action being based on a promise made by promisor after he had secured a divorce.

**MARRIAGE: Breach of Promise—Promise Made During Prohibited**

- 5 Period. A divorcee may, during the year following the securing of the divorce (during which time remarriage is prohibited [Section 3181, Code Supplement, 1913]), make a valid promise to marry the promisee after said year has expired.

**SEDUCTION: Acts Constituting—Married Person. Seduction of a**

- 6 woman may be accomplished by a promise of marriage made at a time when the promisor, to the knowledge of the woman seduced, was living in a loveless marriage to a woman desirous

of entering a convent, and between which married persons a divorce was imminent, aided by the previous, continued and concurrent protestations of love and employment of seductive arts by the promisor.

**SEDUCTION: Reformation—Effect.** Reformation of a seduced woman restores her former chaste character and renders her again subject to seduction.

**MARRIAGE: Promise to Marry—Evidence—Seduction.** Proof of seduction is competent as bearing on the question of a marriage contract.

**DAMAGES: Exemplary Damages—Breach of Marriage Contract—Seduction—Malice.** Exemplary damages are recoverable in an action for breach of promise to marry, in connection with seduction, on a showing that defendant's conduct was wanton and in wilful disregard of the rights of plaintiff. A showing of hatred or ill will towards plaintiff is not necessary.

**MARRIAGE: Promise to Marry—Breach—Evidence—History of Case—Relation of Parties.**

**MARRIAGE: Promise to Marry—Breach—Evidence—History of Case—Relation of Parties.**

**MARRIAGE: Promise to Marry—Breach—Damages—Financial Standing of Defendant.** The financial condition, earning capacity and reputed wealth of defendant are material in an action for breach of promise to marry, as bearing on what plaintiff has lost by defendant's breach.

**TRIAL: Verdict—\$15,000—Excessiveness—Breach of Promise to Marry.** Verdict for \$15,000 sustained in an action for breach of promise to marry. Defendant was evasive as to his wealth and earning capacity, but, as an auctioneer, had from 40 to 75 sales per year, from which sales he made from \$20 to \$40 each. Was successful in business, and at time of trial was worth \$40,000. Defendant's conduct toward plaintiff was strikingly flagrant.

*Appeal from Plymouth District Court.—*WILLIAM HUTCHINSON, Judge.

MARCH 11, 1916.

REHEARING DENIED NOVEMBER 17, 1917.

ACTION at law to recover damages for breach of promise of marriage. There was a trial to a jury, and a verdict and judgment for plaintiff for \$15,000. Defendant appeals. —*Affirmed.*

*T. M. Zink*, for appellant.

*Addison G. Kistle, Geo. S. Wright, and Sammis & Bradley*, for appellee.

PRESTON, J.—The record is a very long one. 49 errors, which take up 14 pages of the argument, are assigned, but they are not all argued. Appellant's first abstract contains 51 pages, but he has filed an additional abstract of 225 pages, and still another short one; and appellant has filed an additional argument; appellee, an additional abstract and an additional argument.

The story of this case commences in 1909. At that time plaintiff was about 20 years of age, and defendant, 37 or 38. Appellant's first wife was the plaintiff's aunt by blood. Plaintiff went to the home of Mr. and Mrs. Muench, near Paullina, Iowa, in the summer or fall of 1909. Appellee taught one term of school, which appellant assisted her in obtaining, and he drove her to and from school a few times during the term. When plaintiff went to defendant's house, he and his wife were not getting along together, and were then contemplating a divorce. The divorce matter was frequently discussed in the plaintiff's presence. Plaintiff knew of the marriage of defendant and his first wife, and their relations until a divorce was granted to appellant in October, 1911. Plaintiff testifies, and it does not seem to be denied by defendant, that, in July, 1910, he told her he had applied for the contemplated divorce. The divorce was not resisted. There appears to have been no trouble between defendant

1. MARRIAGE:  
• promise to  
marry:  
breach: evi-  
dence: suffi-  
ciency.

and his first wife over plaintiff. Appellant appears to have been attractive in appearance. Plaintiff made her home with defendant and his first wife from the time she went there until the decree of divorce was granted, and she remained there after the divorce until about March, 1912. Defendant married his second wife on March 11, 1913.

Soon after plaintiff's arrival at defendant's home, he began to pay some attentions to her, according to her story, and used to drive her back and forth from school. Some 6 or 8 weeks after her arrival, while he was taking her to school, he attempted to kiss her, but she refused. She says several such attempts were made, and some 3 months after she went there, he asked to kiss her and she refused, but he did so anyway. This appears to have been about February, 1910. There is a sharp conflict in the testimony at some points, but she testifies, and the jury could have believed, that in April, 1910, she quit teaching school and was going away to work, but defendant wanted her to stay and told her she didn't need to work, and promised her a team of colts if she would remain there, and bought the team of colts and gave them to her; that defendant continued his familiarities when opportunity offered, without suggesting any additional improprieties, up to June, 1910. About that time, the parties were fishing on his farm, when he told her how much he thought of her; that he was getting a divorce from his wife, and that he wanted to marry her. She told him she would think it over, and, in a conversation a few days later, and after two or three discussions of the matter, she told him she would marry him when he had obtained his divorce. Thereafter, they talked about their proposed marriage, and he continued his lovemaking whenever there was opportunity.

About two weeks after she had consented to the proposed marriage, he proposed that they take a trip together



to the Yellowstone Park. She says she told him that she ought not to do that, and at first said she would not do so, but that he pictured the trip out so grand, and told her he was going to marry her as soon as he got his divorce, and that he had started proceedings, and she finally consented. She claims that, by arrangement, and pretending she was starting for Massena, Iowa, where her sister lived, she went to Sioux City, where he met her; that they proceeded together to Omaha and to Yellowstone. They remained all night at Omaha, where he registered them as man and wife, and they occupied the same room. She claims that here there were further assurances that he would marry her after he had obtained a divorce, and she says that sexual intercourse occurred between them that night for the first time. They completed their trip through Yellowstone Park, traveling as and representing themselves to be man and wife, and returned to Omaha in about two weeks, from where she went to Massena, and visited with her sister about three months. During the time she remained in Massena, he wrote her one or two letters a week, in which he told her how lonesome he was and how he missed her and how he longed to see her and for the time to come when he could marry her, and wanted her to come back to Paullina as soon as she could. While she was at Massena, defendant wrote her, and they took another trip to Omaha, where they stayed together at a hotel, and went to Sioux City together. She returned to defendant's home in November, 1910, where she continued to live until after the divorce was granted. Defendant denies all intercourse, and plaintiff testified that they sustained no illicit relations at his place prior to the divorce. She testifies that defendant continued to talk to her nearly every day about marriage and of his feelings for her.

It appears that the divorce decree contained no provision permitting either party to marry within a year. She

says her relations continued after the divorce was granted; that he continued to talk to her about marriage, every day sometimes, and he said that, one year after the divorce was granted, he would marry her. There is evidence that, following the divorce, the parties resumed their sexual intercourse, and he frequently occupied the same room with her at night; that he would come to her room about ten o'clock and stay until morning. He told her about his property. She left to go to Waterloo to work about March 1, 1912. He told her that, as soon as the year was up after he got his divorce, he would marry her, and she says he cried that she was going, and said he would come to see her, and asked her to write and said he would, and they did; that she did not keep copies of her letters, and destroyed a part of his letters at his request. She testifies that, in obedience to his written request, she met him at Fort Dodge on several different occasions, where they would stay at a hotel as man and wife, and that he came to see her at Waterloo; that they made trips at various times to other towns, on each of which intercourse was indulged in, after which she would return to Waterloo; that on such occasions they discussed their proposed marriage, where they would live, the kind of a house he would build, and other like matters, and discussed the kind of furniture they would have in their home. During her residence in Waterloo, plaintiff received letters from defendant, some of which she retained, together with the envelopes in which they were received; these were introduced in evidence, and they corroborate her story as to the relations between them, and his agreements to marry, and kindred subjects. Defendant denies that he ever wrote or mailed any of these letters, but there is evidence from which the jury could have found that he did. A witness for defendant testified that plaintiff told him that she took the trip through Yellowstone Park with a traveling man, and was going to claim that it was defendant, and that plaintiff

told him that defendant had never promised to marry her.

A witness, Mrs. Peddicord, testified that plaintiff roomed at her house for about seven months after March 8, 1912, and that during that time defendant had been at her house to see plaintiff; that he stayed two successive nights; and she testified to admissions by defendant tending to refute his claim that he had written no letters to plaintiff. Plaintiff says that she stayed at a hotel in Fonda with defendant, March 5, 1913, and that, at this meeting, defendant said to her that he would come to her in Waterloo in about two weeks, and that they would be married, and that everything was settled; and that she consented to this. He married his present wife, with whom he had been keeping company several months, on March 11, 1913, six days after plaintiff says defendant spent the night with her. She testifies that she never heard from him after they stopped at Fonda. She testifies as to the sleepless nights and other effects which defendant's marriage to his second wife had upon her. She testifies she would not have sustained the relations with defendant which she did but for his promises to marry her, and that she relied thereon and believed he would; that she never had sexual intercourse with any other man than defendant.

Defendant also claimed to have made a settlement of plaintiff's claim, for \$300; but we do not understand that question to be in controversy upon this appeal.

We have not set out all the testimony.

2. APPEAL AND  
ERROR: re-  
view: denial  
of new trial:  
deference to  
judgment of  
trial court.

It is necessarily incomplete. There is evidence in the record which would justify the jury in finding that there was a promise of marriage after the divorce and within the statutory time; that plaintiff was seduced by the defendant; there is also evidence in the record from

which the jury may have found reformation on plaintiff's part after the first improper conduct. Appellant bitterly attacks the plaintiff and her character, and claims that, because of her conduct as testified to by her and others, she should not be believed. But the credibility of plaintiff and of all the witnesses was a question for the jury, as was the testimony of the defendant. The trial court, in ruling on the motion for new trial, characterized a part of the testimony of defendant and some of his witnesses as wilful and corrupt perjury, and said that, in his opinion, the defendant was guilty of subornation of perjury, and stated that defendant practically denied everything on the trial,—he denied not only letters, but denied going to Waterloo to see plaintiff; that these two matters in particular, to the court's mind, showed wilful and corrupt perjury, and that he had no doubt about it; that there were things in the letters that no person could forge. All the parties and witnesses were observed by the jury and by the trial court. We do not have the opportunity to do so. It is sometimes as important to see a witness as to hear what he says. We ought to and do give weight to the judgment of the trial court in passing upon a motion for new trial.

1. It is contended by appellant that the alleged contract of marriage made before defendant was divorced is void, and, further, that the fact that the alleged marriage was not to take place until the expiration of one year after the divorce does not give validity to the agreement; that this may not be the basis of an action (citing cases). But appellee does not predicate her case on any agreement of marriage made prior to defendant's divorce. As already stated, the testimony shows new and independent promises following the divorce. But the authorities hold that a promise made when the promisor is married does not make invalid a promise made when he
3. MARRIAGE:  
promise to  
marry: valid  
as affected by  
invalid prom-  
ise.

is not married. Under the authorities, it was not necessary to prove an express promise subsequent to the divorce. It is enough if circumstances are adduced from which a promise can with reason be inferred. *Royal v. Smith*, 40 Iowa 615; *McKee v. Mouser*, 131 Iowa 203; *Rime v. Rater*, 108 Iowa 61.

It is thought by appellant that evidence in relation to the trip to the Yellowstone Park and the relations between plaintiff and defendant and their conversations prior to the divorce, should have been excluded, and the jury instructed to disregard it because not competent. But we think that, even though an action may not be based upon a promise of marriage before a divorce, plaintiff knowing that fact, still the evidence was proper as showing the history of the case and the relations between the parties. *Lauer v. Banning*, 140 Iowa 319.

2. Appellant's next contention is that he was ineligible to marry within one year from the date of the decree of divorce, and, being such, could not enter into a valid contract of marriage within that time, citing Code Supplement, Section 3181; *Lanham v. Lanham*, (Wis.) 17 L. R. A. (N. S.) 804, 806; *Succession of Gabisso*, (La.) 11 L. R. A. (N. S.) 1082, 1088; *Dimpfel v. Wilson*, (Md.) 15 Ann. Cas. 753, 761; *Haviland v. Halstead*, 34 N. Y. 643. But there is evidence in the record that, on different occasions after the divorce was granted, there was an agreement to marry at the expiration of one year from the date of the divorce. While it may be true that an agreement to marry within that year would be invalid, unless they had been married in another state, we see no reason for holding that the agreement is not binding, even though it is made within the year, but the marriage to be performed after the ex-

4. MARRIAGE:  
promise to  
marry:  
breach: evi-  
dence: history  
of case: re-  
lation of  
parties.

5. MARRIAGE:  
breach of  
promise: prom-  
ise made dur-  
ing prohibited  
period.

piration of a year. It has been so held. *Leininger Lumber Co. v. Dewey*, (Neb.) 126 N. W. 87 (4 R. C. L. 146); *Buelna v. Ryan*, (Cal.) 73 Pac. 466; *Cooper v. Bower*, (Kan.) 96 Pac. 59, 794; *Judy v. Sterrett*, 52 Ill. App. 265. Furthermore, had the marriage been consummated in a foreign state where such a marriage would be valid, it is possible that this would, under our own holding, be a legal marriage. *Dudley v. Dudley*, 151 Iowa 142.

3. Appellant contends that there may

6. SEDUCTION!  
acts consti-  
tuting: mar-  
ried person.

be no recovery of exemplary damages by reason of the alleged seduction or sexual intercourse, for the reason that there could be

no seduction of appellee by reason of any valid contract of marriage, and that, if she sustained illicit relations with appellant, she was equally guilty. But it has been held that a female may be seduced by a married man, although he is known to her to be such. *State v. Donovan*, 128 Iowa 44. The record shows other artifices and seductive arts than the promise of marriage; and, while plaintiff's loss occasioned prior to the divorce may not be recovered by her as one of the results of a breach of a subsequent valid promise of marriage, such promise, made when both knew defendant to be living in a loveless marriage, and where, as here, the wife was desirous of entering a convent, and a divorce was imminent, together with his previous continued and concurrent protestations of love and affection, and other seductive arts and artifices, is sufficient to constitute seduction. The disparity of their ages is proper to be considered. *State v. Donovan*, supra; *Hawk v. Harris*, 112 Iowa 543, 547; *Egan v. Murray*, 80 Iowa 180.

But, conceding that the first inter-

7. SEDUCTION:  
reformation:  
effect.

course was not seduction, there is testimony from which the jury may have found that, from November, 1910, until some time

after the divorce in October, 1911, the parties indulged in

no sexual intercourse. From this the jury was authorized to find a reformation, and that defendant's conduct subsequent to the divorce and after the reformation was seduction. *State v. Carron*, 18 Iowa 372; *State v. Knutson*, 91 Iowa 549; *Baird v. Boehner*, 77 Iowa 622, 628; *Falkner v. Schultz*, (Wis.) 150 N. W. 424. Appellee contends that intercourse subsequent to the divorce was seduction, regardless of the question of reformation, and cites, in support of the proposition, *Smith v. Milburn*, 17 Iowa 30, 37; *Olson v. Rice*, 140 Iowa 630; *Wilson v. Mangold*, 154 Iowa 352; *Falkner v. Schultz*, supra; and other cases.

But we do not deem it necessary to further discuss or determine this point, because, as stated, there was evidence from which the jury might have found reformation. Proof of seduction subsequent to the divorce is competent as bearing upon the question of a marriage contract. *McConahey v. Griffey*, 82 Iowa 564; *Beans v. Denny*, 141 Iowa 52; *Fletcher v. Ketcham*, 160 Iowa 364. And it has been held that proof of former seduction is competent on the question of later seduction, as showing the power gained over the woman. *Fisher v. Bolton*, 148 Iowa 651, 652; *Baird v. Boehner*, supra.

In this connection, appellant contends that there can be no malice imputed to appellant, because there was no valid contract of marriage prior to the divorce, because plaintiff had knowledge that defendant was married; and that, when she knowingly entered into her alleged agreement of marriage, she was a party to the unlawful arrangement and equally blamable with appellant; that there is no malice from mere breach of a marriage contract. We have sufficiently referred to appellant's claim in regard to the promise before the divorce. To constitute malice, it is not necessary that

8. MARRIAGE:  
promise to  
marry: evi-  
dence: seduc-  
tion.

9. DAMAGES:  
exemplary  
damages:  
breach of  
marriage  
contract: se-  
duction: se-  
duction:  
malice.

there should be hatred or ill will, or malice in that sense. But the authorities hold that wantonness or the wilful disregard of the rights of others may constitute legal malice. The law is settled in Iowa that exemplary damages are allowable in cases of tort of this character, and are allowable in an action for seduction. *Verwers v. Carpenter*, 166 Iowa 273; *Stevenson v. Belknap*, 6 Iowa 97; *White v. Spangler*, 68 Iowa 222; *Hendrickson v. Kingsbury*, 21 Iowa 379; *Reddin v. Gates*, 52 Iowa 210.

It has been held in many cases that aggravated damages, whether compensatory for a special loss suffered by plaintiff, or as a punishment to defendant, are allowable in a breach of promise case. *Baumle v. Verde*, Ann. Cas. 1914B, 317, note on page 319; *Johnson v. Travis*, (Minn.) 22 N. W. 624; *Hiveley v. Gollnick*, (Minn.) 144 N. W. 213; *Tamke v. Vangsness*, (Minn.) 75 N. W. 217; *Sneve v. Lunder*, (Minn.) 110 N. W. 99; *Thorn v. Knapp*, (N. Y.) 1 Am. Rep. 561; *Chellis v. Chapman*, (N. Y.) 11 L. R. A. 784; *Coryell v. Colbaugh*, (N. J.) 1 Am. Dec. 192; *Jacoby v. Stark*, (Ill.) 68 N. E. 557; *Baumle v. Verde* (Okla.) 41 L. R. A. (N. S.) 840, note; *Hughes v. Nolte*, (Ind.) 34 N. E. 745; *Kurtz v. Frank*, (Ind.) 40 Am. Rep. 275; 5 Cyc. 1021; 4 R. C. L. 157, 159, 160; *Denslow v. Van Horn*, 16 Iowa 476; *Stokes v. Mason*, (Vt.) 36 L. R. A. (N. S.) 388, and note; *Johnson v. Jenkins*, 24 N. Y. 252; *Harrison v. Carlson*, (Colo.) 101 Pac. 76; *Anderson v. Kirby*, 5 Ann. Cas. 103, and note; *Wells v. Padgett*, 8 Barb. (N. Y.) 323; *Sauer v. Schulenberg*, (Md.) 3 Am. Rep. 174; *Lawrence v. Cooke*, (Me.) 96 Am. Dec. 443; *White v. Thomas*, (Ohio) 80 Am. Dec. 347; *Daggett v. Wallace*, (Tex.) 16 Am. St. Rep. 908; *Conn v. Wilson*, (Tenn.) 5 Am. Dec. 663; *Roberts v. Druillard*, (Mich.) 82 N. W. 49; *Wrynn v. Downey*, 4 L. R. A. (N. S.) 615, and note; *Lanigan v. Neely*, (Cal.) 89 Pac. 441; *Sheahan v. Barry*, 27 Mich. 217, 219; *Kelley v. Highfield*, (Ore.) 14 Pac. 744; *Sramek v.*



*Sklenar*, (Kan.) 85 Pac. 566.

Some of the foregoing cases refer more particularly to exemplary damages. Appellant cites no authorities contrary to this view. We do not feel called upon to determine in this case whether damages referred to specifically as exemplary damages are recoverable, because aggravated damages may be allowed for seduction, and there is evidence of seduction in this case. *Lauer v. Banning*, 140 Iowa 319; *Herriman v. Layman*, 118 Iowa 590; *Geiger v. Payne*, 102 Iowa 581; and cases before cited.

Complaint is made by appellant in regard to some of the instructions given by the court and offered by him and refused. But they bear for the most part upon the question of the contract before the divorce, and other questions which we have already determined. The instructions given by the court prohibited the consideration by the jury of any acts of sexual intercourse prior to the divorce, except as a part of the history of the case, and, as they were admissible for that purpose, there was no error in their admission. *Lauer v. Banning*, supra.

It is appellee's contention that, when

11. MARRIAGE:  
promise to  
marry:  
breach: evi-  
dence: his-  
tory of case:  
relation of  
parties.

Defendant entered into his first valid contract of marriage with plaintiff, and when he broke it, he was actuated by malice and bad faith, and that he never had any intention of marrying plaintiff, but that his motives were to induce her to yield to his sexual desires; that testimony of their prior intercourse and of their relations at that time was admissible as bearing on his motives and his malice at the time he first made a valid promise of marriage. The following cases, which we think sustain this claim, are cited: 26 Cyc. 99; *State v. Vance*, 119 Iowa 685; *Clark v. Folkers*, (Neb.) 95 N. W. 328; *Hendrickson v.*

*People*, (N. Y.) 61 Am. Dec. 721, 729; *People v. Molineux*, 62 L.R.A. 193, and note, 329.

4. It is next contended by appellant that there is no evidence that appellee lost any social advantages because of appellant's refusal to marry her, or that he had any social standing, or that she suffered any mortification on account of the failure of appellant to marry her, because she did not tell anyone about it; that these matters, being elements of damage, should be alleged and proved. It is true, of course, that, if any claim for damages is made for these items, they should be proved. But we think there is evidence upon these points. The appellant is shown to be a man of considerable means, so that, from that standpoint, a marriage with defendant would be an advantageous one to plaintiff, and plaintiff testified in regard to her feelings because of his refusal to marry her, and his marriage to another woman.
12. MARRIAGE: promise to marry: breach: damages: financial standing of defendant.

In the note to L. R. A. above referred to, there are many cases where the amount of the recovery is shown and the amount of property possessed by the defendant, and whether there was or was not seduction, and other aggravating circumstances or the lack of them.

5. Appellant contends that the verdict is the result of passion and prejudice and is excessive, citing *Baumle v. Verde*, (Okla.) 41 L. R. A. (N. S.) 840, and note at pages 853, 854; *Johnson v. Levy*, (La.) 16 Ann. Cas. 978, 982; *Giese v. Schultz*, (Wis.) 27 N. W. 353, 355; *Halness v. Anderson*, (Minn.) 124 N. W. 830.
13. TRIAL: verdict: \$15,000: excessiveness: breach of promise to marry.

It is the rule that, in an action for breach of promise of marriage, evidence of financial condition, earning ca-

capacity and reputed wealth is admissible, and may be considered in estimating the damages. *Holloway v. Griffith*, 32 Iowa 409; *McKee v. Mouser*, supra; *Vierling v. Binder*, 113 Iowa 337; *Rime v. Rater*, supra; *Geiger v. Payne*, supra; *Royal v. Smith*, supra.

In the *Geiger* case, a verdict of \$16,000, where defendant was worth from \$50,000 to \$70,000, and where there was seduction, was held not excessive. The testimony of defendant as to his wealth and his earning capacity was somewhat evasive, but he admitted that, in the auctioneering business, he had from 40 to 75 sales a season, and he says he made from \$20 to \$40 per sale. He is shown to have made many real estate deals, and he admits that he never lost any money on any of them. The testimony indicated that, at the time of the trial, he was worth in the neighborhood of \$40,000. There is no standard or definite rule, and ordinarily this court will not attempt to substitute its judgment for that of the jury, unless it is evident that passion and prejudice affected the amount allowed. There was evidence from which the jury could properly have found that the conduct of defendant was strikingly flagrant. If the verdict be regarded as large, its size may be evidence rather of the enormity of defendant's offense in the eyes of the jury than of any passion or prejudice on their part. The verdict is large; but, taking into consideration all the circumstances in the case, we are not prepared to say that it is excessive.

As stated, some of the errors assigned are not argued. As to some of them, they are not referred to in the points argued, and no authorities are cited. In some instances, the same proposition has been restated in a different form, and there is more or less repetition. We have considered those which are controlling. Some are clearly without merit.

On the whole case, it is our conclusion that there is no prejudicial error, and that the judgment ought to be, and it is,—*Affirmed*.

DEEMER, WEAVER and EVANS, JJ., concur.

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W. T. RAWLEIGH MEDICAL COMPANY, Appellant, v. A. S. BANE et al., Appellees.

**TRIAL:** Instructions—Non-Applicability to Evidence. Instructing on issues wholly without support in the evidence is reversible error. So held in an action on a guaranty.

*Appeal from Johnson District Court.*—R. P. HOWELL, Judge.

NOVEMBER 17, 1917.

ACTION on a contract of guaranty. Verdict for defendant. Plaintiff appeals.—*Reversed and remanded*.

*Otto & Otto*, for appellant.

*Henry Negus and Ball & Ball*, for appellees.

**TRIAL:** Instructions: non-applicability to evidence.

STEVENS, J.—I. Appellant, which is a corporation organized under the laws of the state of Illinois, with its principal place of business at Freeport in that state, at some time prior to March 30, 1912, the date of the acceptance thereof by said corporation, entered into a contract in writing with Ray E. Eustick, of Iowa City, Iowa, by the terms of which it agreed to sell and deliver to him merchandise consisting of medicines, extracts, toilet articles and kindred articles to be sold by him. The provisions of said contract material to the decision of this case are as follows:

“Unless prevented by strikes, fires, accidents or causes beyond its control said company agrees to fill and deliver on board cars at Freeport, Illinois, or at its option any

other regular place of shipment, his reasonable orders, provided his account is in satisfactory condition, and to charge all products sold him under this contract to his account at current wholesale prices; also to notify him promptly of any change in wholesale prices. \* \* \*

"This contract is subject to acceptance at the home of the company, and is to continue in force as long as his account and the amount of his purchases remain satisfactory to said company, or until terminated as provided above; provided, however, that said Ray E. Eustick or his guarantors may be released from this contract at any time by paying in cash the balance due said company on account."

The defendants herein guaranteed the performance of the terms of said contract by Eustick in writing as follows:

"In consideration of The W. T. Rawleigh Medical Company extending credit to the above named person, we hereby guarantee to it jointly and severally the honest and faithful performance of the said contract by him, waiving acceptance of this guaranty and all notice and agree that the written acknowledgment of his account or any judgment against said principal shall in every respect bind and be conclusive against the undersigned, and that any extension of time shall not release us from liability under this guaranty.

"Responsible men sign below in ink or indelible pencil.

(Names)	(Occupations)	(P. O. Addresses)
A. S. Bane	Farmer	Iowa City
Wm. Sharf	Farmer	Iowa City

"The above guarantors are entitled upon request at any time to a statement of principal's account."

Eustick ordered merchandise of appellant under said contract in varying quantities from time to time until some time in July, 1913, when plaintiff terminated the contract. At the time of the termination of said contract, he

appears to have been indebted to plaintiff in the sum of \$845.67, for which amount he confessed judgment. The contract required him to remit weekly an amount equal to one half of the receipts from the business, to be applied on his account with plaintiff.

His first order for goods was in April, 1912, and was for \$241.30. He ordered goods each month thereafter during that year, and each month in 1913, except January, up to the 1st of July. Payments were made by him each month, and apparently each week, commencing May 27, 1912, until August, 1913. After the latter date, payments were continued, but were not so regularly made as previously. A quantity of the goods on hand when the contract was terminated was returned to plaintiff, as allowed by the contract, so that, while the amount due when the contract was terminated was \$1,130.40, payments thereafter made reduced this sum to \$845.67, the amount for which Eustick confessed judgment.

The total sales to Eustick amounted to \$1,496.90, but this included a wagon manufactured by plaintiff for use in selling their merchandise, and furnished defendant at a cost of \$175, the amount agreed upon and stated in the contract. The total payments by Eustick amounted to \$651.23, which is only a trifle less than one half the total cost of merchandise purchased by him under his contract.

Two defenses were pleaded by defendants, which were submitted to the jury as follows: (a) That said defendants signed the guaranty upon the understanding and agreement with Eustick that he was not to deliver the same to plaintiff until he had procured a third party to sign the same as guarantor, and that the said Eustick, without knowledge or notice on the part of the defendants, delivered the same to plaintiff without first having obtained another signature thereto. (b) As stated in the following instruction, to wit: "5. The next defense made by Bane is that the

plaintiff extended credit and delivered goods to Eustick in an unreasonable amount and more than the said contract provided for. Now the burden of proof is upon the defendant to establish this claimed defense by a preponderance of the evidence. Now you are instructed that the contract provides that the plaintiff would fill the reasonable orders of Eustick, provided his account was in a satisfactory condition. You are instructed that the defendant Bane had the right to rely on this provision in the contract at the time he signed the guaranty, and if the plaintiff furnished to Eustick an unreasonable amount of goods, or at a time when his account was not satisfactory to plaintiff, that then and in that event there can be no recovery by the plaintiff in this action, and you should find for the defendant; but if the plaintiff did not furnish him an unreasonable amount of goods, or did not furnish him goods at a time when his account was unsatisfactory, then you should find for the plaintiff as to this claimed defense."

Proper exception was taken to the foregoing instruction before the same was read to the jury, and a motion was made by plaintiff for a directed verdict, upon the ground that the evidence was insufficient to justify a submission to the jury of either of the foregoing issues.

The instrument signed by defendants was not limited as to time or amount. Defendants had no personal knowledge of the purchases made by Eustick or the amount of goods delivered to or sold by him, but there is no claim herein that he did not receive the amount of goods charged to his account, or that he failed to sell the same in the manner contemplated at the time they signed the instrument.

In the above instruction, the court construed the provision of the contract therein referred to as a binding obligation upon plaintiff not to sell Eustick goods in unreasonable amounts, or at a time when his account was not satis-

factory to it, and, if it did so, that same would operate as a discharge of the guarantors.

The agreement on the part of plaintiff was to deliver goods on board the cars at Freeport, Illinois, or other points at its option, consigned to Eustick for the purpose of filling all his reasonable orders, unless his account at the time was in an unsatisfactory condition. If this provision of the contract was in any sense intended for the protection of the guarantors, it could only be so construed upon the theory that the agreement to fill the reasonable orders of Eustick carried with it an implied obligation not to fill same when the amount thereof was unreasonable, or when his account was in an unsatisfactory condition; but, under the record before us, it is immaterial whether this provision of the contract be considered as a limitation upon the right of Eustick to demand the shipment of goods in quantities deemed unreasonable by plaintiff, or at a time when the condition of his account was not satisfactory to it, as there is no evidence whatever from which the jury could have inferred either that the amount of goods delivered was unreasonable, or that his account was not satisfactory to plaintiff. The evidence showed that Eustick either sold all of the goods delivered to him or returned them to plaintiff, as above stated. If he remitted each week a sum equal to one half of the amount received, his business must have been conducted at a loss, or else he was improvident in extending credit.

The purpose of the guaranty was to protect plaintiff against loss on account of credit extended to Eustick, and, by express provision of the guaranty, plaintiff agreed to furnish a statement of Eustick's account at any time upon request. No request was made therefor. Eustick failed to pay for the goods ordered and received by him. This was one of the contingencies against which plaintiff



sought by the contract of guaranty to protect itself. The question submitted by the quoted instruction was not involved, nor sustained by any evidence whatever, and it was prejudicial error to give it.

II. In view of the conclusion above stated, it is unnecessary to consider the other defense relied upon by defendants. The same appears to be ruled by *Benton County Sav. Bank v. Boddicker*, 105 Iowa 548, *Merchants' National Bank v. Cressey*, 164 Iowa 721, and probably other cases of like tenor.

For the reasons pointed out, the judgment of the court below is reversed and cause remanded.—*Reversed and remanded.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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J. T. SEITSINGER, Appellee, v. IOWA CITY ELECTRIC RAILWAY COMPANY et al., Appellants.

**NEGLIGENCE: Acts Constituting Negligence—Street Car Collision**

- 1 —**Evidence.** Evidence reviewed, with reference to a collision with a street car at a street intersection, and held to present a jury question as to the negligence of both parties.

**TRIAL: Instructions—Objections—Failure to Make Before Submission**

- 2 sion. Failure to lodge a specific objection to an instruction before it is read to the jury precludes raising such point in a motion for a new trial, no explanation being offered for the delay. (See Section 3705-a, Code Supplement, 1913, now repealed.)

**TRIAL: Instructions—Objections—Failure to Request Specific Instruction**

- 3 struction. Objections to instructions prior to submission, on the general ground that the court had failed to instruct as to the effect of certain evidence, must be followed by a request for a special instruction covering the point, or the objection will be waived.

**TRIAL: Instructions—Applicability to Evidence—Loss of Time and Pain**

- 4 Pain. Preferably, the court should, on the subject of future pain, instruct that plaintiff may recover for such as it is "rea-

sonably certain" he will suffer in the future. but it is not prejudicial error to instruct that he may recover for such future pain as "he will" suffer.

**TRIAL: Instructions—Applicability to Evidence—Loss of Time and 5 Earning Capacity.** Evidence (a) of the character of personal injuries, (b) of the extent of time the party was disabled, and (c) of the present and possible future continuance of said injuries, furnishes basis for instruction as to recovery for loss of time and earning capacity.

**TRIAL: Verdict—\$1,800—Excessiveness.** Verdict of \$1,800 for personal injuries, loss of time, future pain, and injury to property, sustained.

*Appeal from Johnson District Court.—R. P. HOWELL, Judge.*

NOVEMBER 17, 1917.

ACTION for damages. Verdict of the jury and judgment for plaintiff. Defendants appeal. The facts are stated in the opinion.—*Affirmed.*

*Henry Negus and W. J. McDonald, for appellants.*

*Mcasser, Clearman & Olsen, for appellee.*

STEVENS, J.—I. Dubuque Street in Iowa City, on which one of defendant's cars was proceeding northward at the time of the accident in question, intersects Fairchild Street, on which plaintiff was driving eastward, at the time of the collision, with a team hitched to a milk wagon. From Davenport Street, which lies south of Fairchild, the grade of the street car tracks on Dubuque Street rises to the alley 14 inches, from alley to Fairchild Street 22 inches, and from center of Fairchild Street to Church Street 35 inches to each 100 feet. The exact location of Church Street is not shown. Dubuque Street is paved with bitulithic, and Fairchild with brick, paving. The street railway track of defendant is located in the center of the street. The distance from the sidewalk

1. NEGLIGENCE:  
acts consti-  
tuting negli-  
gence: street  
car collision:  
evidence.

on the west side of Dubuque Street to the center of its intersection with Fairchild is 32 feet.

It is claimed by plaintiff that the team he was driving was traveling at a slow trot; that, about the time he reached the west line of Dubuque Street, he observed a street car, about three quarters of a block distant, coming north on Dubuque; that he continued eastward across the track until the rear wheel of his wagon was struck by the street car, overturning the wagon and throwing him out upon the paving; that, when he first observed the car, he thought it was traveling at the usual speed of 8 or 9 miles per hour, and that he could easily pass over the track before the street car would reach that point; but that, when he was passing over the track, he observed that the car was coming toward him at a very rapid rate; that he sought to increase the speed of the team, but was unable to clear the track, with the result that he was struck by the car, as above stated. Plaintiff, upon cross-examination, testified as follows:

"Q. Where did you say you were when you first saw the car? A. I was, as near as I can recollect, where the brick and paving on Dubuque Street join. Q. Fairchild is paved with brick? A. Yes. Q. And Dubuque with bitulithic? A. Yes. Q. Now, by that do you mean the horses' heads were there or the place you occupied in the buggy? A. About where I was. Q. Do you know how far west of the west rail that is of the street car track? A. I never measured it. I should judge it is 30 feet west,—that might be a little more or a little less,—I couldn't say. Q. Was your team on the walk or trot? A. Oh, they was in the habit of going on a very slow trot as a rule, about average of 4 or 5 miles an hour, sometimes might have been going a little faster, sometimes a little slower, but I wasn't hurrying them at all. Q. You continued on down toward the track without changing your gait? A.

Why, yes. Q. You seen the car—you didn't hold your horses up or urge them on either? A. Not until I seen the car coming at me, and I then gave the lines one or two slaps, and one of the team was 3 year old,—she was the one that jerked and got me over, or I wouldn't got over as far as I did. Q. Where was the car when you slapped your horses to hurry them up? A. It was coming right at me, not very far off. Q. Where was it in regard to the south sidewalk crossing on Dubuque Street? A. I couldn't tell the number of feet, because I was trying to get out of the way. Q. Was it south of the sidewalk? A. I couldn't say as to that; my intention was to get there if I could. Q. Whereabouts were you at that time? A. In the wagon. Q. I mean in reference to the track, where was the wagon in reference to the track? A. Why, I was almost onto the track most between me and the horses—horses might have been a little over the track or near about on the track when I tried to hurry them up. I knew that was my only salvation to get over. Q. The car was in plain sight all the time, nothing to prevent you from seeing it? A. I had to watch my team; I didn't watch the car all the time. I noticed when I started over where they was, and I supposed that the gait they claim to go, was going—I didn't know the gait they were traveling—but as street railways and various other cars go, I would have ample time to get across, no distance across the block, which I was pretty well acquainted with. Lived in town quite a while. Q. Your team wasn't frightened at the car, were they, when you slapped them to hurry them up? A. No, they was frightened at me. They were a very quiet team, wasn't cross or anything of that sort, because I had them to town every day. Q. I believe you said you thought the car was going 8 to 10 miles an hour? A. I couldn't tell, but that is what they was going, because they claim they go—they can't run any faster than 8 or 10 miles, or

didn't operate them—that is their claim. Q. Whereabouts was the hind wheel of the buggy when the car struck the buggy, in reference to the track? A. Must have been on the track, or else they wouldn't hit it. Q. Was it near the west rail or over toward the east rail? A. I couldn't tell you that; where they got they hit it. Q. You were looking out of the door of your wagon at the car to see where it was? A. I had to have my eyes on the team at that time, after I saw it approaching me as fast as it was. Q. You paid attention to the team and not the car from that on? A. When I saw the car coming as close as it was, my eye had to be on the team to get it over. Q. Then from the time you seen the car and slapped the horses, you didn't look at the car after that? A. Hadn't time to, man can only do one thing at a time and do it right."

Two witnesses, the motorman in charge of the street car and a passenger thereon, were called by the defendant. The version of the accident as given by the motorman is as follows:

"Q. And at the time you first saw Mr. Seitsinger, he was long round the sidewalk line or the gutter there at the intersection? A. No, I seen him sooner; I seen him cat-cornered across a porch there. There is a house there. I could see him through the porch. I seen him coming. Q. Where was the last stop you made that day before the accident occurred? A. I couldn't tell you. Q. You don't know where the last stop was you had? A. In town before we started out, as near as I know. Q. How fast was your car going at the time you reached Bloomington Street? A. Oh, I should judge perhaps 12 miles or so. Q. You mean to say, at the time your car reached Bloomington Street that your car was only going at the rate of 12 miles an hour? A. 12 or 15 miles, as near as I could tell. \* \* \* Q. Now, then, you said on your direct examination that when you saw Mr. Seitsinger you checked your car? A.

Yes, sir. Q. And you checked your car now because you thought now he was going to drive across the street, didn't you? A. Yes, sir. Q. After you checked your car, you then released the brake? A. After I seen or thought I had the right of way. Q. You thought in going up that street you had the right of way? Yes, sir. Q. And so, because you thought you had the right of way, then, you released your brake on your car? A. Yes, sir. Q. Now then, how far from the intersection, now,—the south side of that intersection,—were you when you first applied your brake? A. Well, I was somewhere—I couldn't say—80 or 100 feet from the intersection. Q. So you didn't apply the brake when you first saw Mr. Seitsinger? A. No, I just throwed off the current. Q. Now you say he was coming down there at a pretty good clip? A. Yes, he was trotting right along. Q. The team was stepping right along? A. It wasn't going fast, but it was trotting right along. Q. It was going what you would call a pretty good clip, wasn't it? A. Yes, sir. Q. And it was an enclosed and covered wagon, didn't you? A. Yes, sir. Q. And you thought he was going to attempt to drive across the street, didn't you, when you first saw him? A. Yes, until he looked out and stopped. Q. Now then, when his horses stopped, his horses' heads, as I understand it, was just three feet from the rails? A. Three or five feet—I wouldn't say—somewhere around there. I knew I had good, clear sailing—I wouldn't hit him. Q. That is the only thing you are sure of, that you had good sailing there? A. Yes, sir. Q. When this team was that far, you were still south, now, on the south sidewalk crossing of that intersection, wasn't you? A. Yes, sir, I was. Q. And he started his team up again? A. Yes, sir. Q. And drove on the track? A. Yes, sir. Q. And his team stopped, as you say, right square on the track? A. Yes; his team

was across, but his wagon wasn't. Q. Jake had his head out the door looking down at you? A. Looking down at me like this (indicating). Q. And just sitting there on the track? A. Yes, sir. Q. Your car ran into the milk wagon? A. Well, I reversed when I seen — Q. How many feet was you from Jake when you reversed that car? A. I was somewhere 7 or 8 feet. Q. So, as I understand it now, you was about 18 feet south of the south sidewalk line when you saw his horses' heads within 3 to 5 feet of the track—that is right, isn't it? A. I don't know. I never figured it up. Q. That is your best judgment? A. I never figured it up—I wouldn't say. Q. It was somewhere in the neighborhood of 18 to 20 feet, wasn't it, south of the south sidewalk line of that intersection? A. I couldn't say. Q. What is your best judgment? A. I haven't any—I never thought of it. Q. You haven't any judgment at all of the distance you were away from him at any particular time, have you? A. Well, I have particular times, but not exactly. Q. And it was at that time, any way, when you were south of that intersection, that he started his team up to drive on the track, wasn't it? A. Yes, sir. Q. And it was while your car was still south of the south intersection that you released the brakes, wasn't it? A. South of the intersection? Q. Yes, south of the south sidewalk line of the intersection—your car was still down there when you released the brake? A. I left my car—I had hold of my brake—I left the car go when I was going up because I thought he would be across when I got there. Q. That is why you drifted your car, because you thought he would be across when you got there? A. Yes, sir. Q. What I am getting at, going back to the other question, is this: that your car was still south of the south sidewalk line of the intersection when you released the brake, wasn't it, that second time? A. Yes. Q. What I mean is, you testified on

direct examination you applied your brake, didn't you? A. Yes. Q. And you testified on your direct examination that you released your brake, didn't you? A. Yes, sir. Q. Now, then, you testified on your direct examination that you applied that brake again, didn't you? A. Yes, sir,—I didn't apply it; I held it. Q. You never applied it the second time at all? A. I held it ready to apply if he wouldn't get across, but then I seen he would get across if he kept on going, and I just held my brake. Q. You just let your car go? A. Yes. Q. Did you turn any more power? A. I didn't—just drifted. Q. Did you apply that hand brake after the first time you applied it and released it? A. No, sir, I didn't. Q. Never applied that hand brake at all? A. No, sir, I didn't have time. When he stopped on the track, why I used my reverse. Q. You had your hand right there on the hand brake all that time, didn't you? A. Yes, sir. Q. Ready to apply that brake, didn't you? A. Yes, sir. Q. Then you went to work and took your hand off the hand brake and reversed the car? A. No, I didn't take my hand off, I still had my hand on the hand brake. Q. You didn't apply that brake in any particular, did you? A. I didn't then, because I thought he would get across; he wouldn't stop on the track. Q. So you thought all the time, now, from the time you first saw Jake, that he was going to go across that track there at that street, didn't you? A. Yes, I did. Q. And that you would have to operate your car very carefully with reference to that? A. Yes. Q. And if you didn't, there was going to be danger of a collision? A. When I thought he was going across. Q. You understand, now, all the time from the time you first saw Jake, there was danger of a collision at that particular point? A. Yes, if he would attempt to cross. Q. And you saw him driving right straight toward the track



in this covered milk wagon? A. Yes, sir, but when he looked at me I thought— Q. But he didn't look at you at any time until he was right square on the track? A. He looked at me when he stopped, when he stopped before he got on the track. Q. Stuck his head out of the door and waved at you? A. No, he didn't wave at me, he just looked at me."

The testimony as to the speed of the street car at the time of and immediately preceding the accident is at considerable variance. J. O. Schulze, president and manager of the defendant company, testified that the track of defendant company on Dubuque Street is about  $1\frac{1}{2}$  miles long; that the schedule running time is 10 minutes, and the speed of the cars thereon is  $8\frac{1}{2}$  miles per hour, without stops; that, if 8 stops are made, the maximum speed of the car, if the whole distance is covered in schedule time, would be about 20 miles per hour. The maximum possible speed of the car was 24 miles per hour, on a level track. The motorman and the passenger referred to testified that the car approached Fairchild Street at from 12 to 15 miles per hour. A witness called on behalf of plaintiff testified that he was riding a bicycle north on Dubuque Street when the street car in question passed him on Bloomington Street, 2 blocks south of Fairchild, and that, from his observation of the car's speed, and comparing the distance traveled by him upon his bicycle and by the street car, up to the time of the accident, he estimated the speed of the car to be from 20 to 25 miles per hour. A witness who resided on Fairchild Street, about a block and a half from the scene of the accident, heard the crash when about a block distant and went immediately to the scene of the accident, and this witness testified that the rear end of the car was about 10 feet north of the north sidewalk line of the intersection.

Two principal grounds of negligence were alleged in

plaintiff's petition: (a) Driving the car at a careless, negligent and excessive rate of speed, thereby causing the collision, and (b) that, by the exercise of ordinary care, the servant of defendants in charge of the car did see, or could have seen, plaintiff in time to have avoided the collision, and was negligent in not having done so.

Defendants admitted their corporate capacity and denied the remaining allegations of plaintiff's petition.

It is argued by counsel for appellants that plaintiff's injuries were the result of his own negligence in attempting to cross the track of defendants and stopping thereon in front of an approaching car. The motorman in charge of the car of defendants apparently concurred in the expressed belief of plaintiff that, by continuing his course east, he had ample time to safely clear the track before the car would reach the point of the collision. If, therefore, the injury was the result of plaintiff's negligence, it must have been due to something else than merely driving upon and attempting to cross the track.

On behalf of appellee, it is contended: First, that, if he was at fault at all, it was only in miscalculating the speed of the car, and that, if same had been traveling at the rate assumed by him and claimed by defendants, instead of in fact at a rapid, reckless and dangerous rate of speed, no collision would have resulted; and second, that, if the wagon in which plaintiff was riding was stopped upon the track, as claimed by the defendants, its servant in charge of the car was negligent in not having the same so far under control that he could have stopped the same in time to avoid the collision, and in failing to do so.

The motorman testified, as above set out, that, when he first observed plaintiff approaching the crossing, he applied the brakes so as to retard the speed of the car and bring same under control, but that, when plaintiff stopped, west of the track, he released the brake and continued to-

ward the crossing, upon the theory that plaintiff had seen him and intended to give him the right of way, and that further special effort upon his part to avoid danger of a collision would not be necessary. He admits that he saw plaintiff thereafter start to cross the track, and must have believed he had ample time to get out of the way of danger, or else he failed to use the means admittedly at hand and available for controlling the speed of, or stopping, the car in time to avoid the collision. In fact, it is claimed that, but for the stopping of the wagon upon the crossing, no collision would have occurred, so that, upon defendants' theory, the jury could well have found that plaintiff was guilty of no negligence until the wagon was stopped upon the track, if it was stopped. Why, if at all, the team was stopped before the wagon had passed entirely over the track and out of the zone of danger does not appear; but it should not be assumed that same was due to any voluntary act of the plaintiff, as the motorman testified that he observed plaintiff continuously looking in the direction of the approaching car from the time he started across the track until the very instant of the collision, and he was, therefore, in a position to realize the danger of a collision between the car and the wagon. It is incredible that he should have, under the circumstances, consciously remained upon the track without attempting to use some of the means apparently available to him to remove himself from danger.

Plaintiff was required to use ordinary care and prudence in approaching and attempting to cross the track of defendant, and such as might be expected of an average man under like circumstances. He was not, however, required to stop and look and listen, but only to make reasonable use of his senses to determine whether a car was in such close proximity as to render an attempt by him to cross the track perilous or dangerous; and, if the car

in question when he first saw it was so far away that he could reasonably believe he had time to cross the track in safety before it would reach that point, he was not guilty of negligence, as a matter of law, in attempting to do so. *Adams v. Union Electric Co.*, 138 Iowa 487; *Watson v. Boone Electric Co.*, 163 Iowa 316; *Flannery v. Interurban R. Co.*, 171 Iowa 238; *Dow v. Des Moines C. R. Co.*, 148 Iowa 429.

The motorman in charge of the car testified that he was proceeding, until he reached the south side of the intersection, at from 12 to 15 miles per hour, but the exact speed at which the car was moving immediately before he reversed it is not shown. One witness, however, who was a block away at the time and heard the collision, testified that the car was several feet north of the north sidewalk intersection on Fairchild Street when he arrived. Plaintiff denied stopping his team either before attempting to cross or while crossing the track. The testimony was ample to require submission of the case to the jury.

## II. Complaint is made of Instruction

2. TRIAL: instructions: objections: failure to make before submission.

No. 9. No exception was taken to this instruction before the same was read to the jury, but, at the time of filing the motion for a new trial, objection was urged that the

court should have, as a part of said instruction, submitted to the jury the question of concurrent negligence. Before the instructions were read, counsel for appellants objected to the court's submitting to the jury the question of the last clear chance, and this objection was the only one made to this instruction at that time. As we interpret and understand this instruction, it does not submit to the jury the question of last clear chance, nor does it apparently purport to do so. The instruction submits one of the grounds of negligence charged and relied upon by the plaintiff, but not the

question of last clear chance. While we do not wish to be understood as approving this instruction, it is not open to the exceptions and objections urged by counsel, and, as we can consider only the exceptions or objections raised in the court below, it follows that there cannot be a reversal on account thereof.

III. The general objection appears to have been made, before the instructions were read, that the court had omitted to include an instruction as to the consideration to be given by the jury to the mortality tables received in evidence. No instruction was given touching this matter, but none was requested. The omission was noticed by counsel before the instructions were read, and, if it was desired, counsel should have requested an instruction on this point. The court would doubtless have given an instruction, had request been made therefor.

IV. The court, in Instruction 13, in stating the elements of plaintiff's damages, if he was entitled to recover, included future pain and suffering, but, instead of limiting recovery therefor to such damages as the evidence showed it was "reasonably certain" he would suffer in the future, used the words, "he will."

An instruction containing almost the identical language complained of was before the court in *Parks v. Town of Laurens*, 153 Iowa 567, 569, and held good. The court there suggested that the amount of proof required was, if anything, greater under the instruction given than would have been necessary had the words "reasonably certain" or "reasonably apparent" been used. It would, of course, have been better had the court submitted the question in the usual form, but we fail to see how appellant was prejudiced by the use of the language complained of.

Another objection made to this instruction was that the court permitted plaintiff to recover for loss of time, earning capacity, and damages to his wagon, and it is now contended that there was not sufficient evidence to justify the submission of these matters to the jury. The evidence showed the character of plaintiff's injuries, and that he was disabled to a considerable extent for several weeks; that he had not, at the time of the trial, entirely recovered from the injury to his spine; and there was some evidence from which it might be inferred that he would suffer pain and impairment of his earning capacity in the future. This question has repeatedly been before the court, and ruled against the contention of appellant. *Cubbage v. Estate of Youngerman*, 155 Iowa 39; *Fisher v. Bolton*, 148 Iowa 651; *Scott v. O'Leary*, 157 Iowa 222; *Wimber v. Iowa Central R. Co.*, 114 Iowa 551.

V. There is but one remaining question for our consideration, and that is whether the verdict is excessive. Numerous witnesses were called who knew plaintiff and had observed him both prior to and following the injuries complained of. Physicians were called, who made an examination and gave testimony tending to show that he had suffered a very severe, painful and possibly permanent injury to his back. Witnesses testified that he was unable to carry on as previously his occupation as a milkman, without assistance not before required, and that he was unable to perform some manual labor previously performed by him. The question was presented in appellant's motion for new trial and overruled by the trial court, which had the advantage of having seen and heard the testimony of the witnesses and observed the appearance and heard the testimony of plaintiff; and we are unable to say that the verdict was excessive.

5. TRIAL: instructions: applicability to evidence: loss of time and earning capacity.

6. TRIAL: verdict: \$1,800: excessiveness.

Finding no reversible error in the record, the judgment of the lower court is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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JAMES J. SHARPE, JUNIOR, et al., Appellants, v. MARGARET JANE WILSON et al., Appellees.

**WILLS:** Contract to Devise or Bequeath—Parol Contract—Degree Of Proof. A parol contract to will or devise property is enforceable if established by proof which is so cogent, clear and forcible as to leave no reasonable doubt as to its terms and character. Evidence reviewed, and held wholly insufficient to meet this rule.

*Appeal from Franklin District Court.*—R. M. WRIGHT, Judge.

JANUARY 20, 1917.

REHEARING DENIED NOVEMBER 17, 1917.

THIS action was originally brought in partition. Thereafter, two of the parties to the suit filed an amended and substituted petition, claiming all the property involved in the original suit and all other property owned by decedent at the time of her death, alleging that they acquired such right under a contract made by their father with the decedent for their use and benefit. The opinion states the facts. Judgment for the defendants in the court below. Plaintiffs appeal.—*Affirmed*.

*E. P. Andrews and Jno. M. Hemingway*, for appellants.

*Healy, Burnquist & Thomas, Clock, Saley & Clock, Senneff, Bliss & Witwer*, and *Burnquist & Joice*, for appellees.

GAYNOR, C. J.—Susan M. Parriott died on February 19, 1912, intestate, leaving a large estate. She was a widow,

without issue. Her only heirs were her brothers and sisters and the children of a dead sister. She left surviving her 3 brothers and 2 sisters, and the children of a dead sister, 7 in number. One of the brothers, James J. Sharpe, Sr., known hereafter in this record as Joe Sharpe, soon after her death transferred all his interest in her estate to his children, 4 in number, known in this record as Eva, Henry, James J., Jr., and Luke.

This action was originally commenced by James J. Sharpe, Jr., one of the assignees of the interests of the brother Joe Sharpe, and Moore I. Sharpe, one of the brothers of decedent, against the other brothers and sisters and the heirs of the dead sister, to partition the real estate left by the deceased, making Luke, Eva and Henry Sharpe also defendants as assignees of Joe. In this suit, the brothers and sisters claimed their individual right as heirs; the children of the dead sister as the heirs of the dead sister; James J. Sharpe, Jr., Luke, Eva and Henry, as the assignees of the brother Joe. A hearing was had upon this petition, and a decree rendered on the 11th day of February, 1914. However, before the decree was executed, a petition was filed by two of the assignees of Joe Sharpe, James J. Sharpe, Jr., and Luke Sharpe, praying that the decree be set aside and the case re-opened. Upon this application a new trial was granted, and on the 11th day of November, 1914, James J. Sharpe, Jr., plaintiff in the original suit, and Luke Sharpe, defendant in the original suit, filed their amended and substituted petition, in which they allege that they are the absolute and unqualified owners of all the property described in the original petition, and of all personal property and all other property of whatsoever kind, whether real or personal, of which the said Susan M. Parriott was the owner at the time of her death. They based their claim upon the following allegations:

"That these petitioners became the owners thereof by



virtue of the fact that, in the latter part of 1908, J. J. Sharpe, their father, known as Joe Sharpe, surrendered and gave them into the charge of Susan M. Parriott; that they were, at that time, minors; that their father surrendered them to Susan M. Parriott on that date, under an oral contract and agreement entered into between J. J. Sharpe, Sr., their father, for and in their behalf, with Susan M. Parriott, in which it was agreed that said J. J. Sharpe, Sr., should surrender these petitioners to the said Susan M. Parriott, who should have full and exclusive control of them, the same as if they were her own children, until they became of age; that Susan M. Parriott on her part promised that she would take and receive them as her own, and educate and treat them as her own children, and at her death would give to them whatever property she might then own and be possessed of; that, in pursuance of this agreement, Susan M. Parriott took complete and exclusive control of these petitioners and received them as members of her family, educated them, and treated them as her own children until her death; that they did not learn of this fact until after the institution of the original suit, and not until the 12th day of April, 1914."

They pray that they be declared the owners of all the property of which Susan M. Parriott died seized or possessed, whether the same be real or personal property. An issue was tendered on this claim, the cause tried to the court, and a decree entered dismissing this petition. From this, James J., Jr., and Luke appeal.

The right of these plaintiffs to recover upon proof of the allegations made is no longer a mooted question in this state. See *Stiles v. Breed*, 151 Iowa 86; *Horner v. Maxwell*, 171 Iowa 660; *Finger v. Anken*, 154 Iowa 507. The disposition of this case, therefore, involves no unsettled question of law. It resolves itself into a fact controversy alone. This question presents itself: Have these plaintiffs established

the rights claimed by them by such a quantum of proof as the law requires of them in cases of this kind? It is the holding of this court that such an agreement as here sought to be enforced, resting as it does on parol, must be established by clear, satisfactory and convincing evidence. Some courts hold that such a contract is looked upon with suspicion, and is only sustained when established by the clearest and strongest evidence. Other courts hold that the proof of such a contract must be so cogent, clear and forcible as to leave no reasonable doubt in the mind of the chancellor as to its terms and character. Our latest pronouncements approving this rule are *Boeck v. Milke*, and cases therein cited, 141 Iowa 713, at 717; *Stiles v. Breed*, 151 Iowa 86, at 91.

The ingenuity of the human mind is sometimes astonishing, especially when called into service by the exigencies of its own contrivance. The mind, responding to the things that are, usually gives active recognition to the things that are. In giving expression to the human mind, the things that are find first and readiest recognition and expression. The normal man, possessing a knowledge which, asserted, brings profit to himself, usually does not conceal that knowledge when the bringing of it into active use will redound to his own advantage. Usually, when men make contracts involving great interests to themselves or to those they love, they do not conceal the existence of the contract when the time arrives for the harvest.

In this case, we have the following facts disclosed by the record, and not disputed:

Susan M. Parriott, the decedent, was a woman of considerable business ability. Her husband died in 1875. She never remarried. On his death, she became the owner of a large estate. So far as this record shows, she managed and controlled the estate herself up to the time of her death. She had brothers and sisters with whom she was on the very

best of terms, for whom she entertained most kindly feeling. In no part of the record can we discover that she entertained any more kindly feeling towards Joe Sharpe and his children than she entertained towards her other brothers and sisters and their children. All were welcome at her home. Many of them were entertained there, and she at theirs. She was more abundantly supplied with this world's goods than most of her brothers and sisters. She never had any children. Her brothers and sisters seemed to be abundantly supplied in this way. As said before, her husband died in 1875. After the death of her husband, she made her home a great deal of the time with her sisters, Mrs. Wilson and Mrs. Stockdale.

For some years before moving to her home in Hampton, she made her home with her sisters. She moved to Hampton in 1897. It is at about this time that the contract is alleged to have been made between Joe Sharpe and Mrs. Parriott under which these plaintiffs are claiming all her property. At this time, Joe Sharpe was living on a farm in Hamilton Township, in Franklin County. He had five children. His first wife died in 1896. At that time, the youngest child was an infant. This youngest child was born in March of that year and died the following September. The plaintiffs in this suit are two of his children. After his wife died, Mrs. Parriott came to his home and cared for these children. Prior to this time, Mrs. Parriott had been living with her sisters; some part of the time had a home in Ackley. She stayed with her brother Joe and took care of his children until such time as another was produced to take her place, a Mrs. Mallon. Joe Sharpe was a witness in this suit. He is the one by whom the plaintiffs seek to establish their contract. He is the one with whom it is claimed Mrs. Parriott made the contract. His testimony as to the contract is that Mrs. Parriott took Luke to her home in Hampton in the spring of 1897, and J. J., Jr., in the fall

of 1898. His sister wanted to adopt the boys, and he objected because they would have to change their name. This was after the children had been taken by her. Some question had arisen as to the payment of tuition for the older boy while attending school at Hampton.

"She said, 'Let me adopt the children as my own, and there won't be any trouble about this tuition business.' I said, 'Does that mean that the children would have to change their name?' and she said, 'Yes.' 'Well,' I said, 'I won't consent to have the children's name changed.' I then requested her to bring the children back, and that there would then be no question about tuition. She said, 'I can't part with them, Joe. I want the children, and I can't part with them.' She cried. I insisted that she bring the children back. She then said that, if I would let her take the children and keep them, she would educate them, clothe them, and take care of them like her own children, and she said, 'Joe, when I am gone, they will have what I have got.' I said, 'Susie, take them.' She took them. I have exercised no control over them since. They remained with her since that time up to the time of her death. They have never lived with me since."

It appears that, soon after the boys left, he was asked by his partner, Armstrong, what had become of the boys, and he said that they were off on a vacation. The oldest boy was 27 years old at the time of the trial. The youngest boy was 21. Never in all these years did Joe mention this alleged contract to these boys; never during all these years did he again refer to the contract and conversation with Mrs. Parriott. His oldest daughter, Eva, was on the witness stand, and testified that she never heard of this claim until after the death of her aunt, although, for some portion of the time, she resided with her father. Eva and her father came to Hampton upon hearing of the death of the aunt; came together on the train. Eva testifies that he never

mentioned this alleged contract to her. The fact disclosed by this record is that he never mentioned it to anyone until he communicated it to J. J., his son, on April 12, 1912.

It appears that, in the fall of 1898, Joe Sharpe married the second time; that he moved to Boone in 1902; that his second wife died there in 1903; that in 1904, he went to Dakota; that while there, he corresponded with his sister and his boys, and his sister frequently wrote him, but no letter is produced in which this contract was referred to, nor does he claim that he ever received any letter in which this contract was referred to by Mrs. Parriott. On the death of the second Mrs. Sharpe, in 1903, all the children visited Joe in Boone. After her death, Joe and all his children came to Mrs. Parriott's and stayed some time. There was no mention of this alleged contract, either by him or Mrs. Parriott.

About a year before Mrs. Parriott's death, J. J., Jr., visited his father in Dakota; was there about two weeks; no mention made of this alleged contract. While Joe was in Dakota, both Eva and Henry stayed with Mrs. Parriott. Henry stayed there for some time and attended school. None of these children claimed to have ever heard Mrs. Parriott mention or refer to any such agreement as is claimed in this suit. In fact, they affirm that nothing was ever said to them by Mrs. Parriott to the effect that her property should pass as claimed in this controversy.

In 1910, or about that time, his sister Mrs. Griggs died. Joe returned from Dakota to attend the funeral; went to Mrs. Parriott's home and stayed there some time. The boys were then approaching manhood. No mention was then made of the alleged agreement, nor does he claim that at this time he had any conversation with Mrs. Parriott touching these boys. On learning of Mrs. Parriott's death, and on his way to the funeral, in company with his daughter, Eva, then a young woman, he expressed no anxiety about

the disposition made of this property. If the contract had been made, the harvest time had arrived. On arriving, he made no inquiry as to whether Mrs. Parriott had executed a will or not, though he says he thought this necessary to make the contract effectual. J. J. was appointed administrator of the estate, and not until after his appointment was any investigation made to ascertain the existence of a will. But even in the search then made, no mention was made by Joe of this alleged contract, although he claims now that he thought that the contract was to be consummated by a will, or that she would make a will in pursuance of the contract, and give to these boys what he claims she agreed to give them. Though believing all the time that a will was necessary to make this contract enforceable, at no time, on discovering no will, did he express any surprise or refer to this contract, or complain of his sister and her failure to make a will. The record affirmatively shows that he expressed no surprise, made no complaint and exhibited no regret on finding no will.

After the death of Mrs. Parriott, he talked freely with his sisters about their share in the estate, and to one of the sisters gave advice as to the use she ought to make of her share when received; recognized his sisters as the legitimate heirs of Mrs. Parriott; recognized himself as an heir, and assigned all his interests, not to these two boys alone, but to his four children, share and share alike.

His silence and all his conduct, during all the years, speak eloquently against this claim. We think this claim had its suggestion in the fact alone that his sister took these boys into her home, cared for them, clothed, fed, and educated them at her own expense, and that they remained there until her death. But it is not believable that she agreed to give them all she had, upon her death, to the exclusion of her brothers and sisters and nieces and nephews, for whom she had done little during her lifetime compared

with what she had bestowed upon these boys. There was nothing in the conduct, character or relationship, at the time this contract is alleged to have been made, that could have induced so beneficent a gift. It is not pretended that Joe was her favorite brother. It cannot be assumed that these nephews were dearer to her then than the children of her sisters. No fact is shown in this record tending to make these children dearer to her at that time than were the others, beyond the mere fact that they were motherless, and, to some extent, neglected. This might excite her pity, her sympathy, her desire to relieve them of the embarrassment of their then environment, but nothing is shown in her relationship to them or to their father from which a motive can be found for the contract relied upon. It may be insisted that her care of them for all the years would suggest a tenderness, but it must be borne in mind that the father married soon after these children came to her; that the children were not agreeable to the stepmother. This stepmother died in 1903, and the father never remarried; moved to Dakota in 1904, and lived upon a ranch, where there were slight opportunities for the education and development of the children. Eva did not always remain at home with her father, but stayed a portion of the time with her relatives, and attended school. Henry was a considerable time at Mrs. Parriott's, attending school. The father seemed to be contented to allow the children to be cared for by others. This may have been due to conditions over which he had no control. The fact that they remained there, under the conditions existing, has not much probative force in favor of their present claim. Mrs. Parriott's home seems to have been open to all her relatives who desired to come to her. Others of her nieces and nephews stayed with her and attended school during this time. She seemed to be generously fond of her young folks, and her heart was big enough for them all.

Joe's testimony, as it appears in the abstract, discloses the following facts:

"Went to North Dakota in 1904. Did not come back to visit for about three years. Wrote the boys and Mrs. Parriott quite frequently, and Mrs. Parriott wrote me quite often. Was in Dakota four years before Eva came. (Eva was the oldest child.) Eva was with her grandmother Lee and with her uncles. I think she was at Mrs. Parriott's part of the time. Don't know that she went to school in Hampton and stayed at Mrs. Parriott's. Henry did. I came down and got Henry in 3 years. Eva came herself. Went from Iowa Falls to Boone in 1902. My second wife died there in 1903. After my second wife died in Boone, I went to Mrs. Parriott's. I was in Boone about 9 months. The boys did not visit me at Boone. They came down to the funeral. In recess and during vacation, my other 2 children, Eva and Henry, visited frequently with Mrs. Parriott. After my wife died at Boone, I was at Mrs. Parriott's about 2 months. All my children were there. No, Eva was going to school in Iowa Falls. I lived on a ranch for a number of years in Dakota. I came to Hampton when my brother-in-law, Stockdale, died. Then I came when my sister Mrs. Griggs died. That was 4 or 5 years ago. Went home with Mrs. Parriott from the funeral. Stayed there possibly 2 nights. Heard from the boys and Mrs. Parriott frequently. Was notified of Mrs. Parriott's sickness by letter from one of the boys, and the same day a telegram notifying me of her death. Jim visited me once in Dakota when Eva was sick, in about 1912. Stayed there about 2 weeks. Henry did not stay at Mrs. Parriott's and go to school when I lived in Iowa Falls. When I was at Boone, Henry boarded at Stockdale's and went to school. He may have lived at Mrs. Parriott's for a while."

He further testified that, while he lived at Iowa Falls, before he went to Boone, and after Mrs. Parriott took the



children, he visited them at Mrs. Parriott's at least once a month.

We set this testimony out for the purpose of showing the splendid opportunities afforded Joe to mention or discuss this alleged contract prior to the 12th day of April, 1912, and to emphasize his silence. If this case rested upon Joe's testimony alone, the claim could not stand, on the face of what this record discloses.

It is contended, however, that Mrs. Parriott, soon after these boys came to her, made statements to certain witnesses from which it is made manifest that she had entered into such a contract as is relied upon here, and such as imposed upon her the obligation sought to be enforced here against her estate. These conversations are said to have occurred about the time that some controversy arose between Mrs. Parriott and the school board touching an obligation to pay for the tuition of the elder boy, or perhaps both boys. She seems, so far as this record shows, to have entertained the idea that, because the boys were living with her and making their home with her, she, being a large taxpayer, ought not to be required to pay tuition for the schooling. It appears that she made some complaint to her brother Joe on this score. It appears that she talked about this, scolded about it, and so contended with the board. It seems that she had some talk about her school board troubles with one William Barry. The exact time when this conversation occurred does not definitely appear. We take it, however, that it occurred in 1899 or 1900. At that time, the Barrys lived across the road from Mrs. Parriott. He was asked this question, on direct examination:

"Now did she state to you while you lived there the manner and terms under which she had the boys? A. Yes, sir. Q. Now tell the court what she said about that. A. She said when she took these boys she wanted to adopt

them, and their father wouldn't have any adoption papers taken out, for the reason that they would lose their name, and so they entered into a contract that she was to take them, verbally, and to take care of them and educate them as her own, and at her death what she possessed was to go to them; that the father agreed to this. This conversation was about 14 years ago. Q. Whom did you first tell this to about your talk with Mrs. Parriott? A. Well, I and my wife, I guess,—until this affidavit came up, that was about the first time that I talked. Joe Sharpe came to ask me to make this affidavit. He came in May or June last summer. Until Sharpe came, I think I had not talked to anyone except my wife about it."

He was then asked this question:

"Will you tell me again what Mrs. Parriott said? A. That she wanted to adopt those boys as her own, take out adoption papers, and their father refused to do that on account of losing their name, and then they entered into a verbal contract that she was to take them, educate them, take care of them as her own, and at her death what she possessed was to go to these children. Q. Now those were her words? A. Yes, sir. Q. She said, 'Mr. Barry, when I took these children the father and I entered into a verbal contract,'—she used that expression exactly, did she? A. Yes, sir. Q. That is clear in your mind that she used those words? A. Yes, sir, clear in my mind as the day she said it. I was talking in the road between her place and mine, just outside the gate. She opened the subject. She brought up the subject there in regard to the school board here. That is what brought up the subject, about the tuition. She said she had some talk with the school board, but didn't go into details on that part of it. I drove off, I was in a hurry. I think our conversation ended about there at that time."

One J. J. Wirt was called. He testified that he lived near to Mrs. Parriott, and that, during the time he lived

there, she was a frequent visitor at his house. He testifies that the first conversation was in 1899, in the spring. He was then living at the place where Wm. Barry formerly lived; he succeeded Barry at this place. He was asked this question:

"Did you ever have any conversation with her as to how she took these boys, and as to how she held them? You may tell what she said about them. A. She said she took the boys when they were quite small, and wanted to adopt them, and her brother wouldn't let her adopt them on account of the change in the name, and then she said she didn't want to give the boys up. She had become attached to them and they were like her own children, and she finally said—agreed with her brother to enter into a contract with him, and she was to take these boys and care for them the same as if they were her own children, and educate them, bring them up, and have full control of them as a parent. She said then she agreed with her brother if he would agree with this agreement that she would make them her heirs, and was to give them the property if she had any left. She said that her brother agreed to this proposition."

He further testified that the first time he talked of this conversation was with his wife; that was about the time he knew the suit was coming on. He said:

"We talked it over by ourselves. I had a second talk with her at her home. It came about in this way: I asked her again about this conversation, because we were talking about it. I said to her, 'You told me once what it is, but I don't remember it, and I would like to know it all over again.' My recollection is distinct back 15 years as to these conversations. My mind is clear, very clear, but I don't remember word for word what I testified to last October. In stating what Mrs. Parriott said, I understood that I was giving word for word what she said. My second con-

versation was about a year after the first. At this second conversation I didn't recall word for word what was told me on the first conversation, but I recall it this afternoon. The conversation came up in connection with the tuition. My wife was present and heard the conversation."

He was asked this question:

"You were not mistaken as to the exact language that the woman used in talking with you while you were there?"

A. Not when it makes an impression on me like that did."

Mrs. Wirt testified that Mrs. Parriott came to her home once or twice a week while she lived at the Beebe place. She was asked this question:

"Do you remember the conversation had in the presence of your husband as to how she took the boys? A. I do. Q. Tell the court what it was. A. She said that she would take the boys; wanted to take the boys as her boys; educate and clothe and care for them the same as if they were her own children, but her brother wouldn't consent to that on account that he did not want to change their name; and she said also that she came to a settlement with him—an agreement with him—that she would take the boys and care for them, and when she died these boys would get all the property she had; that her brother consented to this. That is just what she said."

On cross-examination, she was asked:

"Mrs. Wirt, you testified last October? A. I did. Q. Now will you tell us, without my interrupting you, just tell the court, what Mrs. Parriott said to you about these children? A. I said that she wanted to adopt these children and care for them, and clothe them and educate them, but on account of the changing of the name her brother wasn't willing she should. (Question reread.) A. I just gave you that. (Question repeated.) Do you want me to repeat it again? Q. No, I do not. Is there anything further? A. No, sir."

**Redirect examination:**

"Q. Do you mean that all she told you was that she wanted to adopt these children and care for them and educate them as her own, and that he objected to it on account of changing the name? Do you mean that was all that she said at the time, or did she say more? A. I think that is what she said. Q. Was there anything more? A. No, sir. Q. Did she say anything to you about a contract that she had made with him? A. Why, as I said before, a verbal contract. Q. Was that all that was said, that she just simply said she wanted to adopt the children, educate and take care of them, or that she did, and that he objected on account of losing their name? A. I think she said that she wanted to take the children and keep them as her own. Q. Did she say anything further? A. Why, she said she entered into a verbal contract with him."

Question by the plaintiff: "In addition to saying that she was to adopt the children and educate the children and take them as her own, but he wouldn't do it on account of losing the name, did she say anything more to you at that time about what was done? If so, state. A. I don't remember that she did. Q. Well, you said a while ago that they entered into a contract, didn't you? A. Why, into a verbal contract. Q. Did she tell you what the contract was? A. No more than she wanted to. She would take the boys and care for them and educate them as her children, and he was willing for that."

If we could accept this testimony, it would have much persuasive force in favor of plaintiff's claim. If we could believe that these witnesses, uninfluenced by the hypnotic power of suggestion, had, of their own independent memory, after these intervening years, reproduced for us the conversations had with the deceased as they were actually had, we might be persuaded to give ear to plaintiff's contention. These witnesses are comparatively old people. They had,

at the time, no personal interest in the matter concerning which they are called upon to testify. There is no reason in the world why they should have retained this in their memory,—why it should have reposed there silently all these years, unimpaired by the lapse of time. That they had talked with Mrs. Parriott, we may assume. That this talk related to the children and her wish to avoid payment of tuition, we may assume. This much might well be retained in the memory. The rest might readily come from the building process of suggestion. Joe and his son, J. J., Jr., were searching for evidence of this character. They had consulted attorneys and knew what was essential to make a case of this kind. Barry's attention was first directly called to this conversation by these parties when they approached him to have him sign an affidavit, presumably for the purpose of the new trial hereinbefore referred to.

It has long been recognized in this state that testimony of this character is not very persuasive in its probative force. Its weakness lies in the fact that the witness may not have understood clearly what was said to him. The imperfection of the human memory renders it quite possible, and, when long years intervene, quite probable, that he does not remember just what was told him, even though he understood it at the time. These witnesses may be honest in thinking that they remember now what was said to them so long ago. There is a remarkable similarity in their statements. Though professing to give the exact words used by Mrs. Parriott, they cannot repeat the conversations twice in the same way. Of course, that it not particularly remarkable, and ought not to be remarked upon now, except that the witnesses so positively assert that they clearly remember the language used by her in the conversations. There was, no doubt, some foundation to build upon. No doubt they had some conversations with Mrs. Parriott touch-

ing her desire to avoid the payment of tuition. We say this because, in these conversations, she probably based her contention on the fact that the boys were residing with her and making her place their home; but it is not within the limits of probability that she gave to these strangers a detailed statement of the conditions and circumstances under which she had taken them into her home; that she detailed to them conversations which neither she nor her brother Joe repeated to any other living soul. We must find that she did this before we can accept their testimony.

This estate is a very large one, and was at the time it is claimed this contract was made. She had one sister, at least, with whom she had resided for ten years after her husband's death; another sister with whom she was on most intimate and sisterly terms. She had nieces and nephews for whom, this record discloses, she entertained a kindly feeling. This record bears us out in saying that these witnesses had been talked with before ever they went upon the stand,—talked to by parties who were interested in securing to themselves this entire estate, interested in securing evidence upon which to build a claim to the entire estate,—by those who knew what was necessary to sustain the claim. With a slight foundation of actual fact, we believe that these witnesses were led into thinking that they remembered the conversations as detailed; this, through the influence of oft-repeated suggestion.

We might not be justified in saying this if it were not for the testimony of Mrs. Mallon. Mrs. Mallon resided at Joe's house after his first wife's death. She was there at about the time the boys were taken by Mrs. Parriott. She testified:

"When I was at the Soldiers' Home, Joe and Jimmie came down to see me. They said they wanted me to come up and tell that I heard Mrs. Parriott say she would leave what she had to these children. They wanted me to come

and gave me great inducements to come. I told them I couldn't come. They told me to come up there, told me where they lived, and told me that I wouldn't be at any loss to come up. I told them I was coming up anyway, and they wanted me to come and see them. I did come up. I told them she was gone now, and that I couldn't say that; that I never heard her say it. They wanted me to say things that I couldn't say, and that I didn't hear her say, and that was, that she was going to leave the children her property."

This discussion has proceeded far enough. After a careful reading of this record, we are satisfied that the judge before whom the case was tried, who had an opportunity to hear and see the witnesses, to observe their manner of testifying, who had all those aids that come to a trial judge that are not given to us, did not err in dismissing plaintiff's petition; and the action is, therefore,—*Affirmed.*

LADD, WEAVER, PRESTON and SALINGER, JJ., concur.

EVANS, J., took no part.

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SAMUEL SIMONS, Appellant, v. ISAAC PETERSBERGER et al.,  
Appellees.

**LIBEL AND SLANDER:** Privileged Communications—Financial Condition of Another. Information concerning a merchant's financial condition, properly obtained from said merchant by an agent of a credit-rating company, and in good faith and without malice communicated by said agent to his principal, with substantial truthfulness, is privileged.

*Appeal from Scott District Court.*—F. D. LETTS, Judge.

NOVEMBER 17, 1917.

ACTION for damages. By direction of the court, the



jury returned a verdict for the defendant. Plaintiff appeals. The facts are fully stated in the opinion.—*Affirmed*.

*John C. Higgins and Sharon & Harrison*, for appellant.

*Lane & Waterman and Isaac Petersberger*, for appellees.

STEVENS, J.—This case was before this court upon a former appeal. See same title, 171 Iowa 564. The interpretation there placed upon plaintiff's petition, which is somewhat difficult to understand, was as follows:

"The petition is somewhat obscurely stated; but the theory of the case presented by plaintiff seems to be that the defendant Petersberger, an attorney at law in Davenport, falsely and maliciously reported to the Jewelers Board of Trade that plaintiff was in financial straits, and that this false and misleading statement was by the Board of Trade sent out to the wholesale dealers in that line of business, thereby injuriously affecting plaintiff's credit and standing as a business man; and that, in the further pursuance of said wrongful purpose to injure plaintiff and to obtain his outstanding bills for collection, Petersberger and the Credit Adjustment Company, a corporation organized and controlled by him, falsely led plaintiff to believe that they held or controlled practically all his outstanding indebtedness, and, by threatening to force him into bankruptcy, induced him to execute an instrument surrendering all his property to the Credit Adjustment Company, and to further pay to said company the sum of \$30 in money."

Adopting the above as the correct meaning thereof, what is said herein will be with this in view. The defendant Petersberger admits the writing of the letters complained of, and alleges that they were written in good faith, were true, were based upon information furnished him by the plaintiff, and that, at the time of the writing of said letters, defendant was acting as the agent of the jewelers' board of trade, and

that same were privileged communications between the defendant and his said principal. Plaintiff had, prior to the time in controversy, been for several years engaged in the jewelry business in Davenport, Iowa, and, in the course of said business, had become indebted in a considerable sum to numerous wholesale creditors, and to a bank in said city upon a note for \$500.

On or about the 31st of March, 1910, the defendant, who is an attorney at law, practicing his profession in said city of Davenport, presented to plaintiff for payment a claim of \$357.29 in favor of Zimmern, Rees & Company, a creditor of plaintiff's, which had been sent to him for collection by some New York collection agency. Plaintiff was unable to pay the same, and sought an extension of time in which to do so. He testified that defendant informed him—but whether before or after the information hereafter referred to had been obtained does not appear in the record—that he represented the jewelers' board of trade of Chicago, an institution organized somewhat on the plan of the Dun and Bradstreet companies, for the purpose of obtaining and furnishing information to certain wholesale dealers and jobbers regarding the financial condition of retail jewelry merchants and others. The plaintiff at this time exhibited to the defendant Petersberger his books of account, and made a full statement of his financial affairs; whereupon, and on the same day, defendant wrote the following letter to the jewelers' board of trade:

"Davenport, Iowa, 3-31-10.

"Re Simons Jewelry Co.

"Jewelers' Board of Trade,

"609 Columbus Bldg.,

"Chicago, Ill.

"Gentlemen:

"In presenting a claim of \$357.29 in favor of Zimmern, Rees & Co., which we received for collection from our New

York correspondents, and in endeavoring to force settlement on same, we had occasion today to investigate the condition of the above concern, which is unincorporated, consisting of Samuel Simons, who has been a resident of this city for about six years.

"He states his absolute inability to take care of this account at present, due to business depression and other conditions locally, which were fully reported to you by your Mr. Henry M. Johnson. In making our investigation of debtor's affairs, we ascertained that they were indebted to the amount of about \$4,500, \$500 of which is due to a local bank. They have assets as follows: Stock and merchandise \$4,533.65, as of date January first; accounts received, \$717, and fixtures, \$1,800; \$900 unpaid and unsecured, upon which there is two years' time.

"In addition, there is a lease on the premises at a monthly rental of \$87, and the lease runs four years. The annual business for the past five years is as follows: 1905, \$3,957; 1906, \$5,962; 1907, \$6,054; 1908, \$5,695; 1909, \$4,597. The expenses in connection with the store is about \$175 per month, and debtor's personal and household expenses amount to about \$125. Debtor has pledged his life insurance to secure additional assistance, but in our opinion has now reached a state where, in order to conserve the assets and allow him to continue, which he desires to do, some concerted action is necessary on the part of the creditors. The Chicago parties interested are as follows: Rettig, Hess & Madson, 72 Madison St., Chicago, \$73.12; Sproehle & Co., Hayworth Bldg., \$1,011.75; Depress, Bridges & Noel, 103 State St., \$281; Emil Braude & Co., Hayworth Bldg., \$311.

"We are also writing a letter to the New York office, giving them the same information as herein contained, together with a list of the New York creditors.

"We are in a position to represent you in this matter, and upon receipt of claim, we will devise some definite plan

to carry out the idea herein contained, and any suggestion you care to make.

"Yours truly,

,"Isaac Petersberger."

He also wrote a letter to the same concern at its New York address, giving it a list of plaintiff's New York creditors, and stating that the writer was in a position to represent it in the interest of plaintiff's creditors.

It is claimed by appellant that the statement that he was paying \$87 per month rent was untrue; that, while he was paying that amount for the building, he leased a part thereof for \$12 per month, thereby reducing his actual expenses therefor to \$75 per month; that he did not, in fact, pledge his life insurance, but, shortly after entering into business in Davenport, deposited the same with the company issuing it, and borrowed small amounts upon two different occasions thereon; and he further contends that he was wholly solvent, and that, by the use of the following language, "Debtor has pledged his life insurance to secure additional assistance, but in our opinion has now reached a stage where, in order to conserve the assets and allow him to continue, which he desires to do, some concerted action is necessary on the part of the creditors," defendant misrepresented the true financial condition of plaintiff, and induced his creditors to immediately demand payment of their accounts, with which demand he was unable to comply.

Some time later, the exact date not appearing, plaintiff made to his creditors a full statement of his financial condition. This statement showed total liabilities of \$5,574.55, and assets, which included store fixtures, of \$6,682, showing an excess of assets over liabilities of a trifle over \$1,100. The jewelers' board of trade, immediately upon receipt of defendant's letter, notified each of plaintiff's creditors thereof, stating the financial condition of plaintiff to be sub-

stantially as set forth in defendant's letter, and in the subsequent statement sent out by plaintiff. At the same time, a letter was written by it to the plaintiff, containing a substantial restatement of the information obtained from the defendant Petersberger. Appellant claims that the defendant Petersberger, in obtaining the information therein contained, and writing the letter above set forth, was actuated by malice, and for the purpose of destroying the credit of the plaintiff, and to obtain the accounts of creditors for collection for his own profit and benefit. Plaintiff further claimed that none of his creditors were crowding him, and that he was able to buy goods on the market without difficulty; that, while his assets did not greatly exceed his liabilities, his business had grown rapidly, and he required but a little time in which to pay the debts; and that, notwithstanding the adverse conditions under which he has been compelled to carry on his business since the transactions above referred to, he has paid his creditors in full; but that he has been compelled to receive goods on consignment, because of the loss of his credit with wholesale concerns.

Some time after the letters were written, plaintiff claims that the defendant sought to induce him to convey all of his property to the Credit Adjustment Company, a corporation owned, managed and controlled by the defendant Petersberger, for the benefit of his creditors, said agreement to be effective only upon the placing of the claims of 75 per cent or more of plaintiff's creditors with defendant for collection, and the agreement to pay defendant 11½ per cent of the aggregate amount due said creditors for services as trustee. This instrument is dated May 20, 1910. Defendant Adjustment Company did not take possession under said agreement. It is admitted by plaintiff that, before signing the same, he consulted an attorney, and signed in pursuance of his advice. Suits were brought against plain-

tiff by defendant on some of the accounts or notes due plaintiff's creditors. The claims upon which suit was brought, however, were paid.

The information upon which defendant based the letter in question was obtained directly from the plaintiff and from an inspection of the books kept by him. At the time, plaintiff knew that defendant was a lawyer, having in his hands for collection a claim of a substantial amount in favor of one of his creditors, which he was unable to pay. Whatever information he furnished defendant was voluntary, and doubtless upon the belief that a frank statement of the growth of his business since he went to Davenport, and of the true facts respecting his liabilities and assets, would induce the creditor in question, and probably other creditors, to refrain from urging payment of their claims, and further inspire their confidence in his ability to pay. This information appears to have had the opposite effect, and, instead of convincing his creditors that he was wholly solvent, appears to have convinced them that his financial situation was unfavorable. If the creditors were induced to present their claims for payment by the statement of defendant of plaintiff's true financial condition, the defendant would not be liable; if, however, defendant's letter contained matters not reasonably necessary to a truthful and accurate statement of the information derived by him from plaintiff or other reliable sources, or of a nature intended to serve some personal end, then the character of such statements and the purpose of defendant in writing them, become material. The facts stated in defendant's letter were admitted by plaintiff to be substantially correct, except the suggestion of defendant that plaintiff had reached the stage where it would be to the advantage of creditors to make some arrangement to conserve his assets and allow him to continue in business, as he desired to do.

Letters from creditors introduced in evidence tend to confirm the suggestion that they were influenced by the indicated financial condition of plaintiff, rather than other statements of defendant's; although the jewelers' board of trade, in its letter to plaintiff's creditors, repeated the substance of defendant's statement in regard to the pledging of life insurance and the importance of concerted action among the creditors.

Plaintiff, after the execution of the agreement above referred to, visited his creditors, explained to them his financial condition, and time appears to have been allowed him within which to pay his indebtedness, and he was enabled to continue in business; but he claims he could only obtain goods on consignment.

Defendant Petersberger claims that he was the attorney and correspondent at Davenport of the jewelers' board of trade, and that a part of his duties were, apparently, to report facts coming to his knowledge affecting the credit or financial standing of merchants engaged in handling jewelry and articles of like character. A witness connected with the jewelers' board of trade at Chicago testified that defendant was its local correspondent at Davenport, and that the action taken by the former was upon the information furnished by him.

Many organizations similar in character to the above exist in various cities of this country. The purpose of their organization and methods of acquiring information respecting the financial condition of retail merchants and others are well known. It is earnestly claimed on behalf of the defendant that all of the matters contained in his letter were privileged; that he had a right, and it was his duty, as the agent, representative or correspondent of the jewelers' board of trade, to furnish the information in question. It is not claimed, however, in this case that the letter was written in answer to an inquiry soliciting information respecting the

financial affairs of plaintiff. The courts are not harmonious on the question as to the extent to which communications from correspondents in answer to inquiries respecting the financial condition of merchants or voluntary reports by such correspondents in the line of their duty as such are clothed with privilege. The Supreme Court of Wisconsin, in *State ex rel. Lanning v. Lonsdale*, 48 Wis. 348, held that such report in the hands of the agency was so far privileged that its contents may be lawfully communicated confidentially to subscribers seeking information upon that subject, if done without malice and in the belief of the truth thereof. To the same effect, see *Locke v. Bradstreet Co.*, 22 Fed. 771; *Erber & Stickler v. R. G. Dun & Co.*, 12 Fed. 526.

The rule as adopted by the Supreme Court of Idaho in *Pacific Packing Co. v. Bradstreet Co.*, 139 Pac. 1007, was as follows:

"As for the contention that these reports on the financial standing of business concerns are privileged, we are unable to give to such a doctrine the sanction of the court. We agree that some courts have so held, but we do not believe it to be a sound or just rule, and it would certainly be demoralizing to business, and open a ready and safe way for the unscrupulous, the blackmailer or grafter, to ruin the business standing and credit of an individual or corporation at pleasure, and without recourse. The only safe and just rule, either in law or morals, is the one that exacts truthfulness in business as well as elsewhere, and places a penalty upon falsehood, making it dangerous for a mercantile, commercial or any other agency to sell and traffic falsehood and misrepresentation about the standing and credit of men or corporations. The company that goes into the business of selling news or reports about others should assume the responsibility for its acts, and must be sure that it is peddling the truth. There cannot be two standards of right, nor two brands of truth, one for moralizing and one for



business. \* \* \* If a mercantile agency can safely make false reports about the financial standing and credit of the citizen and destroy his business, it can then take the next step with equal impunity, and destroy his reputation, leaving him shorn and helpless."

The following recent cases hold that no privilege attaches to a report issued by a mercantile agency to its subscribers generally, or to those who have no interest in the standing of the person covered by the report: *Bohlinger v. Germania Life Ins. Co.*, (Ark.) 140 S. W. 257; *Denney v. Northwestern Credit Assn.*, (Wash.) 104 Pac. 769. See also *Hayes v. Press Co.*, (Pa.) 18 Atl. 331; *Ukman v. Daily Record Co.*, (Mo.) 88 S. W. 60; *Giacona v. Bradstreet Co.*, (La.) 20 So. 706; *Mitchell v. Bradstreet Co.*, (Mo.) 22 S. W. 358; *Dun v. Weintraub*, (Ga.) 36 S. E. 808.

The Supreme Court of Arkansas, in *Bohlinger v. Germania Life Ins. Co.*, supra, referring to the privilege to be accorded communications between principal and agent, stated the rule as follows:

"Communications made by a principal to an agent, or by an agent to a principal, relative to the subject matter of the business of the agency or employment, and containing information or giving direction relative thereto, fall within the class of privileged communications, although they contain defamatory matter concerning a third person. If the statements are published by one in good faith to another, in order to protect his own interest or to protect the corresponding interest of the other in the matter in which both parties are concerned, then such statements are privileged, when the subject matter of the publication makes it reasonably necessary, under the circumstances, to accomplish the purpose desired."

In *Nichols v. Eaton*, 110 Iowa 509, the court said:

"One may make a publication to his servant or agent,

without liability, which, if made to a stranger, would be actionable. In the protection of his own interests, one may make a communication to his agent or servant without subjecting himself to liability, unless he exceeds the privilege and does more than his duty or interest demands. \* \* \* The statement must be such as the occasion warrants, and must be made in good faith, to protect the interests of the publisher and the person to whom it is addressed. A communication by a principal to his agent touching the business of the agency is not actionable, without proof that the principal was actuated by malice towards the person to whom the communication relates."

See *State v. Haskins*, 109 Iowa 656.

As above indicated, the information communicated by the defendant to the jewelers' board of trade was obtained by the defendant directly from the plaintiff, at a time when, as attorney for one of plaintiff's creditors, he was demanding payment of an account for a substantial amount which plaintiff admitted that he was, at the time, unable to pay. It would seem as though plaintiff's credit, if of the character claimed by him, was obtained without knowledge on the part of his creditors of his true financial condition, which, as indicated, was of doubtful solvency. Whether the communications in question were qualifiedly privileged or not under the proper rule applicable to such reports, the right of defendant, as the representative or agent of the jewelers' board of trade, to make truthful reports thereto respecting the financial condition of merchants in the city of Davenport, for the purpose of enabling it to furnish reliable information to its patrons, is not open to doubt. He was bound, however, in the performance of such service, to act in good faith, without malice, and for the purpose of furnishing truthful and reliable information. Newell on Slander & Libel (3d Ed.), Section 587; Townshend on Slander & Libel (4th Ed.), Section 241-a. What was said in the

letter touching on the ability of defendant to handle accounts, and indicating a desire that creditors favor him therewith, was confidential in character, and does not appear to have been communicated to plaintiff's creditors. It is material only in so far as it tends to throw light upon the motives and purposes of defendant in writing the letter to the mercantile agency. What was therein said as to the importance of concerted action among creditors was, at most, only an expression of opinion, which, so far as the record shows, may well have been based wholly upon the information obtained from plaintiff.

We are unable to reach the conclusion that the defendant exceeded his legal rights in writing the letter and furnishing the information to the jewelers' board of trade, for which it appears he was agent and correspondent at Davenport. The claim which defendant presented to plaintiff for payment appears to have been received by him in an entirely proper manner, and the presentation and demand for payment thereof were in accordance with the usual method of handling matters of like character. The statement of his financial condition to defendant certainly did not indicate that plaintiff was in fact entitled to extensive credit. However, it appears that his business had grown in value from year to year, and that he had increased his stock, and he is not shown to have been dilatory in paying his accounts, or that same had previously been placed in the hands of attorneys for collection. The fact that defendant solicited that claims against plaintiff be sent him for collection does not in itself show that he was proceeding without due regard to the interest or welfare of appellant. In a subsequent letter, written a few days after the letter complained of, defendant used the following language:

"We assure you that we are unalterably opposed to bankruptcy proceedings in any adjustment matter, except

in cases of fraud, which element does not enter into this matter."

There is nothing in the record from which it could be inferred that defendant acted with malice or in bad faith toward plaintiff in respect to any of the matters complained of, or that he did not truthfully represent to the commercial agency the information furnished him by appellant, except that he omitted mention of the \$12 rental received from subletting a portion of the building, and stated that plaintiff had pledged his life insurance policy for further assistance, instead of stating that same had been previously deposited with the company as security for a loan.

That plaintiff was able to purchase goods before the facts regarding his financial condition were brought to the attention of his creditors would not entitle him to recover damages of the defendant if a truthful statement thereof by him to them resulted in serious impairment or loss of his former credit. Defendant certainly had a right to rely upon the truth of the statements furnished him by plaintiff, and to communicate them to his principal.

In the former opinion filed in this case, reference was made to a check for \$30 which plaintiff gave to defendant at the time of the execution of the trust agreement. The court below required said amount to be deposited with the clerk, which the record shows was done before motion to direct a verdict was sustained.

Without further review of the testimony or citation of authorities, we reach the conclusion that the trial court did not err in sustaining defendant's motion and directing the jury to return a verdict in his favor, and the judgment rendered thereon is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

STATE OF IOWA, Appellee, v. ZONA CLOUGH, Appellant.

**PROSTITUTION, HOUSE OF: Elements of Offense—Character of**

- 1 **Intercourse.** It does not follow that defendant may not be properly convicted of keeping a house of ill fame when the only evidence of illicit intercourse relates solely to the defendant herself and in her own home, when the evidence tends to show other material elements of the offense, to wit: (1) That defendant was a prostitute; (2) that she plied her trade in said house with men indiscriminately and for hire; (3) that she urged other women to do likewise; (4) that the house was resorted to for the purpose charged; and (5) that the house was generally reputed to be a house of ill fame.

**PROSTITUTION, HOUSE OF. Elements of Offense—"Keeping"**

- 2 and "Resorting to" Contrasted. The crimes of keeping houses of ill fame and of resorting to such houses, etc., are made up of elements common to both, and such elements are necessarily provable by evidence common to both.

*Appeal from Union District Court.*—H. K. EVANS, Judge.

NOVEMBER 17, 1917.

THE defendant was convicted upon charge of keeping a house of ill fame, and appeals.—*Affirmed.*

*James G. Bull* and *E. A. Lee*, for appellant.

*H. M. Havner*, Attorney General, *H. H. Carter*, Assistant Attorney General, and *George A. Johnson*, for appellee.

WEAVER, J.—I. Appellant first asks a new trial on the alleged ground that the verdict of guilty is without support in the evidence. In argument, counsel seek to sustain this proposition on the theory that the principal witness for the State is unworthy of credit; that her story is inconsistent and incoherent; and that she shows herself insincere and revengeful. The objection is without merit. It is an elementary principle in the trial of jury cases that

the credibility of witnesses and the weight to be given their testimony are matters for the jury alone.

II. So far as error is alleged upon rulings of the court in the course of the trial below, it is quite impracticable to follow counsel's propositions in logical or consecutive order. Their briefs are constructed in entire disregard of our rules, which require a clear statement under separate and distinct headings, or in separate paragraphs, of the several propositions of law and of fact on which reliance is placed. This has not been done, and we shall attempt no more than to mention a few, which, from their repetition in various forms, we infer are thought to be of controlling importance.

It is argued that the only evidence of

1. PROSTITUTION,  
HOUSE OF: elements of offense: character of intercourse.

prostitution or illicit intercourse in the house of defendant relates solely to the defendant herself, and that, even if it be proved that she did indulge in prostitution in her own home, it would not constitute the offense described by the statute. Code, Section 4939. It is doubtless true that the mere act of illicit intercourse by the woman with a paramour in her own house would not alone make her place of abode a house of ill fame, but when the State goes further, and presents evidence tending to show that she there plies her trade as a common harlot, entertaining men indiscriminately for hire and urging other women to unite with her there in the same business, and that the house was in fact resorted to for the purposes of prostitution, and then adds to this evidence of the general ill fame or reputation of the place kept by her, a case is made which abundantly sustains a verdict of guilty, even though the accused be the proprietor of the house and her own acts of prostitution are the only ones of which there is direct evidence.

There are no common-law crimes in Iowa. The offense with which the appellant is charged is purely statutory, and, if the statute clearly defines the thing or act which is forbidden, a resort to common-law definitions to add to or detract from the effect of the language of the statute is neither necessary nor permissible. The statute describes the offense as "keeping a house of ill fame, resorted to for the purpose of prostitution or lewdness." Now "prostitution" has no purely legal or technical meaning which differs from the general acceptance of the word in common usage as being the act or practice or habit of "prostituting or offering the body to indiscriminate intercourse with men." Webster's International Dictionary. The term "house of ill fame" has to some extent a restricted meaning in law, where it is regarded as the synonym or equivalent of bawdy-house, or house kept and resorted to for the purpose of prostitution. *State v. Lee*, 80 Iowa 75. Now if the keeper of the house is herself a prostitute and there plies her trade, and such house is resorted to by men for the purpose of there indulging in illicit intercourse with her or with other women of like character, the offense is complete under the statute, and if there be, as counsel claim, any common-law rule by which proof of the prostitution of the proprietor or owner of the house and of resort thereto by men for the purpose of prostitution with her, is held to be insufficient to sustain a conviction, we are not disposed to recognize its authority. To hold otherwise would be to engraft upon the statute an exception wholly at variance with its positive terms.

2. PROSTITUTION,  
HOUSE OF: elements of offense: "keeping" and "resorting to" contrasted.

III. Appellant also complains that the trial court admitted testimony tending to show no more than that she was guilty of violating the statute (Code Section 4943) which provides punishment for *occupying*

or *resorting* to a house of ill fame for the purposes of prostitution, when the crime charged is the *keeping* of such place, in violation of Code Section 4939. It is hardly necessary to say that the two offenses, while distinct, are each made up, in part, of elements which are common to both, and neither can well be proved without testimony which may also be competent and material to a prosecution for the other. An examination of the record fairly demonstrates that none of the evidence to which this objection is offered was inadmissible, and the assignment of error upon its admission cannot be sustained.

IV. To the giving of certain instructions, and to the refusal of requests for others, appellant also excepts. None of the questions so raised require discussion, except to say that, in so far as the requests state propositions of law which are correct and applicable to the case, they are all fairly covered by the charge of the court, while others are controlled and governed by the rules of law to which we have expressed our adherence in the foregoing paragraphs of this opinion.

A thorough examination of the record discloses no reversible error, and the judgment of the district court is—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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ALICE TOPPER, Appellant, v. W. W. MAPLE, Appellee.

**NEGLIGENCE:** Acts Constituting Negligence—Operation of Automobile—Evidence. Evidence attending a rear-end collision of an automobile with a buggy reviewed, and held to present a jury question on the issue of defendant's negligence.

**EVIDENCE:** Judicial Notice—Time of Sunset. It seems that the court will take judicial notice of the time the sun sets, even



though, in order to determine said time, the court is compelled to resort to an independent investigation.

*Appeal from Polk District Court.*—W. H. MCHENRY, Judge.

NOVEMBER 17, 1917.

ACTION to recover damages for personal injuries caused by reason of the alleged negligence of defendant, in running into the rear of plaintiff's buggy with an automobile driven by defendant. The transaction occurred August 19, 1915, at about 8 P. M., at the intersection of Southeast Sixth Street with the Burlington Railroad tracks in Des Moines, Iowa. Trial to a jury, and at the close of the testimony, the trial court sustained defendant's motion for a directed verdict. Plaintiff appeals.—*Reversed and remanded.*

*Francis L. Meredith and Tomlinson & Gilmore*, for appellant.

*Cohen & Cohen*, for appellee.

1. NEGLIGENCE: acts constituting negligence: operation of automobile: evidence.

PRESTON, J.—1. The grounds of negligence, briefly stated, are, substantially, that defendant was running his automobile in a negligent and dangerous manner, at a dangerous rate of speed; that defendant did not exercise the proper degree of care and attention to control the movement of his automobile, and did not stop soon enough.

There is a conflict in the testimony at some points, but it is either admitted or there is evidence tending to show that plaintiff, accompanied by her son, left the home of her daughter at 1521 Maple Street, Des Moines, Iowa, at 7:30 P. M., and drove their horse and buggy in a south and westerly direction, arriving at the railroad crossing in ques-

tion at or before the hour of 8 o'clock P. M., according to plaintiff's testimony, and 8:30 according to defendant's. The son, 15 years of age, who was driving, was in the exercise of ordinary care. They heard no warning of the approach of the automobile from behind, when the buggy was struck by defendant's automobile, demolishing the buggy, throwing the occupants to the street, and throwing the horse so that it lay upon its back. Defendant was driving his car at the rate of 10 to 12 miles an hour, according to some of the testimony, and he testifies, 8 miles. Defendant's testimony is that it was dark, but plaintiff's evidence is that it was not very dark. The street lights were on. They could see a distance of about 100 feet. Another automobile was approaching from the opposite direction, about 150 feet distant. It is claimed by defendant that the driver of this approaching automobile did not apply his dimmers, and that the light blinded the defendant so that he could not see anything, just before he struck the buggy; that he was right in the light as he was approaching plaintiff's buggy from the rear. But plaintiff's testimony is that the rays of light from the approaching automobile were not directly in front of her, but were to the left of her buggy. Defendant contends that this third party was violating one of the ordinances of the city in failing to apply his dimmers. There was no red tail light in the rear of plaintiff's buggy. Plaintiff's horse was trotting slowly near the curbing. She says she did not notice any automobile lights from the rear. Defendant says he applied his dimmers just before he struck the buggy, and that before that his lights had been on full. Defendant was making a professional call, and says that he and the party with him were having a good deal of argument in regard to his dimmer lights; that, when he came into the zone of light, as he calls it, from the approaching automobile, it blinded him, and at that instant he heard a

crash, and he found he had run into plaintiff's buggy; that he stopped his car instantly; that his machine did not go more than from 15 to 30 feet after he turned on his dimmer lights. He says he did not see any buggy ahead of him. This is the substance of the testimony bearing upon the question as to whether the defendant was negligent or not.

Defendant's motion for directed verdict is on the grounds, first, that defendant was not negligent because he was driving his car at a rate of speed between 10 and 15 miles an hour, and that, under the ordinance, he was not limited to 15 miles an hour at the place of the accident; second, that the plaintiff was guilty of contributory negligence in failing to have a red light attached to the rear of the vehicle; and third, that there was concurring negligence of the third party approaching with an automobile.

Under this record, we think it was a question for the jury to say whether, under all the circumstances, defendant was negligent in the matters charged. It was a question for the jury to determine whether defendant was, as he claimed, within the light from the approaching automobile and blinded thereby, and whether he was, under all the circumstances, considering the distance and the other facts, within the light zone and blinded, and whether he was negligent in driving at the rate of speed he was, under the circumstances shown.

2. The point most strongly relied upon by defendant to sustain the ruling of the district court is that plaintiff was guilty of contributory negligence in failing to have a red tail light in the rear of her buggy, as provided by an ordinance of the city, which was introduced in evidence. The ordinance provides that this is required during the period from one hour after sunset to one hour before sunrise. But there was clearly a conflict in the testimony whether
2. EVIDENCE: Judicial notice: time of sunset.

it was, at the time of the accident, one hour after sunset. If it was not, no red light was required. As said, defendant claims the accident was at about 8:30 o'clock. Testimony for plaintiff is that it was about 8 o'clock, some of it tending to show that it was before 8. Plaintiff says that after the accident defendant looked at his watch and stated that it was then just 8 o'clock. The only evidence in the record as to the time the sun set is that it was about 6:30 or 7 o'clock. Even under this evidence, the jury could have found that the accident was not an hour after sunset. But this testimony as to the time the sun went down is very indefinite, and is of but little help. It could, if necessary, have been proved with but little trouble.

Appellant contends that we should take judicial notice of this matter, but no cases are cited. We said, in *Haaren v. Mould*, 144 Iowa 296, substantially that judicial notice does not depend upon actual knowledge of the judge, but that he is at liberty, when the question arises, to investigate and refresh his recollection by any means which he deems sufficient and proper. Bradner on Evidence (2d Ed.), page 186, citing *People v. Chee Kee*, 61 Cal. 404, states that courts will take judicial notice of the time when the sun rises and sets during different days and seasons. See also 15 R. C. L. 1100 and 1101. Counsel for appellant, in argument, say that, on the date in question, the sun set at 9 minutes after 7. Our investigation shows that it was 7 minutes after. It was for the jury to find from the evidence the time of the accident.

Appellee makes some contention that the accident was because of the negligence of the party approaching in another automobile without applying his dimmers, or at least that this was a contributing influence, and the concurrent negligence of a third party. But, under the entire record, we are of opinion that the case should have been submitted to the jury, under proper instructions.

The judgment is reversed and remanded for proceedings in harmony with the opinion.—*Reversed and remanded.*

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

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MARION WOODARD, Administrator, Appellee, v. HERALD PUBLISHING HOUSE, Appellant.

**MASTER AND SERVANT:** *The Relation—Implied Contract of Employment—Acquiescence.* The relation of master and servant may result from the act of the master in acquiescing in the good-faith rendition of services for the master by another without any express contract of employment.

**PRINCIPLE APPLIED:** Deceased had been working for the employer some weeks prior to his death. The construction of a cement floor to an ice house was under way. When another branch of the work was taken up, deceased became dissatisfied with the wages and left. A week later, he returned and asked for work at the reduced wages. The sub-foreman, who was in apparent charge of the work, but who had no authority to employ help, urged deceased to go to work, and told deceased he would speak to the general superintendent, as soon as he came, about the matter. The superintendent, who had full control of the work, soon came, saw deceased at work, and voiced no objections. The sub-foreman did not speak to the superintendent, because he did not see him. Shortly after the superintendent arrived, deceased was killed. *Held*, the record supported a finding that the relation of master and servant existed.

**NEGLIGENCE:** *Acts Constituting Negligence—Exposed Electric Wires—Contributory Negligence.* Evidence reviewed, and held to support a finding that a master was negligent in maintaining heavily charged electric wires in the immediate vicinity of workmen, who did not know of the extreme and attendant danger, and likewise that the servant was not guilty of contributory negligence in the acts resulting in his death.

**NEGLIGENCE:** *Assumption of Risk—Master's Negligence.* A servant does not assume the risk of the master's negligence when he has no knowledge of such negligence. So held where the master negligently exposed high voltage electric wires.

**TRIAL:** *Verdict—\$5,000—Excessiveness.* Verdict of \$5,000, re-

- 4 duced by the trial court to \$3,000, for the death of a common laborer, 48 years of age, without much accumulation of property, held not excessive.

*Appeal from Decatur District Court.*—THOS. L. MAXWELL, Judge.

NOVEMBER 17, 1917.

ACTION at law by plaintiff, as administrator of the estate of W. W. Johnson, deceased, for damages caused by the alleged negligence of the defendant. There was a trial to a jury, and a verdict for plaintiff for \$5,000; but the trial court required plaintiff to remit \$2,000 or submit to a new trial. The remittitur was made, and judgment entered for \$3,000. The defendant appeals.—*Affirmed.*

*Cummins, Hume & Bradshaw* and *V. R. McGinnis*, for appellant.

*C. W. Hoffman* and *R. L. Parrish*, for appellee.

PRESTON, J.—It is alleged, substantially, that defendant is engaged in the business of operating an electric light plant; that the wires run from the power house out over the top of an ordinary door to a small tree near the door; that they also connected the power house with another wire, that led from near the door of the old power house into the new power house, and permitted a wire to lie upon the ground just east of the new power house; that the wires over the door were only about 6½ feet from the ground, and were not properly covered or protected, so that defendant's workmen were compelled, when entering and leaving the buildings, to pass under said wire, and over the wire that was loose on the ground; that said wires were carelessly placed, and were in such condition as to endanger the lives of defendant's employees; that, on July 9, 1913, deceased was employed in assisting in laying a cement floor in defendant's west building; that in the discharge of

his duties he was mixing and carrying cement under said overhead wires, and, without knowing the dangerous character thereof, he picked up a loose wire to move the same out of his way; that, just prior to the time he picked up said wire, a current of electricity was turned on said overhead wires; that, without knowledge thereof, and without any warning of the dangerous character of the same, he placed or attempted to throw said wire, so picked up, on or over the overhead wires, and was instantly killed by the electric current from said wires.

The grounds of negligence are: Placing the wires so nearly over the heads of the workmen; placing the other wires where their workmen were compelled to walk over and remove them; not having the wires overhead properly guarded and protected; not having a danger sign to warn employees of the dangerous character of said wires; turning on a deadly current of electricity while deceased was working under said wires; not warning deceased of the danger to which he was subjected.

The answer denies, and alleges that it was erecting an ice plant in connection with its electric system, also a new smokestack and boiler room in connection therewith; that, in making the improvements, it was necessary to take down their motor wires from their permanent position and lower them; that the only wire that was movable was a light wire to the interior of the ice plant, which light wire was safe; that the main wires bearing the current from the power plant to the main line were properly insulated, so that, under ordinary circumstances, there was no danger from them; that deceased had worked in and about the premises at a time prior to his death, and had been warned of the danger, especially when the ground was wet; that deceased was not in the employ of the defendants by any authority, but was assisting in said work at the request of another employee; that deceased removed the mortar box from a point

some distance from the wires to a point under them; that he used a barrel of water near his work, and made the location wet and dangerous; that deceased negligently, and knowing the danger, picked up the light wire and undertook to put it over the main motor wires, and at the same time was warned by those present not to do so, which warning he disregarded; that, by reason of his contact with the main wires, under the conditions stated, the electric current passed from the wires to his body, and thus caused his death; and that his death was caused wholly by his own negligence. It was conceded on the trial that the wires running out of the building were, at the time of the death of deceased, charged with 2,200 volts. The defendant moved for a directed verdict at the close of plaintiff's testimony, and again at the close of all the evidence. The motions were overruled, and the cause submitted to the jury.

1. MASTER AND SERVANT: the relation: implied contract of employment: acquiescence.

1. It is strongly urged by appellant that deceased was not, at the time of his injury, in the employ of the defendant, and that the relation of master and servant did not exist, and it contends that the deceased was a mere interloper and trespasser. Appellee contends that the employment of deceased was by Fowler, who was in apparent charge of the work, and further that, after his employment by Fowler, the company, by its superintendent, Gilbert, who was in charge of the work, and who had authority to employ and discharge men, saw deceased at work and acquiesced therein. The trial court did not instruct as to appellee's first contention, but did instruct on the theory of acquiescence, and for this reason appellee says that the instructions were more favorable to appellant than it was entitled to, and that the court should have instructed on the other theory as well. But plaintiff has not appealed, and only asks a determination of that question in case



there is a reversal on other grounds. The point as to acquiescence is argued more elaborately than the others, and is evidently the point most seriously relied upon for a reversal.

It appears from the evidence that, at the time of the accident, defendant was putting a cement floor in the ice plant, and they had been working at this building for about a month. Deceased had, during that time, helped mold the cement blocks and attended the masons. Deceased had quit about a week before, because, when he went to work on the building, he wanted \$2.50 per day, the same wages that he had been getting while making blocks, but the superintendent would not pay more than the other men were getting, \$2 a day. The day he was killed, he came back to work, and wanted Fowler to speak to Gilbert, the superintendent, about going to work again, and was willing to work for \$2. It was getting quite late, and Fowler saw he was going to be late, and told deceased he wished he would go to work and help him, so as to get through earlier. Gilbert, at that time, about 2:30 o'clock in the afternoon, according to some of the testimony, was temporarily absent. Deceased went to work when Fowler asked him to. Fowler asked him to go to work at once, and said he would speak to Gilbert when he came around. Deceased complied with Fowler's request, mixing mortar, and was so working when he was killed. Fowler had not seen Gilbert to speak to him before Johnson lost his life. Gilbert returned in an hour or so, and noticed deceased working there as soon as he came up, and was familiar with the conditions and the situation. Gilbert made no objection to deceased's working there, but gives no reason why he did not do so. The superintendent says that, when he came up, Johnson was almost directly under the place where they were raising sheets, building the smokestack; and he did not consider it a safe place for him to work. It is shown that Gil-

trial court attempted to, and we think did, follow them, and correctly stated the law in the instruction set out, and the evidence was sufficient to take the case to the jury on the doctrine of acquiescence. We shall not take the time or space to restate the reasoning in the cases cited.

It certainly cannot be claimed that, under the record in the instant case, deceased was a mere trespasser or intermeddler, and that he officiously interfered with and undertook to perform the services without request or employment, and that he did not in good faith enter upon the employer's work,—at least it was a question for the jury.

2. **NEGLIGENCE:**  
acts constitu-  
ting negli-  
gence; exposed  
electric wires:  
contributory  
negligence.

2. As to the defendant's negligence, it is not quite clear just how the deceased was injured, as no one appears to have been noticing at the particular time. Plaintiff's theory is that deceased picked up the wire on the ground to throw it out of his way, and threw it over the other wires, while it is the contention of defendant that deceased took hold of the wires. There is evidence that the overhead wires were spliced at the point where deceased was injured, and that they were not properly taped or covered. What we have before said indicates the general situation. We shall not go into the evidence.

Taking into consideration the location of the wires and their dangerous character, as the jury could have found, whether the wires were properly spliced and taped, and all the circumstances shown in the record, we think it was a question for the jury to say whether defendant was or was not negligent. So, too, as to the alleged contributory negligence of the deceased. It is true that he had worked about the plant before, and there is evidence tending to show that the men had been told, some weeks before, in the presence of deceased, as to the danger in regard to the wires, but at other places and under other circum-

stances. Just how much deceased heard or understood of this prior admonition is not shown. And he doubtless did know in a general way of the danger from wires with a high voltage; yet we may assume that there is not much knowledge among ordinary laymen in regard to electricity. Deceased was a common laborer, and is not shown to have had special knowledge of electricity, or of the condition as affecting these particular wires at the time of the accident, or of their dangerous condition, due to moisture or defective splicing; so that there are some matters in regard to the situation at the time he was hurt that he did not know,—at least the jury could have so found. A witness for the defendant testifies that he said to deceased, while deceased was in the act of raising the wire from the ground, "Don't do that;" but this is disputed by witnesses for the plaintiff. Whether deceased was so warned, and, if so, whether he heard or understood, and whether the alleged warning preceded or was simultaneous with the accident, is uncertain; and, the evidence being in conflict, it was a question for the jury.

3. There is evidence that, after deceased began work in the afternoon of his death, he moved the mortar box from another point to the place where he was working, where the wires were lower. On this branch of the case, the court instructed as follows:

"No 8A. If you find from the evidence that, on the day of the accident when Johnson was requested and directed by Fowler to assist in said work, that the mortar box used in mixing the mortar at which Johnson was to work was then located at a point near the sand pile and cottonwood tree, where the motor wires which caused the death of said Johnson were secured to said cottonwood tree, at an elevation of twelve feet or more from the ground, and you further find that, when Johnson commenced working, mixing and carrying the mortar to Fowler, he, with-

out any authority or direction from the defendants, or their superintendent, moved said mortar box to a point near the boiler room door, where said wires were elevated only to an extent of six or seven feet above the ground, and said Johnson placed said mortar box, without such authority, directly under said wires, and there made a place for himself to work, with knowledge or previous warning of the dangerous character of said wires, and by reason of the fact that said Johnson moved said mortar box and made a place for himself to work in said dangerous situation, he thereby came in contact with said wires, as shown by the evidence, and was there killed, this would constitute such contributory negligence on the part of Johnson, notwithstanding any negligence of the defendants, that the plaintiff could not recover in this action, and your verdict, if you so find, should be for the defendants."

The complaint made in regard to this matter is that the instruction is the law of the case, and that the finding of the jury is contrary to this instruction; but this assumes and is on the theory, as we understand appellant, that deceased had knowledge and previous warning of the dangerous character of the wires. We have already indicated that these were questions for the jury.

4. It is thought by appellant that deceased assumed the risk. But if the defendant was negligent in the particulars charged, as the jury could and must have found, then the risks from such negligence would not be such as are incident to the business.

5. It is contended that the damages are excessive, and indicate passion and prejudice of the jury. It is a difficult proposition for a jury or anyone else to determine with any degree of accuracy just what the damages

3. NEGLIGENCE:  
assumption of  
risk: master's  
negligence.

4. TRIAL: ver-  
dict: \$5,000:  
excessiveness.

should be in such a case. We have often said that it is a matter largely within the discretion of the jury. Deceased was a common laborer, about 48 years of age, and had not accumulated any considerable amount of property. We think the verdict as originally returned was not so grossly excessive as to indicate passion and prejudice, and that, the court having required a reduction of \$2,000, the judgment should stand. There may be other questions of minor importance discussed, but those we have referred to are controlling. We discover no reversible error, and the judgment is, therefore,—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

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BERTHA CHAPMAN, Appellee, v. FRED CHAPMAN, Appellant.

**DIVORCE: Grounds—Prior Unsuccessful Action—Effect.** A second  
1 action for divorce by the same party for the same cause, following the dismissal, *on the merits*, of a former action, must be determined on the evidence of acts occurring subsequent to the decree of dismissal.

**DIVORCE: Grounds—Cruelty—Profane and Abusive Language.**  
2 Profane and abusive language addressed to complainant by the defendant in a divorce action, is material, though *in and of itself* insufficient on which to base a decree.

**DIVORCE: Grounds—Cruelty—Abusive Language—Evidence—Suf-**  
3 **ficiency.** Evidence relating to charges of want of chastity, physical encounters between husband and wife, and much in the way of mutually coarse, profane, and abusive language between them—both of apparently equal coarseness of nature—reviewed, and held insufficient to justify a decree of divorce.

**WITNESSES: Credibility—Vouching for Credibility of Witness.**  
4 It does not lie in the mouth of a party to insist that his own witness is an artistic falsifier.

**DIVORCE: Evidence—Corroboration—Rule to Determine.** No ex-  
5 act standard exists for the measurement of required corroboration in divorce proceedings. But it must be sufficient in quantity.  
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tity and nature to lead an impartial and reasonable mind to believe that the applicant's *material* testimony is true. Slight corroboration on a vitally material point may be sufficient. Large corroboration on a comparatively immaterial point may be wholly insufficient. Corroboration on *one* alleged transaction or fact does not necessarily work corroboration of *all* other alleged transactions or facts.

**DIVORCE: Pleading—Failure of Proof.** An allegation "that plaintiff has conducted herself at all times since her marriage as a dutiful and faithful wife," followed by an affirmative showing that such allegation is untrue, reveals a *fatal* failure of proof on a material allegation.

*Appeal from Monona District Court.*—W. G. SEARS, Judge.

NOVEMBER 21, 1917.

PLAINTIFF was granted a divorce on the charge of cruel and inhuman treatment. Defendant appeals.—*Reversed.*

*Oliver & Allen*, for appellant.

*J. A. Prichard*, for appellee.

SALINGER, J.—I. Earlier than this suit plaintiff sought a divorce on the charge of cruel and inhuman treatment. The present petition alleged that, in the first suit, she claimed "that, by reason of the aforesaid ill treatment," she believed she could no longer live with defendant without endangering her life, and alleged that she therefore left bed and board and brought said earlier suit; and that the same resulted in a dismissal of her petition on the 16th day of May, 1914. In this suit she, in effect, sets up the same charge of cruelty that was made in the earlier suit. It is added that she returned to her husband after said dismissal with the intention of making it her home, and that, shortly after this return, defendant did again such acts as the petition in the first suit complained of.

1. DIVORCE:  
grounds:  
prior unsuccessful action:  
effect.

For some purpose, plaintiff offered in this trial the cross-petition in the first trial. But that pleading itself is not in the abstract, and we know nothing concerning its offer, except that the offer was made, and ruling, upon objection to it, reserved.

Both by motion to strike and by plea of estoppel in bar, defendant in effect asserts that plaintiff may not obtain a divorce upon any "cause of action for divorce on the ground of cruel and inhuman treatment" that may have existed prior to May 16, 1914.

The answer, in addition to this plea of estoppel, is, in effect, a general denial, which emphasized especially its denial of having done any of the acts charged subsequent to said dismissal. It avers affirmatively that plaintiff is coarse and profane in language and expression, hasty in action, and a person of violent and ungovernable temper.

Many of the questions put to plaintiff were broad enough to cover time both before and after the dismissal of the first suit. To all of them, the objection was interposed that the decree of dismissal in the first suit made answers inadmissible. On whether the testimony so received may have consideration, appellee concedes that, if plaintiff "had been relying entirely upon evidence which could have been used or was used in the former trial, then the plea of former adjudication would be good." The attempted avoidance of the concession is the statement that all the actions of both parties during all their married life would be competent evidence "to enlighten the court as to the condition of affairs between them." It is further said that evidence was introduced in the first trial which, if false, was a fraud upon the court; that its tendency was to prove plaintiff to be an immoral character; and that this would cause her great mental suffering, which would continue "until this was disproved." Followed to its logical end, this claim means that if, on the first trial, the defendant had falsely

sworn that plaintiff was guilty of a specified immorality, and the court had thereupon found against the plaintiff, or if he had falsely denied a specific charge to which the plaintiff addressed testimony, this leaves her at liberty in this trial to introduce the false accusation of the husband and the true accusations made by the wife in the first suit—first, for the purpose of showing that a fraud was committed upon the court in the first trial, consisting of said false swearing, and, second, to enlighten it “as to the condition of affairs between them.” In the last analysis, this is a claim that, if the prevailing party testify falsely on any matters settled by decree, the defeated party is at liberty to sue again, and to proceed as though the decree had not settled said matters. We cannot, of course, so hold, and this appeal must be determined upon the state of the evidence in support of the allegations in the petition which charge misconduct subsequent to the time at which said first decree was entered.

No condonement is pleaded, that the defense is not in the case, and we should not confuse estoppel by adjudication with condonement. To be sure, a repetition of offense will avoid condonement and may sustain a decree. But that does not in the least meet the point that, where one makes specific charges and puts in testimony in their support as the basis for seeking a decree of divorce, and is defeated, he may not obtain a divorce by suing over and asserting and proving the same charges. *Lewis v. Lewis*, 75 Iowa 200, is not to the contrary, because there was a voluntary dismissal because of an agreement on part of defendant to abstain from the drunkenness for which divorce was sought; and all that is held is that, on repeating this offense, its condonation was not available. On the other hand, that one who seeks divorce because beaten on a stated day, is denied a decree, will not bar her from asserting a



beating later than the entry of such decree. In other words, while it will not help her to re-prove what the decree against her held did not entitle her to a divorce, this will not relieve us from determining whether plaintiff has proven that, since her return to him, defendant abused her, swore at her, cursed her, called her indecent names, accused her of unchastity and of having sexual intercourse with other men, beat and bruised her person until her life was in danger, and she was again compelled to leave his home for fear of her life, and that she can no longer live with him as his wife, without danger to health and life.

II. While in strictness the petition is

2. DIVORCE:  
grounds:  
cruelty: pro-  
fane and abu-  
sive language.

not grounded upon the fact that defendant was profane and addressed plaintiff abusively, and while proof that he was profane and so addressed her will not of itself justify decree for plaintiff (*Peabody v. Peabody*, [Mich.] 149 N. W. 975), evidence on these points has materiality. Plaintiff says that, when she asked him to harness a team, he would do it, but would say, "Pretty soon the boys will be gone and then, God damn you, you will not even get a horse to go anywhere;" that one who he thought was going to testify for her, he called all the names "one could think of," and said, "God damn you, you can have him if you want him"—no intimation of unchastity being made. She testifies that he said, "God damn, if I knew that, I never would have took you back," and "All right, by God, you are not the only woman;" but admits that this was said at a time when she advised the husband that she had been informed by her lawyer that she was under no obligation to live with him as his wife; that she would not do so; and that doing some of the housework was all the duty she owed; and probably after she had told him she no longer loved him. Their son Lee testifies that, while he has heard his father swear, it was not at his mother.

## 2-a

3. DIVORCE: including that of Gray and Mrs. Bishop,  
grounds: witnesses for plaintiff, she was rather easy  
cruelty: abusive language: to anger, and when angered, addressed the  
evidence: sufficiency. worst imaginable profanities and epithets  
to her husband. Her own testimony is a confirmation. It  
had been told over and again that "son of a bitch" was  
one of her frequent remarks. Knowing this, she testified  
as follows:

"I do not remember that I swore at the children. Q.  
Did you call him a son of a bitch? A. Not that I know  
of. Q. Did you ever swear at the boy? A. Not that I  
remember of. Q. You never called Fred any names, did  
you? A. Not that I remember of."

In cases where it was sworn that she used vile profanity and also personal violence, she responds by a denial of the violence only, which at times is no more than that she does not remember the charged violence.

## 2-b

She testifies that, after she returned, he was guilty of the rather vague offense of "throwing it up" to her; that "he kept calling up men to her;" but that she does not know whether he meant she was intimate with them or not; that he said he knew she was meeting men in Omaha right along; that he knew Webb had been intimate with her in Hot Springs; that she was getting fleshy since she was at Hot Springs, and he thought there was something wrong and that it belonged to Webb—accused her of being in the family way "with some other man besides himself." This the defendant fully and explicitly denies. She says that one Sunday morning the youngest boy was fixing a cart and was getting ready to take a ride, and she said, jokingly, "Aren't you going to take me a ride?" that the boy replied.

"No, by God, call Cal Webb to take you for a ride;" that his father was there in the house, and she said to the father that she was going to whip the boy for that, and the defendant answered, "By God, you will not." This is also denied. The boy testifies that he did taunt her about Webb; that he doesn't know how he happened to do it; and that he has heard her taunting his father about her flirtation with Webb. We find no denial of this taunt.

2-c

Plaintiff says that, at one time when they were talking, she said something and he got mad, and, in the presence of the son, Lee, chased her all around the house, and knocked her down and got on her with his knees; that she became so sore she could hardly turn over in bed that night. This boy says that, at the time in question, the father did not offer to hurt her. Defendant says he never struck her in his life. She claims she was in said condition the next day, and on that day visited the Sorensens. The Sorensens were witnesses, and no attempt was made to corroborate this claim through them.

III. The main incident relied on is what occurred on the night on which she left. It must suffice that the most essential only be here detailed. Her account is that, on her return early in the evening of that night, her husband insisted she had been away "to see about this law suit," and she denied it, and said she had done nothing crooked; that he responded, "Yes, by God, what did you do at Hot Springs?" which, it seems, implied an accusation of unchastity. She replied she thought he was through with that, but he repeated the offensive remark. At this point, her testimony becomes rather self-contradictory. First, she says that, on the repetition, she grabbed a dish and "let him have it;" that thereupon he threw up his arm, and the dish went

to the floor; that she don't think he was struck, and, if a piece of the dish cut through the plaster, she didn't see it; and when she threw, her husband grabbed her and threw her on the floor; that, in so doing, he struck her arm against a door, and after she was down, he got one knee on her chest and held her neck down. Yet she says, also, that she was naturally provoked, and did not throw the dish in good humor; that she does not remember whether she "grabbed anything off the table;" and that she didn't have time to throw anything before her husband made said assault—forgetting the other statement that the assault came after the throw.

Gray, her witness, gives this account: On her arrival, the husband was in good humor; nothing was said about her relations with other men. There was some inquiry as to where she had been, and she spoke up and said to defendant that his father and mother were crooks; that the whole bunch was; to which he answered, "If anybody is a crook, you are as much a one as I am," and she replied, "The records at the courthouse show you were trying to hire a man and woman at Hot Springs to swear against me." He said he didn't, and she answered, "You say that again and I will fire a dish at you;" that the husband answered, "That is what I said;" and that he had not been trying to get evidence against her. She retorted he had, and if he said he hadn't, she would throw a dish at him; that he repeated he hadn't, and she "slammed" or "fired" the dish at defendant—a heavy, big porcelain dish filled with potatoes, and about ten inches across the top. She acted pretty mad at the time. When she threw it, defendant was sitting on the corner of the table, which was not very wide, and she was standing by another corner of the table: that defendant threw up his elbow; that, after striking the elbow, the dish struck the wall, which had two coats of plaster, a hard finish and an under one, and broke into

pieces no bigger than an inch square, on going "plumb" through the hard finish into the soft plaster.

Defendant says it made a cut in the wall about four inches long and probably a half an inch deep, and he would have been hit square in the face had he not diverted it by his throwing out his elbow. Gray says that she reached to grab another dish, a small kind of a cut glass sauce dish, and said, "You just hit me," and defendant answered, "That is what I ought to do;" that then defendant jumped and grabbed her by the arm and got her on the floor, and while there, she gave defendant a good deal the worst of it; that she mashed him in the mouth or in the teeth while he was laying her down, and made his teeth bleed "all along," and defendant let loose of her and she got away; that he did not have his knees on her body, and did not choke her; and witness was in position where he must have seen it, had this been done. This is, in substance, the version of defendant. Gray adds that, when she got up, she said, "You son of a bitch," and walked into the other room, and ran to the phone and began to call for the sheriff, saying Fred had gone wild and was crazy and everything else, and that she would not live with him any more.

A witness says plaintiff didn't cry a bit, except that, when she called the sheriff, "she was trying to make out a cry." Plaintiff testifies that, when she got up from the floor, she called the sheriff on the phone, and he advised her to leave, and she did so with one Ross, whom the sheriff sent. The sheriff says plaintiff called him up, and he judged by her voice over the phone that she was then crying; that she said they were having trouble down there, and wanted him to come for her, and he sent Ross, a liveryman, to get her. Ross says, when asked whether Mrs. Chapman was crying when he arrived, "Well, sir, you have got me; I didn't pay much attention to it."

It has been pointed out in another place what the evidence is on her being profane, abusive, high-tempered, quarrelsome, and given to physical violence. In addition, there should be noted what is more fully gone into in another connection; i. e., that the evidence shows she came back without love, without forgiving, planning for a second divorce suit, disclosing this state of mind to the husband—among other things telling him that her attorney advised her not to cohabit, and that she would not, and that she did not.

### 3-a

If plaintiff be not adequately corroborated, all she testifies to may not be considered at all. If she be adequately corroborated, it accomplishes no more than that all her testimony must be considered in determining whether she has sustained the allegations of her petition by a preponderance of the evidence. We shall have occasion to consider to what extent she is corroborated, but for present purposes will assume that she has been. This brings on an application of the law to what she says and to the counter evidence.

In *Olson v. Olson*, 130 Iowa 353, the use of indecent, violent, threatening language and of threats "to fix" the wife are held insufficient. In *Shors v. Shors*, 133 Iowa 22, while a decree of separate maintenance is not sustainable upon personal violence and threats alone, it is clear there were long continued, wholesale charges of adultery, which included a denial of the fatherhood of the daughter; and there was proof that the husband abused the child because of this. In *Ellithorpe v. Ellithorpe*, (Iowa) 100 N. W. 328 (not officially reported), there is some language which, carelessly read, gives too much weight to accusations of unchastity. What is really held is that, where the record shows the use of vulgar and profane language, threats to induce other women to enter into concubinage with the

husband, and insistence that the wife consent, frequent application of opprobrious epithets implying want of chastity, a general fault-finding disposition, and that the wife broke down with nervous prostration, repeating the charge of immorality in evidence on the hearing is a breach of the condition underlying an alleged condonement.

In *Peabody v. Peabody*, (Mich.) 149 N. W. 975, it was a factor against divorce that, when the husband tried to induce plaintiff to return, her mother informed him he could not come in, and ordered and pushed him off the premises; and that the violence of the husband was done when he was under stress. In *Knight v. Knight*, 31 Iowa 451, at 454, there had been an estrangement and plaintiff took counsel with reference to the procuring of a divorce, but this difficulty was adjusted, and they went to living together again, plaintiff still refusing, however, to occupy a bed with the defendant. There is evidence of greater violence on part of the husband than appears here, and it, too, is denied. We say the record shows further that plaintiff seemed to possess a temper readily aroused, a will which never yields, and a caustic wit ever furnishing a keen retort which she made no effort to restrain, and defendant's make-up appeared not to be best adapted to these peculiarities of the plaintiff. We hold one reason why plaintiff is not entitled to divorce is that her own conduct brought upon her all the ill treatment of which she complains, and that there is no doubt that, if she had justly appreciated the responsibilities and duties of her position, had properly regarded the failings of her husband and restrained her pride and guarded her temper, she might have remained an honored and cherished wife. As in the *Olson* case, 130 Iowa 353, 355, we say that there was much to palliate what the husband did and to excuse him, and that the cure is not the divorce court, but improvement on the part of both. In

*Owen v. Owen*, 90 Iowa 365, we held that, where a woman of 27 married a man of the same age, one is inconsiderate and provoking, and the other irritable, and some violence provoked by her conduct is used, and once, in self-defense, he pushed her down, bruising her cheek, neither is entitled to a divorce.

*Layton v. Layton*, 166 Iowa 74, is in some aspects quite like the instant case. There, there was an act of physical violence committed while defendant was punishing the oldest girl, and the wife interfered. There is some testimony tending to show that there was a physical encounter, and that, during the melee, defendant threw plaintiff to the ground; but we point out that there is no evidence the husband used any more force than was necessary to cause her to desist from taking the cans from his buggy, and that, while her arms were somewhat bruised and blackened in the contest, her life was at no time seriously in danger. In *Blair v. Blair*, 106 Iowa 289, there were frequent quarrels, for which both were at fault. The wife, though kind at times, was of a hasty and violent temper, which caused her to use profane and abusive language towards her husband, and threaten and attempt bodily injury on him. At various times she took an ax and threatened to break his head. She threw a pan of lye water in his face, injuring his eyes, threatened to let his brains out with a smoothing iron, threw the lid of a butter dish at him, jumped for the butcher knife and threatened to cut his liver out, used abusive language, threatened to open his head with a chair, struck him with a buggy whip. He frequently came home under the influence of liquor, but only twice drunk. He did not use vulgar or profane language. When he had been drinking, he was arrogant and boastful of his wealth, and was at times coarse in his language, and provoking in his manner towards his wife. He spoke in coarse terms of



her physical condition to his brother-in-law, secured a statement of a boy in his employ that she had hugged and kissed him, and endeavored to induce this boy to be caught in an act of illicit intercourse with her. He made public on the trial her immoral conduct before marriage, which he had forgiven. On occasions, he insinuated that she was too free with other men, and he used threats and violent language, but never attempted bodily harm, and the wife had no reason to fear personal violence. She was a strong and hearty woman, in as good health as when she married, and we reversed a decree granting her a divorce on account of the husband's treatment of her. In *Sylvester v. Sylvester*, 109 Iowa 401, decree for plaintiff is reversed. The acts of cruelty testified to by the wife are, on the whole, more aggravated than the ones claimed here, and the testimony of danger to health much more strong. There are similarities, in that assaults are admitted and counter assaults are proven. It would extend this opinion unduly to set out the details of the *Sylvester* record, but what we have said sufficiently notes it in its bearings upon this case. It must suffice to say that, if a divorce was not due in the *Sylvester* case, it is too clear for argument that this is so here.

## 3-b

Plaintiff testifies that, when she returned to her husband, she "was fairly well in health," though she was not in very good condition "to stand things he would throw up and say." She excludes "watching and spying" by saying she does not think her husband was watching her or spying on her after she returned, and this was when she lived with him before her first divorce suit, and that she paid no attention to his watching her. She adds he had her awfully nervous and stirred up, but "sure" she talked back to him, though he had it over her in a war of words; that

she is in a very nervous condition, and thinks "in a worse condition when living with him." She concludes that his accusations "and this trouble" didn't have a very good effect on her health, that at times her health was broken, and "I don't think I could live with him without endangering my life. I was positively afraid of him."

In *Olson v. Olson*, 130 Iowa 353, there was evidence of the use of indecent, violent and threatening language, and of threats to fix the wife. We hold that, under all the circumstances, these did not rise to sufficient dignity to be a menace to plaintiff's life or health, and that this is so though there be testimony that at one time defendant called her a damned liar. It is pointed out in *Knight v. Knight*, 31 Iowa 451, at 457, that plaintiff does not testify the blows were inflicted with force, or that they occasioned any personal injury, and it is quite probable they were attended with no other consequences than wounded feelings; and that, where what is complained of is brought on by the indomitable will of the wife and her ever readiness to resent the slightest approachment upon the domain of her rights, there is no reason to apprehend physical danger in further continuance of cohabitation if the wife will abandon this course on her part. In *Wells v. Wells*, 116 Iowa 59, at 60, both petitions were dismissed. We find that plaintiff's conduct towards his wife was by no means such as it should have been; that he did unquestionably at times mistreat her, but that there is substantially no evidence of permanent impairment of health; and that none of these cases of physical violence complained of were calculated to endanger life.

*Leonard v. Leonard*, 174 Iowa 734, is not available here, because it presents a case of such unjustified assaults by a large, powerful man upon a small and seriously ill woman, and such other mistreatment as that, in the very nature of things, it may not be doubted that continuing to submit to it would make it unsafe to the life and health of the woman.

The evidence fails to show "such inhuman treatment as to endanger the life" of the plaintiff.

IV. We have indicated that, if every  
4. WITNESSES :  
credibility : material thing testified to by plaintiff had  
vouching for corroborator, that still the weight of the  
credibility of witness. evidence is against the petition rather than  
a preponderance sustaining it. But is there such corroboration? It may be admitted that what occurred at one time when plaintiff was angered because a young dog had torn slippers she had left on the porch, is some evidence that defendant did swear at plaintiff, and call her a vile name. What occurred is disputed, but we will assume it has said tendency. But it is clear that all that effects is to shore up the claim that he was guilty of like conduct on the other occasions upon which he is charged with the same. Now, though that be so, positive testimony by disinterested witnesses, and of a witness called by plaintiff, certainly as much tends to show that on said occasions he did not indulge in such conduct. In other words, evidence showing a disposition to do a certain thing cannot stand against positive evidence that it was not done. The method by which appellee seeks to break the force of this situation is not a permissible one. First, she charges that defendant has tried to, probably has, alienated the affection of the boy Lee. We find no evidence to sustain this claim, unless it be that the testimony given by the boy is naturally not satisfactory to appellee. Of a witness called by the plaintiff, her counsel tells us that, if this court "could have seen this young man on the stand and heard his testimony. it would believe, as did the lower court, that his testimony was absolutely unworthy of belief," and further, "the evidence of this witness certainly needs no contradiction to prove its falsity." Of the same witness, and one called by defendant, we are told that they "were schooled to give

their testimony, and its very nature and the kind of testimony it was, and the manner in which it was given, negatived its truth. It was false and inspired alone by the defendant." Also, that, if defendant was capable of forgery, it would be a small thing for him to suborn witnesses, "and he did this in both trials." We have to say that, self-evidently, it cannot avail the plaintiff to urge that her own witness is unworthy of belief, and was suborned to and did perjure himself. It should be added there is no evidence that anyone was suborned, and all the testimony touching this is that of the witness whom plaintiff called, and who says nothing except that defendant never asked him to tell anything but the truth.

5. DIVORCE: evidence: corroboration: rule to determine.

We are not unmindful there is a line of cases which, rightly seeking to escape the requiring of literal corroboration on every charge made and incident disclosed, attempt to hold that corroborating one act may be of such nature as to make it likely that other acts charged and not corroborated have been committed, and that, so, corroborating one corroborates all. We are in no doubt that, if a murderous and unjustified and unprovoked assault were fully established, it would tend to corroborate the claim that there were other assaults of like nature, but, manifestly, we should not go so far as to say that corroborating *anything* testified to will, of itself, furnish corroboration as to all. We think that this is not the law. What is the law is made clear by a fair consideration of the authorities as a whole. There need not be express corroboration of every item of evidence introduced to establish the fact contended for. It is sufficient if it tends in a general way in that direction. It is not required that the corroborating evidence shall be of itself strong enough to prove that charge. It need but tend in some degree to establish the

fact sought to be proved. *Clark v. Clark*, (Minn.) 90 N. W. 390. Even if the direct corroboration as to acts entitling to divorce is slight, it may become sufficiently strong by proof of acts that are in harmony with and indicate a disposition to commit said acts otherwise insufficiently corroborated. *Tuttle v. Tuttle*, (N. D.) 131 N. W. 460.

In *Andrews v. Andrews*, (Cal.) 52 Pac. 298, the rule was laid down that, where the cruelty consists of successive acts of ill treatment, it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff. It is sufficient corroboration if a considerable number of *important* and *material* facts are so testified to by other witnesses, or there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm the statements of the plaintiff. In *Peabody v. Peabody*, (Mich.) 149 N. W. 975, stress is laid upon the fact that, while witnesses corroborate the testimony of plaintiff "in some of its phases," it is not done as to any of the more serious charges. In *Olson v. Olson*, 130 Iowa 353, the husband and wife conflicted, and we lay stress upon the fact that there was no corroboration of "his use of violent names on two occasions." While we do say, in *Leonard v. Leonard*, 174 Iowa 734, that it is not essential that the testimony of plaintiff be corroborated at every point, or that it touch every element or ingredient of the marital offense alleged, and say it was held in *Clopton v. Clopton*, (N. D.) 91 N. W. 46, that, where the whole case precludes the possibility of collusion, the corroboration need be very slight, that is addressed, and rightly so, to the facts of that case.

4-a

Now as to the claim that there were false accusations of unchastity, the record is this: George Sorenson remembers a talk he had with defendant some time after the trial of

the former suit, and thinks defendant spoke about her keeping company with men while she was at Hot Springs, but doesn't remember just what he said. Being then asked to tell the best he could as he remembered it, he said he didn't believe he could do that, but thinks defendant said she was "kind a flirting" with other men in Hot Springs; that he did not accuse her of having intercourse with any of these men, though he thinks the defendant said he was told she kept company with men at Hot Springs and in Sioux City. Mrs. Sorenson says that, after she left the second time, defendant said plaintiff had been intimate with other men, but she never told plaintiff of this. Again, she says that she visited with plaintiff in town at Mrs. Bishop's, and doesn't remember whether she told plaintiff what defendant told her, but believes she did. Again, she testifies the defendant said she was with a man in Hot Springs, but she adds she did not understand him to mean she was acting the role of a prostitute or anything of that kind; that he had never said anything to her from which she understood he was trying to charge his wife with having sexual intercourse with other men; that she never heard him accuse her of being bad with Webb; that he did not charge her with being unchaste, but that she was running around with other men, and the witness didn't know what he meant by it.

## 4-b

All that remains is the testimony of Mrs. Sorenson, who says she personally has never known of any unkind treatment of plaintiff by defendant, and that, from all she could see, defendant appeared to be good to her, but who testifies also that, "in August," plaintiff showed witness her arm where she was hurt, and told her defendant had hurt her, and that there was a kind of a little mark, witness not knowing how bad the arm was hurt. Give this its utmost

weight, and it shows that, soon after plaintiff left, she had some sort of a bruise on her arm. That only corroborates what no one denies, namely: That on the night upon which plaintiff left, that occurred which might easily cause some sort of a mark on her arm. It certainly cannot overcome the great weight of evidence which shows that any injury sustained by plaintiff on that night was due to her own violence, and done upon her in self-defense.

The cases just analyzed, as well as *Knight v. Knight*, 31 Iowa 451, at 457, and *Olson's case*, 130 Iowa 353, at 354, indicate quite clearly that the statute is not yet repealed, and that corroboration, therefore, means something which leads an impartial and reasonable mind to believe that the material testimony of the plaintiff is true.

V. Aside from all this, it was error  
6. ~~DIVORCE~~:  
pleading: fail- to grant plaintiff the relief prayed by her.  
ure of proof. Plaintiff alleges:

"That during the time they lived together as husband and wife (all the time since they were married), she has conducted herself toward the defendant as a dutiful and faithful wife."

She should so allege, because, seeking affirmative relief in equity, she should do equity, and because, possibly, that unless this allegation is true, she should have no relief in equity, because she has failed in her part of that contract which the law implies. But what of the proof? True, she testifies she returned in good faith, intending to make that her home and to get along with her husband, if it were possible, and determined to do her duty as a wife. But does not her own testimony show that she neither intended nor did this? We find it difficult to believe that any impartial mind can read this record and reach the conclusion that she made, or even thought of making, such an attempt. It is forced upon us that she returned to retrieve a lost

cause, and to institute a second divorce suit which should be successful; and are constrained to conclude that, instead of proving said allegation of the petition, every act from the time she returned until she again left, colors the purpose of that return, negatives her being a dutiful and faithful wife, and demonstrates that she who is seeking the aid of equity does not by her conduct appeal to the chancellor.

The husband acted promptly in asking her to return. She desired two weeks to deliberate in, and was given that time, and took it before concluding to return. In asking her, the husband stated they had three children that ought to have a father and a mother. She answered she could not always be with the children anyway. She admits she told him repeatedly she wished she had not come back. Her entire stay was from about the end of May to the end of August. She admits that her affection for her husband waned, and the matrimonial yoke was galling as early as some eight or nine years ago, when she was sick. She confesses she did not love him at and before the time when she started her first divorce suit; that she never could love him after that first suit, and did not love him when she returned to him; and that she would not get a divorce if she "cared a cent for him." She does not deny a statement of her husband's that he asked her at one time why she returned, and she said the damn judge gave her the worst of it, and she had to come home or get nothing. Being asked whether she ever forgave her husband for the wrongs she thought he had done her before the close of the first trial, she answers:

"There was a whole lot of things I never could forget, and I don't know if he asked me to. I don't remember whether I ever forgave him or not."

The husband testifies that, when they were returning home, he said to her, "If you are going to stay, don't ever



mention this to me, and I will never say a word to you;" and that she replied, "No, I will be damned if I will do it," which fairly harmonizes with her statements on forgiving him, and is testimony which she has not chosen to deny. She made search for and found some envelopes and unsigned letters, which she says have writing done by her husband. Assume she did no wrong in searching for what would get her a divorce; but things that were used in the first trial would not get her a divorce. By way of illustration, Exhibit "J" found by her was put in on the first trial as Exhibits "B" and "C." Here is the wife, intending a good-faith reconciliation, confessing that she and her attorney went to the courthouse to make comparisons to help the effectiveness of this discovered evidence, consisting of what she was unable to get a divorce upon—confessing that she knew the effect of what she was seeking for and keeping as evidence, and that she "guesses anybody would know it." This conduct can mean nothing but her return in a spirit of bitterness, unforgivingly, and with a desire and purpose that a then contemplated second suit for divorce should be victorious. Speaking to these very letters, she testifies that, when she returned, she had these letters still in mind, and that the trial judge who defeated her had said that she failed to get a divorce because she had not shown these letters to be forgeries. She says, despite all this, that she did not expect more litigation. But, as seen, she not only admits the search and the comparisons at the courthouse, but testifies that, on the very night of her return, she thought that, if her husband "kept acting up like that, there might be some time." She carried this spirit into other things. She did not want defendant's father on the place because he had been a witness against her in the unsuccessful suit. She called his mother and his people "crooks" for the same reason, and opposed the children's

seeing the near relatives of the father. The Arensons were to be tabooed because they had testified against her.

Still other things throw light on whether she came back to be a loyal and helpful wife, or as a planner who hoped to wage a more successful war from the home of the enemy. The husband testifies that plaintiff kept going to town, and sometimes it would be eleven at night before she got home. This is not denied. He continues that, on one of these occasions, when she returned, she told him that, if he didn't settle with her, she was going to break him, because she had been up and talked with her attorney; that he asked her why she didn't take the \$3,000 he offered, to which she replied her attorney told her not to take it; that she would get more money. The denial is that she never told him that she and her attorney calculated to strip him of his property—which does not quite meet what it is attempted to meet with it, and something, too, which loses force by the fact that she was more or less constantly in touch with her attorney after she had returned, though it would seem that, if she were back in good faith, that relationship would, at least for a reasonable time, have been suspended.

Nor is this the most persuasive impeachment of her good faith and refutation of her claim that she was a faithful and dutiful wife. The youngest boy says he heard her say to the husband that her attorney told her she didn't have to work. The husband testifies she informed him her lawyer told her she didn't have to do his washing, and she wouldn't do it; so he did his own washing on Sunday, washing the dirty clothes that day and sending the lightest ones to the laundry. She testifies she told him she would wash for the family, but not for him, and that her attorney had advised her that she was under no obligation to work for him or bake the bread. She forgets she has done this, and in rebuttal testifies the attorney did not tell her

she was not obliged to do her husband's washing, and that she never told her husband she had been so advised, and that she did her duties as housewife again, "like I always did." The son says she washed and cooked for him, and the father cooked him a few meals sometimes.

Nor is this all, or the clearest. She says that, because her husband had disgraced her in the first trial, by charging her with being intimate with other men, she would not live and cohabit with him as his wife. She states that her attorney advised her to return and live with him, and that maybe the old affection would come back, but that the law did not oblige her to live with the husband as his wife unless she felt like it; that she herself didn't think she was under obligation to do this; that she intended doing the work, but was not going to be a wife to defendant; that she told him, a day or so after her return, that she did not propose to cohabit with him; and that her attorney said she did not have to submit to him, and was under no obligation to again sustain the intimate relations of a wife. She told him, shortly before she left him, that she did not love him. She says frankly she considered the doing of the work she did do as fulfilling all her obligations; that this is all she did to revive the affections of the husband; and that she thought that this was all that was necessary. In the face of all this, she testifies that she did not tell Mrs. Sorenson she (plaintiff) did not intend to live with defendant, but merely said she did not intend to do so if he kept on acting the way he did. And yet it was confessedly her intention, upon advice of counsel, not to live with him no matter how he acted, because the intent was fully formed on the very instant of her return. And she goes so far as to swear she never told her husband that her attorney had advised her she did not have to live with the husband as his wife. And she makes an attempt to have it appear

that this advice was given upon a second consultation, or that, at least, it was then confirmed, and was due to her bringing one of the papers she had found to her lawyer—in doing which she overlooks that the advice as to her duty upon her return was given to and followed by her before she submitted these papers to her counselor.

It is our judgment that the decree below is not sustained by the evidence, and that it must for that reason be—*Reversed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

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CITY NATIONAL BANK OF AUBURN, INDIANA, Appellant, v.  
M. R. MASON et al., Appellees.

**APPEAL AND ERROR:** Reservation of Grounds—Failure to Object  
1 to Instructions. Instructions must be objected to in order to secure review on appeal.

**BILLS AND NOTES:** Consideration—Want of Consideration—Evi-  
2 dence. A renewal note, even though extending the time of payment, is without consideration if the original note was without consideration. It follows that a defense that was pleadable to the original note is pleadable against the renewal.

**TRIAL:** Instructions—Applicability to Evidence. Issues wholly  
3 without support in the evidence must not be submitted. So held as to the issue of want of consideration and falsity of representations concerning a promissory note.

**BILLS AND NOTES:** Holder in Due Course—Defective Indorsement  
4 —Effect. The plea of holdership in due course is materially discredited when allowed to rest on an indorsement which is open to the reasonable possibility of having been made without authority. So held where the original payee was a corporation, and the indorsement was in the corporation name, "per L. A. Miller," there being no showing as to the official position, if any, occupied by "Miller," or his authority.

*Appeal from Hardin District Court.*—R. M. WRIGHT, Judge.

NOVEMBER 21, 1917.

ACTION on a promissory note resulted in judgment for the defendants. The plaintiff appeals.—*Reversed.*

Geo. W. Ward, for appellant.

Williams & Huff, for appellees.

LADD, J.—On August 12, 1913, defendants executed their promissory note to the De Soto Motor Car Co. for \$522.16, payable on or before January 1, 1914. The note was transferred to plaintiff on or about October 1, 1913, being indorsed "De Soto Motor Car Co., per L. A. Miller." It was given in renewal of one of the two notes of \$500 each, executed in August, 1912, the other renewal having been paid. Defendants pleaded: (1) That the original notes were without consideration; and (2) that one Field obtained said notes through the perpetration of fraud on the defendants; and these issues were submitted to the jury.

I. The instructions were not objected to, and therefore criticisms thereof may not be considered. *State v. Nott*, 168 Iowa 617; *State v. Piernot*, 167 Iowa 353; *State v. Cooper*, 169 Iowa 571; *Thomas v. Illinois Cent. R. Co.*, 169 Iowa 337; *Parkhill v. Bekin's Van & Storage Co.*, 169 Iowa 455, 468; *State v. Fisher*, 172 Iowa 462; *State v. Stanton*, 172 Iowa 477; *American Fruit Prod. Co. v. Davenport V. & P. Works*, 172 Iowa 683; *Joyner v. Interurban R. Co.*, 172 Iowa 727; *Johnson v. Bernstein*, 178 Iowa 1052; *Pengilly v. Southern Land Co.*, (Iowa) 157 N. W. 146 (not officially reported); *Gilman v. McDaniels*, 177 Iowa 76; *Hanson v. City of Anamosa*, 177 Iowa 101; *Sawyer v. Hawthorne*, 178 Iowa 407; *Berry v. Hardin*, 178 Iowa 165; *Rule v. Carey*, 178 Iowa 184; *Cohen v. Hayden*, 180 Iowa

1. APPEAL AND  
ERROR: reservation of  
grounds:  
failure to object to instructions.

232; *Chumbley v. Courtney*, 181 Iowa 482.

II. One of the defendants, Mason, was asked to "tell the jury what the conversation was that you had with L. M. Field at the time and place." An objection as immaterial and incompetent was overruled.

The point made in the brief is that evidence that the note was payable only upon conditions not expressed in the note was not admissible.

It is enough to say that no evidence of that kind was sought to be elicited. The evidence was tendered in order to prove want of consideration of the original notes, and that these were obtained by misrepresentations on the part of Field. The law is well settled that, if a promissory note is without consideration, a renewal thereof, even though extending the time of payment, also is without consideration. *Parson v. Nields*, 137 Pa. St. 385 (21 Am. St. 888); *Seager v. Drayton*, 217 Mass. 571 (105 N. E. 461); *Wheelock v. Berkley*, 138 Ill. 153 (27 N. E. 942); 8 C. J. 218, and cases cited in note. The note sued on, then, stands in place and stead of the original note and is subject to like defenses, and the evidence bearing on the want of consideration of the original notes tending to establish fraud in their inception was admissible.

III. The court instructed the jury that the burden of proof was upon the defendants to show that plaintiff took the note with notice of the want of consideration, and it is insisted that the record was without evidence bearing thereon. We have been unable to discover any such evidence in the record, and because of its absence are of the opinion that this issue ought not to have been submitted to the jury.

IV. The defendants testified, in substance, that Field

2. **BILLS AND  
NOTES: CON-  
sideration:  
want of con-  
sideration:  
evidence.**

3. **TRIAL: in-  
structions: ap-  
plicability to  
evidence.**

approached them with the proposition that they purchase a share of stock in a company to be organized, known as the De Soto Motor Car Co., a sales and manufacturing company, saying that he had disposed of 9 shares of the par value of \$1,000 each, and the one offered was the last; that he would guarantee a dividend of 8 per cent annually; that he would retain their notes given for the stock until the company was organized and the stock certificate issued, and send it to them; that he would not sell or dispose of the note in the meantime; that the factory was to be at Auburn, Indiana. In reliance on what he said, the two notes of \$500 each were given.

Neither the share of stock nor any other thing of value was ever received by either defendant, nor has either demanded the share of stock. The only evidence of the falsity of these representations is that of Mason, who swore to being in Auburn, Indiana, in October, 1914, and that "the De Soto Motor Car Company never built no factory and had no manufacturing plant that I know of. \* \* \* I do not know whether or not the De Soto Motor Car Company had any factory at any time;" and that it had no office or place of business that he could learn of; and he based this testimony on inquiries made of men he met on the streets, including Field. With reference thereto, the court instructed the jury that the representation of Field that he would deliver the share of stock, that he would guarantee a dividend, and that he would hold the note, would not alone constitute fraud, though the promises may have been false; but that, if the "said Field made the foregoing representations, coupled with the representation that he had disposed of nine shares of stock, and had had experience in the manufacturing of automobiles, and such statements or a portion thereof were false, and he knew the same, or a part of the same, were false, and the de-

fendants relied upon the truth of such statements and made said note because of such reliance, then the note had its inception in fraud, and the plaintiff cannot recover in this case unless it is shown by a preponderance of the evidence that it bought said note before maturity and for valuable consideration, and without knowledge of said fraudulent acts of said Field."

Appellant contends, and rightly so, that no evidence was adduced tending to show that Field had not disposed of the nine shares of stock, as represented by him, or that he did not have experience in the manufacturing of automobiles. As there was no evidence bearing on these issues, the court erred in submitting them to the jury.

V. The burden of proof to show that the note was acquired without notice of fraud in its inception was on the plaintiff, and it insists that this was so fully met that a verdict should have been directed for plaintiff. We do not regard the evidence of that conclusive character, especially in view of the indorsement of the note by one not shown to have been an officer of the payee nor in fact nor by virtue of his employment authorized to transfer the note by indorsement, and other matters developed in the testimony of plaintiff's cashier. See *Arnd v. Aylesworth*, 145 Iowa 185; *McNight v. Parsons*, 136 Iowa 390; *Keegan v. Rock*, 128 Iowa 39; *In re Estate of Philpott* 169 Iowa 555.—*Reversed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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C. J. HALL, Appellee, v. C. H. POLK et al., Appellants.

**DRAINS:** Establishment—Appeal—Review of Fact Findings.  
1 Courts will overrule the board of supervisors in its findings on



questions of *fact* involved in orders establishing drainage improvements only when the objectors establish a fairly clear case of error. Evidence reviewed, and held insufficient to overthrow the findings of the board: (a) That the expense would not exceed the benefits; (b) that the area of the district was sufficient to justify the expenditure; and (c) that all benefited lands were included.

**DRAINS: Establishment—Appeal—Reviewable Matters.** Findings 2 of *fact* involved in the establishment of public drainage improvements are appealable: i. e., whether the proposed improvement is adequate, or whether the costs will be out of all reasonable proportion to the benefits.

**DRAINS: Establishment—Benefits—Direct and Immediate Benefits.** 3 In determining the question of benefits, preliminary to the establishment of a drainage improvement, the test is not whether market values will be *immediately* affected, but whether, within a *reasonable time*, the proposed improvement will adequately increase the actual values of the lands within the proposed district.

**DRAINS: Establishment—Preliminary Survey—Sufficiency.** The 4 preliminary survey of a drainage project, having for its object the straightening of a natural watercourse, is not insufficient because it does not specify in detail the manner in which the waters of lateral streams will be taken care of. Such details properly belong in the permanent survey.

**WITNESSES: Competency—Drainage—Adequacy of Proposed Plan.** 5 A nonexpert witness on scientific drainage, even though residing in the immediate locality, and having knowledge of local conditions, is not competent to express an opinion as to the *adequacy* of a proposed drainage scheme—that is, whether it would so carry off the waters cast upon it by ordinary rains, seepage, lateral streams, lateral drainage, and tiling, as to avoid overflow.

**WITNESSES: Competency—Drainage—Physical Conditions, Past 6 and Present.** Nonexperts on drainage matters are competent to detail the present physical *fact* conditions surrounding a proposed public drainage improvement, and the past *fact* conditions, as observed by them, as bearing on the adequacy of the proposed improvement and on the preliminary issue of benefits or injury to the lands within the proposed district.

**DRAINS: Establishment—Appeal—Inadequate and Speculative**  
**7 Scheme.** An order establishing a public drainage improvement will be set aside when it fairly appears that the scheme is inadequate, and would be experimental, with the probabilities strongly in favor of inefficiency. So held where the ditch proposed was purposely made smaller than necessary, in order to save costs, it being contemplated that nature would in time enlarge it to a size sufficient to properly care for all waters; but whether it would so enlarge within a reasonable time was left in doubt and speculation, with probability strongly in favor of inefficiency.

*Appeal from Fremont District Court.*—O. D. WHEELER,  
 Judge.

NOVEMBER 21, 1917.

APPEAL from a decree setting aside the findings and order of the board of supervisors of Fremont County, establishing a drainage district.—*Modified and affirmed.*

*T. S. Stevens and William Eaton*, for appellants.

*Tinley, Mitchell & Thornell*, for appellee.

LADD, J.—On July 8, 1913, certain owners of land which would be affected thereby petitioned the board of supervisors of Fremont County to establish a drainage district and order the excavation of a ditch to drain the same, extending from the county line on or near the Northeast Quarter of Section 13, Township 69 North, Range 40 West of the 5th P. M., southwesterly, in the general course, as nearly as practicable, of the East Nishnabotna River, to the northeasterly end of the Rankin-Cowden ditch, or extension thereof, in Section 21, Township 71 North, Range 41 West. Seth Dean was designated as engineer, to survey and report on the feasibility of the enterprise and such other matters as the statute requires, and he so did, January 26, 1914, accompanying such report with

1. DRAINS: establishment: appeal: review of fact findings.

a map or plat. Therein he described the river as rising in Carroll County, about 100 miles northeast of where it flows through the eastern line of Fremont County; that its course is so sinuous as to be 200 miles long in that distance; that its average fall in a direct line is 4.7 feet per mile, and is considerably more toward the source than near the outlet; that it drains 1,070 square miles, the watershed being from 6 to 30 miles wide; that it has many tributaries from 2 to 40 miles in length, which bring the water into it in times of heavy rainfall, "in quantity forming a flood wave, in the valley near Atlantic, that overtops the banks and submerges the adjoining bottom lands and flows down the valley at the rate of about one-fourth mile per hour. The width of land submerged in Fremont County by these floods varies from one eighth of a mile to one and a half miles, and the depth of water runs from nothing to five feet. The duration of the flood wave in Fremont County is from a few hours to several days, and the damage caused to the landowner depends largely on the season of the year that the flood occurs; for, should one appear in the early spring from rain or melting snow, but little real damage may be done, but should one appear during the crop period, it usually results in a loss of the use of the lands submerged, for the season."

The report recommends that a ditch 11.59 miles long be excavated to carry off the water, instead of the river, whose course is 20.50 miles, thereby shortening the distance 46 per cent.: the ditch to be 12 feet deep, 20 feet wide at the bottom, 44 feet at the top, and to have a fall of 2.51 feet per mile, instead of the fall of the river, which is 1.46 feet per mile. The ditch was to follow generally the direction of the river, and considerable of it was to be located in the bed of that stream; and it is said that the relocation of but one bridge will be necessary, and that it

permits of the development of drainage systems on either side, whenever the landowner shall conclude to establish same. He estimated the earth to be excavated at 870,000 cubic yards, and says of the channel that it—

“is an economical one to cut with a floating dredge, the only machine now on the market with which I am acquainted that can successfully do this work, and experience has proven that, by adopting a size of channel suited to machines built in standard sizes for such work, much better bids can be secured for construction than by designing a strictly theoretical size of ditch, requiring specially designed machinery to do the work. I do not claim nor expect that the channel above recommended will carry all the water that comes down the valley in time of heavy flood flow: such a channel would require much greater capacity; but the one above recommended will care for probably nine tenths of the flood flows, and nature will enlarge the channel in proportion to the volume of water flowing therein from year to year until it will be ample for all needs, it being more economical in this case to let the river do part of the work than to pay a contractor. I estimate the cost of reclamation as follows, viz.:

“Estimated cost.

“For right of way, 210 acres @ \$75 .....	\$15,750
“Excavating 870,000 cubic yards @ 7½c .....	61,363
“Inlets and local drainage .....	3,000
“Administration, engineering expenses, legal fees, court costs and incidentals .....	8,000
“Total .....	\$88,113

“The total area of land within the proposed drainage district is about 9,205 acres. From this is to be deducted the right of way for the ditch, and the area in county roads, leaving the net taxable area about 8,954 acres, to which can

be added 4 miles of railroad track and 10 miles of county road, on which a special tax rate per mile is to be assessed, making the flat rate tax per acre about \$9.72, with a maximum rate about \$14.58, and a minimum rate of about \$1 per acre,—sums that can be profitably invested in the enterprise by the landowners, and will bring a sure return in the increased value of the land reclaimed and the increased production of crops.”

Then follows the recommendation that the district be established and the ditch excavated. Thereupon, the board of supervisors directed notice to be given, and in due time claims for damages were filed, and appellees and others filed objections to the establishment of the district and improvement as proposed. On hearing, the board of supervisors adopted appropriate resolutions ordering the improvement and defining the boundaries of the district. Fifteen of the objectors appealed therefrom to the district court, where the different appeals were consolidated, and, on hearing, the orders of the board of supervisors were reversed and set aside. The defendants bring the controversy to this court for final adjudication. There were many objections, sixteen in number; but those relied upon went to the adequacy and efficiency of the improvement as proposed, and to whether the burden would not be so out of proportion to the probable benefits as to render the improvement inexpedient. The district court found:

“1. That the benefits to the land described in said drainage district, to wit, East Nishnabotna Drainage District, as reported and recommended by the engineer, Seth Dean, will not justify the expense of the construction of said proposed drainage ditch; and that the expense of the construction of said ditch in said drainage district will be far in excess of any benefits conferred.

"2. That the area of the proposed district is not sufficient to warrant the expenditure proposed.

"3. That not all the lands benefited by the improvement are included within the said drainage district.

"4. That the estimated cost of construction will not cover the expenditure necessary to provide drainage for a large portion of the lands embraced in the proposed district as established by the Board of Supervisors of Fremont County, Iowa, while acting as a drainage commission; nor will the construction of the proposed drainage ditch provide drainage for a large portion of said lands included in the proposed drainage district; nor is provision made for carrying the waters of streams flowing into the district.

"5. That the proposed drainage ditch as ordered by said board, in the drainage district above referred to, is not adequate to carry the usual and ordinary floods, and will not drain said lands in times of usual and ordinary freshets."

2. DRAINS: establishment: appeal: reviewable matters.

It will be noted that these findings, though in detail, merely upheld the objections as stated. The issues are purely of fact, and involve an examination of the record before us and the ascertainment of what deductions should be drawn therefrom. That the court may review the findings of the board of supervisors was settled in *Focht v. Fremont County*, 145 Iowa 130. It is equally well settled that the burden of proof was and is on the objectors to sustain the objections interposed, and that the court will interfere with the action of the board of supervisors reluctantly, and only on a fairly clear showing of error in its findings. *Mittman v. Farmer*, 162 Iowa 364; *Temple v. Hamilton County*, 134 Iowa 706; *Prichard v. Board of Supervisors*, 150 Iowa 565.

3. DRAINS: establishment: benefits: direct and immediate benefits.

In determining whether the lands will be benefited, and the extent of such benefits, the test is not whether the market values will be affected immediately thereby, but whether, within a reasonable time, the proposed improvement will increase the actual or intrinsic values or worth of the lands included in the district. *Chicago, R. I. & P. R. Co. v. Wright County Drainage Dist. No. 43*, 175 Iowa 417.

4. DRAINS: establishment: preliminary survey: sufficiency.

An enterprise such as here contemplated has two main purposes: (1) To facilitate the flow of the waters as they come down from the river above and as these come in from the tributary streams; and (2) to afford an adequate outlet for the drainage of the lands included in the district. Much of this land overflows, more is too wet for cultivation, and scarcely any would not be greatly benefited by adequate tile drainage. Some of the excess of water comes from the hills north and west of the proposed ditch as the rain falls, and it may be that a portion of the injury to land from this source might not be obviated by taking away the water below. Undoubtedly, soil or debris would continue to be washed from the hill surface to the lower lands; but these lower lands—and there appears to be a small area so affected—would be much benefited by the prompt removal therefrom of this and other surface water. One witness based his opinion in part on the supposition that no provision was made in the engineer's report for streams flowing into the river. It will be noted that the cost of this is estimated at \$3,000 in the report, and such details are matters to be worked out in the permanent survey. *Laurence v. Board of Supervisors*, 151 Iowa 182. This estimate was not shown to be inadequate. Nearly all the excess water comes down the river and overflows or seeps into the lands

at times of heavy rainfalls. It is mainly to carry away these waters that adequate drainage is required.

Many of the witnesses called by the objectors expressed the opinion that lands would not be benefited by the improvement; but this was on the assumption that the proposed ditch would not accomplish its purposes. None of appellees' witnesses, as a basis of opinions expressed, assumed that the ditch proposed would so carry off the water in all ordinary rainfalls as to avoid overflow and any considerable seepage therefrom and directly from the river, and also that drawn into the ditch as an outlet from the drainage systems, tile, open ditch, or both, to be constructed throughout the district. On the contrary, they appear to have first determined that the improvement would accomplish nothing in carrying away the water, and then to have testified to what necessarily must follow: that no benefit to the lands named would result. Our drainage laws, however, proceed upon the theory that scientific knowledge is essential to determine and pass upon the probable efficiency and adequacy and cost of a proposed drainage system. *Zinser v. Board of Supervisors*, 137 Iowa 680; *Hartshorn v. Wright County District Court*, 142 Iowa 72; *Shaw v. Nelson*, 150 Iowa 559; *Lyon v. Board of Supervisors*, 155 Iowa 367; *Mittman v. Farmer*, *supra*.

Without the report and plat of an engineer, found by the board of supervisors to be disinterested and competent, a drainage district may not be established nor an improvement ordered, nor can an improvement of this kind be constructed otherwise than as recommended by an engineer. In other words, the law recognizes the drainage of large bodies of land to present scientific problems which only an expert may be expected to successfully solve. So many matters bear thereon,—as the topography of the area to be



drained, of that surrounding, the amount of water coming on or through the same from the stream above or tributaries within and extending beyond the boundaries of the district, the extent of the rainfall and how distributed, other climatic conditions, to what extent an even as well as an increased fall will facilitate the passage of water first entering the ditch, and how this will influence the flow from beyond, and others,—that a person who has not made a special study of the subject is not qualified to express an opinion thereon of any considerable value. This is especially true where his viewpoint is limited to the immediate vicinity of his own locality, even though he may have had knowledge of conditions there for many years.

None of the witnesses called by the objectors, except Ballard and Bannon, were shown to have possessed any special knowledge concerning drainage. And none other than these were qualified to express an opinion

as to whether the improvement as contemplated would prove successful in carrying off the excess surface and river water: that is, the waters which interfere with the most profitable cultivation of the soil. This being so, their evidence that certain lands would not be benefited, or that certain tracts would be injured, was entitled to no consideration, save as this was indicated by the physical conditions described, or the recital of past conditions within their observation and memory. Opinions as to benefits or injury were not so limited, save in one or two instances as to the influence of water from the hills, and these related to a comparatively small area, and could not be accorded controlling importance.

From a careful examination of all this evidence, we are satisfied that the objectors failed to meet the burden of showing that the expense would exceed the benefits to result from the proposed improvement. Nor was there any evi-

dence that all the lands that would be benefited were not included. Some 40's were included which would derive but slight advantage from the excavation of the drainage canal. Possibly there are one or two tracts which would not receive any benefit. This alone would not be enough to defeat the organization of the district, or the drainage as proposed, and no claim is made that any of these should be excluded from the district in event of a reversal.

Nor is there any warrant in the record for the deduction that the area of the district is not sufficient to justify the expenditure. On the contrary, it appears that the soil throughout the district is of great fertility, and that approximately the whole area would be improved for cultivation and much of it nearly doubled in value, if the drainage should prove efficient. No evidence was adduced tending to show that lands which would be benefited were not included, nor that the estimated cost would not cover the necessary expenditure. Our conclusion is that the first four findings of the trial court are without substantial support in the record, and they should be and are set aside.

Our trouble has been with the fifth finding: that the ditch proposed is inadequate to carry off the usual and ordinary floods. The engineer in his report seems doubtful on this point, for he asserts that he neither claims nor expects the channel recommended to carry all the water when there are heavy flood flows. Greater capacity would be required. He estimates that it will carry away nine tenths of such water, and expresses the opinion that "nature will enlarge the channel from year to year" until adequate for the needs. As he suggests, it is often more economical to allow a ditch to wash out than to remove the earth by the hand of man. But nature does not always meet expectations. Such improvements always are in a measure experimental. Some chances must be taken.

7. DRAINS: establishment: appeal: inadequate and speculative scheme.

The best that can be done is to ascertain all the facts possible, and from these and deducible scientific data determine what is essential to the attainment of the results contemplated. The certainty of conclusions reached often depends almost entirely upon the accuracy of the finding of such facts and data. Here it is not proposed to do that which is thus found to be essential. Much of this is left to what is said to be the course of nature. The percentage of fall is the same throughout the entire length of the ditch, and doubtless, as claimed, the flow would be likely to be more rapid than were the bottom variable, and straight banks would avoid much of the friction of a sinuous stream. The increase in the fall would increase the velocity of the flow, and probably result in carrying off most of the water first falling in heavy rainstorms over the district (especially when properly drained into the ditch) before the bulk of the waters accumulated in the river above would come down. The probable consequence to be anticipated is that water would pass through the proposed ditch much more rapidly than by way of the river. But a cross section of the ditch would be only 384 square feet, and the velocity, 5.56 feet per second; so that, when the ditch would be full, but 2,135 cubic feet of water would pass any given point per second. The engineer estimated the average width of the river at  $87\frac{1}{2}$  feet at the top, 55 feet at the bottom, and the average depth at 12 feet, and was of the opinion that the velocity of the flow is 3.4 feet per second; and there is nothing in the record to the contrary. Its capacity, then, is 2,907 cubic feet per second, or 772 cubic feet more than would pass a given point through the ditch. Probably, owing to the uneven bottom and banks of the river, and the more rapid drainage into the ditch from tributaries and other drains, there would not be quite this difference in capacity.

It is not claimed that the ditch will carry away all the water. The engineer estimates that about nine tenths of it

will be taken care of, and that, when relatively widened, it would carry off much more than the river bed. How long the process of widening must continue in order to render the ditch of adequate capacity is not indicated by his testimony, and this uncertainty is somewhat emphasized by what he says:

"In other words, time is cheaper than money, and it is better to cut a small ditch, and let the water widen the ditch out to sufficient capacity in a few years to carry all of the flood water. You cannot tell in advance just how rapidly it will do it, because it depends on the amount of water that is coming down the channel and the frequency of the floods. The widening process goes on more rapidly during the freezing of the banks. They will freeze perhaps two feet, and then, when the frost comes out, they will slough off, and the earth is carried out by the water. That is the most rapid way that the stream widens. When a ditch attains a maximum of width, it will not widen further. It will stop when the widening of the channel is sufficient to carry the flow of water that comes down. What causes it to stop is that the flow of water in the channel being widened out in the channel so that it is thin, and the friction of the water acting on the banks, is sufficient to overcome a tendency to scour. It will eventually widen out to about the same width the old channel now is. The widening process will go on quite rapidly at first, then gradually decrease; and it will be a number of years before the ultimate size of the channel is reached. I don't look for it to get much deeper, for the reason that, as it widens, the thread of water in the bottom becomes more shallow, and it is the depth of the water flowing in the bottom of the stream that gives it a current sufficient to scour the bottom. \* \* \*

You can't figure in advance the uniformity with which a channel will be widened by the action of the water. To make the enlargement successful, it must be uniform throughout

the district. If, one fourth of the distance across this valley, the ground and soil should be hard and tenacious, and would not yield, and would remain substantially the size it has now cut, the proposed ditch would still be discharging about 2,135 second feet, if it did not enlarge any. The value of drainage to the border 40's of which I spoke a while ago, depends upon relief from flood water that comes down from the hills. If the old ditch was discharging more water at the south end than the new ditch will, then the new ditch will not facilitate the drainage of the border 40's. My plan is to drop earth on the lower side, and fill up the old river so as to force the water down the new channel and confine the water to the new channel. One or the other of these ditches is going to predominate. If the new ditch takes the water, it will be determined by the question of the discharge of the new; and if the old ditch predominates and continues to carry the water, the discharge from the old ditch would determine the efficiency of the drainage. It is more or less problematic. I cannot guarantee that all of the things will be carried out."

Bannon, an engineer called by appellees, was of opinion that the river as it is would carry off more water than the proposed ditch; that, were the water kept within the ditch, it would make a sufficient channel by erosion, but that this would be along the sides, and it probably would not deepen; that the proposed ditch would be large enough for normal conditions, but not to carry off the floods that come down during or after heavy rainfalls; that the old channel would fill about half way and remain that way, and "you would have a stream, part of it going through the new and part of it through the old channel." The proposed ditch crosses the river forty times, and with reference thereto this witness says:

"The crossing of one of these streams with the other will retard the flow of the water in a short time: one or the other will be open to take the water. They won't both flow open all the time. The new ditch will carry the water down to where they make the crossing. They are bound to interfere with each other. One ditch will stop while the other has the water, the water goes through the other one, or else they will fill in together, which is a fact, and then it is going into the one furnishing the least resistance. Water is like an electrical current: it will take the shortest route out of there. If the big ditch is larger, and offers the least resistance to that volume of water, the tendency will be to go into the old ditch. It will go that way in course of two or three floods, one or the other is going to take precedence over the other. In some places the new ditch will have a little edge, owing to the opening into the stream, and it will come down to the next place where there is the least resistance offered, and you will have the water in that ditch; in one place you will have water in the old ditch, and another place, water in the new ditch, and you will have a ditch there, part new ditch and part old ditch."

Another engineer called by appellees, Ballard, was of opinion that:

"The old channel would carry the greater volume of water. The new one would possibly carry water at flood stages, but it would be retarded at each one of the forty crossings. The velocity we have given the old river, of 5.56, would not carry the same velocity where the old river crosses the proposed ditch. It would be retarded by the friction of the cross currents, possibly 40 per cent. The bottom of the Dean ditch being no deeper than the bottom of the old river bed, one or the other of the channels would be tearing out and the other be blocked. Probably a part of that distance, the greater volume of water would predominate, and fill the old ditch for years to come. The water

comes down loaded with silt, and probably in some of these bends and fill up, but not more than 70 per cent. of the opening. \* \* \* In my judgment, if the ditch proposed by Mr. Dean is constructed of the sizes given, it would not take care of the water of the large floods that come down the river. It would obstruct a good deal of surface water from entering the river."

The evidence discloses that the soil, for about one fifth of the distance, is what is known as gumbo; that this does not readily yield to erosion; and that it probably would only fall away by sloughing off after freezing and thawing. The plan of the engineer in charge of filling the river on the lower line of the ditch would seem sufficient to keep the current within the ditch proposed, especially as the tendency of the water would be to move forward rather than turn. Indeed, the plan seems, as declared by Bannon, well worked out, except in the matter of the capacity of the proposed improvement. The river overflows from heavy rainfalls, which ordinarily are frequent during the spring and summer months; and to excavate a ditch with less capacity for passage of waters than the river bed, and rely on the action of the waters to widen it to such an extent as that it will carry off, not only what the river carries, but the overflow, would be taking a risk hardly to be approved, and never in the absence of a showing that this is likely to happen within a reasonable time, or that the risk might not be avoided by the excavation of a more adequate waterway. The record before us does not indicate within what time the proposed ditch would in all reasonable probability widen sufficiently to carry off all waters coming down the river from above, together with that from its tributaries, drainage and rainfalls within the district (excepting always extraordinary floods),—that is, accomplish the purposes of its construction; and whether this would ever happen under the cir-

cumstances shown is too much a matter of speculation and conjecture to warrant the large expenditure of money contemplated.

Had the plan called for the excavation of a drainage ditch with the carrying capacity of the river, or slightly smaller (enough to offset its irregularities and the erosion likely from increased velocity of the current), or somewhat larger, we should not have hesitated to approve it. The matter of drainage, aside from its bearing on the public health or welfare, is largely a business proposition, and should proceed only on the probabilities of success; and expenditure should not be pinched to the extent of jeopardizing the success of the enterprise. The record leaves little or no doubt that, with the ditch proposed approximately a third, or possibly even a fourth, larger, the improvement might have been made with reasonable assurance of its adequacy for the complete drainage of the district. The expense would have been considerably greater, but not as much as the benefits conferred would have justified. The evidence indicates that the soil of the district is of exceeding fertility, and that practically all of it would be much benefited, and a very large area, now not dry enough, rendered suitable for intensive cultivation. Our conclusion is that the ditch as proposed would be experimental, with the probabilities of its efficiency doubtful and speculative, and for this reason the decree of the district court is sustained. The other findings of the trial court are set aside and reversed. Of course, the question as to relative expense and benefit will be open in event of the proposal of the construction hereafter of a ditch of greater capacity. As so modified, the decree is affirmed.

*Modified and affirmed.*

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.



C. U. HUNT, Appellee, v. CHICAGO, BURLINGTON & QUINCY  
RAILROAD COMPANY, Appellant.

**NEGLIGENCE: Evidence—Res Ipsa Loquitur—Applicability—Jerk**

1 of Train. The applicability of the doctrine of *res ipsa loquitur* depends not on the mere fact that an accident happened, but upon the nature of the accident—upon the circumstances attending an accident. No presumption of negligence is deducible from the mere fact that the caboose of a freight train gave a sudden and severe "jerk" just preceding a stop.

**MASTER AND SERVANT: Actions—Presumptions—Res Ipsa**

2 Loquitur. The doctrine of *res ipsa loquitur* may have application to an injury to a servant. The controlling fact is not the relation which exists between the parties, but the nature of the occurrence.

**MASTER AND SERVANT: Actions—Negligence—Sudden Jerk of**

3 Train. No jury question is presented on the issue of defendant's negligence by the mere fact that the conductor of a freight train, while in a place of safety, was injured by a sudden and severe jerk of the train.

*Appeal from Page District Court.*—A. B. THORNELL, Judge.

NOVEMBER 21, 1917.

ACTION for damages for personal injuries. At the close of the evidence there was a directed verdict for the defendant, on the ground of failure of proof of negligence. Later, plaintiff's motion for new trial was sustained. From such order the defendant has appealed.—*Reversed.*

*Scott & Peters, Palmer Trimbel, and M. J. Roberts,*  
for appellant.

*Earl R. Ferguson and C. R. Barnes,* for appellee.

EVANS, J.—The plaintiff, at the time  
1. NEGLIGENCE : of the injury complained of, was a conductor  
evidence : *res* for the defendant railroad company. His  
*ipsa loquitur* : run was between Centerville and Keokuk,  
applicability :  
jerk of train.

Iowa, the railroad, however, passing through a portion of the state of Missouri. The plaintiff received his injuries on July 19, 1913, near the town of Memphis, Missouri. His claim is that, while engaged in the line of his duty on a westbound freight train, and while standing in the caboose thereof, there was a sudden jerk of the train, which threw him to the floor, whereby he sustained the injuries complained of. His averment is, in substance, that the jerk of the train was unusual in degree and that it was reckless and negligent. The petition avers that the place of the accident was about one mile west of Memphis. It appears also from evidence that the water tank was one mile west of such town; that there is a down grade for the greater part of the distance from the town to the water tank; that the train in question made its usual stop at the water tank.

As to the alleged accident, the plaintiff testified as follows:

"I remember some sort of an accident happened down the line there after we left Memphis, something like a mile. We were going down hill. I could not say whether we were just rounding the curve at that time or not. The train I was on usually takes water down there. We had got to the water tank. The train had attained a speed of something like 20 to 25 miles per hour. I was setting out cars on the wheel report and entering other cars that were picked up. I had not finished that work yet. I was standing up, with the train book in one hand, and setting them out just as I would do on any other trip. I had book and pencil in my hand. \* \* \* I was there booking those cars and filling out the cars, and all at once there was an awful shock that threw me,—what I hit against I could not say,—and that is the last I remember until I came to at home. I have been in the railroad service for about seven years, as brakeman and conductor,—all in the freight service; always working for the C. B. & Q. \* \* \* A.

One of the most violent shocks I ever received in my working capacity while on the road. \* \* \* A. This was the most violent shock I ever received. I was thrown to the floor towards the engine. I do not remember anything at all until after I was thrown until along that night. Q. Now, basing your answer and opinion and your own experience of seven years in the freight service,—were you then so familiar with the division between Centerville and Keokuk at that time? A. Yes. Q. What might have caused this shock, if you say that you know? A. It might have been caused by the engineer shutting off the throttle with the spring behind the draw-bar, which, when shut off, would force the front end to stop and run the rear end all together with a terrific shock. It may have been caused by his allowing his air to go into emergency all at once. 'There wasn't any warning given me that I know of at the sudden jerking of the train, or stopping of it. \* \* \* I do not know of any reason or necessity for train being stopped that suddenly. \* \* \* It is about a mile from the Memphis station to the water tank. I was away from this station when I felt the shock, in the neighborhood of a mile. The engine was supposed to stop there for water, and I knew that. They don't whistle for the water tank. I have traveled over the road a great many times as freight conductor."

There was no other affirmative testimony pertaining to the accident than the foregoing. That is to say, though other members of the train crew testified on the subject, they all denied that there was any such accident, and denied that the plaintiff's injuries were caused in the manner described by him. This conflict of the evidence does not concern us on this appeal, except that it confines the plaintiff's proof to the very narrow ground covered by his own evidence as a witness, without the aid of any additional facts established by other witnesses. The order ap-

pealed from was one granting a new trial. Both parties, however, have planted themselves squarely upon the question of the merit of plaintiff's case, and of the propriety of the first ruling of the court in directing a verdict for the defendant. The case appears to be one wherein we ought to meet the discussion upon the merits, rather than to deal with the question of discretion in the granting of a new trial.

That the plaintiff in some manner suffered serious injuries is undisputed. That, for the purpose of this appeal, he must be deemed to have suffered the same in the manner described by him is also clear. The decisive question is, Was the evidence of the plaintiff sufficient to sustain a finding of negligence against the defendant, if such verdict were rendered? The plaintiff invokes the doctrine of *res ipsa loquitur*, and contends that the fact of the accident, coupled with evidence that there was no obstruction upon the track, makes a prima-facie case of negligence. The defendant denies that this doctrine is controlling of or applicable to the case. The defendant also makes the sweeping contention that, under the holdings of the Federal courts, the doctrine of *res ipsa* is never applied in master and servant cases. The parties agree that the case is governed as to the law by the Federal Employers' Liability Act. Much attention is devoted in the briefs to the question whether, under the present state of the law, the doctrine of *res ipsa* is applicable to master and servant cases. In support of its contention, the defendant relies upon *Patton v. Texas & P. R. Co.*, 179 U. S. 658; also, *Midland V. R. Co. v. Fulgham*, 104 C. C. A. 151 (181 Fed. 91). We are not disposed to enter into a very exhaustive discussion of this rather elusive subject. A few general observations thereon will suffice to indicate our view that the doc-

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*quitur.*

trine is not controlling in the present case. In its extreme application, this doctrine would permit the mere fact of an accident to be deemed as prima-facie evidence of negligence as the cause thereof. In this form, the doctrine has not been favored by the courts, and its application has been confined to a very limited field, its most common and prominent application being in favor of a passenger against a common carrier. See *Case v. Chicago, R. I. & P. R. Co.*, 64 Iowa 762; *Baldwin v. St. Louis, K. & N. R. Co.*, 68 Iowa 37; *Kuhns v. Wisconsin, I. & N. R. Co.*, 70 Iowa 561, 565; *O'Connor v. Illinois Cent. R. Co.*, 83 Iowa 105; *Haden v. Sioux City & Pac. R. Co.*, 99 Iowa 735; *Brownfield v. Chicago, R. I. & P. R. Co.*, 107 Iowa 254. In this form, it has not been deemed applicable to master and servant cases. But there has been a quite uniform tendency in the courts to give recognition to the doctrine in a qualified form, and to extend its applicability accordingly. *Marceau v. Rutland R. Co.*, 211 N. Y. 203 (105 N. E. 206, 207). The doctrine in such qualified form is not that the mere fact of an accident is, of itself, evidence of negligence as a cause thereof, but that the *nature* of an accident in manner and circumstance *may* be such as to indicate negligence as a cause thereof; that is to say that the circumstances of an accident may be of such a nature as to constitute circumstantial evidence tending to show negligence. Some accidents, therefore, may be of such a nature as to render the doctrine applicable, while other accidents may be of such a nature as to render it inapplicable. In considering this question, it must be borne in mind that it is not the fact of *injury* of a plaintiff which gives rise to the application of the doctrine, but it is the accidental event from which injury resulted. *Fitch v. Mason City & C. L. Trac. Co.*, 124 Iowa 665, 668; *Cahill v. Illinois Cent. R. Co.*, 148 Iowa 241; *Thomas v. Boston El. R. Co.*, 193 Mass. 438 (79 N. E. 749);

*Wyatt v. Pacific Elec. R. Co.*, 156 Calif. 170; *Levin v. Philadelphia & R. R. Co.*, 228 Pa. 266 (77 Atl. 456); *Eisentrager v. Great Northern R. Co.*, 178 Iowa 713. Where an *accident* is, in its nature and circumstances, separable in identity from the *injury* of a complaining plaintiff, it is these circumstances that are looked to, to determine the applicability of the doctrine in question. The derailment of a train; a collision of trains; an overturned coach; a broken bridge,—these are illustrative of accidents which are often attended with circumstances indicating their cause, and which would be deemed as accidents even though they had not resulted in injury to the particular plaintiff. If the circumstances disclosed are not such as tend to indicate negligence, then they cannot be deemed to *speak*. If they do tend to indicate negligence, they do speak, as circumstances only, and to that extent the doctrine becomes applicable. When thus applicable, we see no reason why it may not be applicable in master and servant cases, within appropriate limits. This is especially so in cases where the defenses of contributory negligence and the fellow-servant rule are abrogated. But it is also true that the scope of its operation must ordinarily be narrower in master and servant cases than in cases between common carrier and passenger, because the mutual obligations between master and servant are by no means identical with those that obtain between carrier and passenger. A very full consideration of the question will be found in *Basham v. Chicago Great Western R. Co.*, 178 Iowa 998.

Turning, then, to the case before us, what was the accident which resulted in the plaintiff's injury? It was a sudden jerking, to an unusual degree, of the caboose of a freight train. What were the circumstances of this unusual jerking? In a sense, there were no circumstances except the fact of the jerking, unless we treat as a circumstance the fact that the train was about to stop at the water tank.

Such a stop would need to be at a particular place, and the attempt to make it might result in a sudden jerking. The so-called accident was so void of circumstances that it would not have been deemed as an accident at all, except for the injury to the plaintiff. We think it quite clear that there is nothing in the nature of the circumstances of this accident to open the door to the application of the doctrine of *res ipsa*. To apply such doctrine to this case would be, in effect, to say that the fact of the injury is prima-facie proof of the negligence.

3. MASTER AND  
SERVANT: ac-  
tions: negli-  
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train.

This leaves an inquiry whether, independently of such doctrine, sufficient evidence of negligence is to be found in the record. At this point, we take note of the contention of the plaintiff that he proved that there was no obstruction upon the railway, and that, therefore, there was no occasion for the jerk. For the establishment of this fact, the plaintiff relies upon the testimony of the engineer, Johnson. This witness testified in denial of the testimony of plaintiff. He testified that there was no unusual jerk. It inhered in such denial that there was no reason for a jerk. If the plaintiff had no case without this negative testimony of the engineer, we fail to see how his case could be made stronger by a denial of the testimony upon which he relied. The testimony of Johnson does show that he stopped the train at the tank; that he had come for most of the distance down grade, and had to use the brakes for a proper stop. There is no claim that the plaintiff did not know that the usual stop was to be made. Indeed, he himself testified that it was usual, and that no warning was usually given. That such a stop would result in a jerking more or less severe is a matter of such common knowledge as to have come practically within the range of judicial notice. The books are full of cases where negligence has been predicated upon the jerking of a freight

train, and it has been held, with practical unanimity, that the jerking of a freight train, even though severe and unusual, is not, of itself, evidence of negligence as to employees operating the same. It becomes negligence only when the injured employee is known to be in a position of peril. *Whitsett v. Chicago, R. I. & P. Co.*, 67 Iowa 150, 157; *Chesapeake & O. R. Co. v. Walker's Admr.*, 159 Ky. 237; *Beaton v. Great Northern R. Co.*, 123 Minn. 178 (143 N. W. 324); *Burlinett v. Erie R. Co.*, 144 N. Y. Supp. 969; *Ray v. Chicago, B. & Q. R. Co.*, 147 Mo. App. 332; *Hawk v. Chicago, B. & Q. R. Co.*, 130 Mo. App. 658; *Hedrick v. Missouri Pac. R. Co.*, 195 Mo. 104; *Erwin v. Kansas City, Ft. S. & M. R. Co.*, 94 Mo. App. 289 (68 S. W. 88); *Guffey v. Hannibal & St. J. R. Co.*, 53 Mo. App. 462; *Saunders v. Chicago & N. W. R. Co.*, 6 S. D. 40 (60 N. W. 148); *Wright v. Sioux Falls Trac. System*, 28 S. D. 379 (133 N. W. 696); *St. Louis & S. F. R. Co. v. Gosnell*, 23 Okla. 588; *Usury v. Watkins*, 152 N. C. 760 (67 S. E. 926); *Weinschenk v. New York, N. H. & H. R. Co.*, 190 Mass. 250 (76 N. E. 662); *Frohriep v. Lake Shore & M. S. R. Co.*, 131 Mich. 459 (91 N. W. 748).

The appellee places special reliance upon *Douda v. Chicago, R. I. & P. R. Co.*, 141 Iowa 82; *Texas & Pac. R. Co. v. Behymer*, 189 U. S. 468; *Texas & Pac. R. Co. v. Putnam*, 57 C. C. A. 58. In all these cited cases, the injured party was known to be temporarily in a position of danger. In the *Douda* case, he was under the engine. No movement of the engine was possible without injury to him. In the second case mentioned, the injured party was on the top of an ice-covered car, and was thrown therefrom. In the third case, he was on the draw-bar, and was thrown therefrom. The negligence in these cases was predicated to a large extent upon the special duty owed to the employee temporarily in his position of danger. That element is entirely absent in the case before us. We think, therefore, that it



must be said that the plaintiff failed in his proof of negligence, and that the trial court correctly ruled in the directing of a verdict at the close of the evidence. It follows that the order granting a new trial was erroneous, and it is, accordingly,—*Reversed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

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NORTHWESTERN TRADING COMPANY, Appellee, v. WESTERN  
LIVE STOCK INSURANCE COMPANY, Appellant.

**PLEADING: Bill of Particulars—Authorized General Pleadings—**

- 1 **Conditions and Exceptions.** A motion for a more specific statement will not lie as to matters which are, *under statutory permission*, pleaded generally, nor as to matters which the pleader is under no obligation to negative. So held as to certain exceptions and conditions precedent contained in a policy of insurance. (Section 3626, Code, 1897.)

**PLEADING: Bill of Particulars—Facts Already Possessed by**

- 2 **Movent—Facts Constituting Defense.** A movent may not predicate prejudicial error on the overruling of a motion for more specific statement when the information desired is *already in his possession*, or, if not in his possession, such lack of possession affords movent a *complete defense* to plaintiff's action. So held where defendant, in an action on a policy of insurance, prayed for details as to the time, place, and circumstances of the death of insured animals, when, presumptively, he already had such information in his possession, under required proofs of loss; while, if he did not have such proofs of loss, he was armed with a complete defense to plaintiff's action.

**PLEADING: Bill of Particulars—Undue and Burdensome Details—**

- 3 **Pleading Evidence.** The fact that to sustain a motion for more specific statement would (a) compel, to some extent, a pleading of evidence, and (b) load the pleading with undue and burdensome details, may be influential in justifying a denial of the motion.

**APPEAL AND ERROR: Reservation of Grounds—Points First**

- 4 **Raised on Appeal.** Points made for the first time on appeal will not be considered.

*Appeal from Polk District Court.*—THOS. J. GUTHRIE, Judge.

NOVEMBER 21, 1917.

ACTION on a policy of live stock insurance, brought to recover for the death of 260 head of horses. The defendant filed a motion for more specific statement, calling for a detail of the circumstances of the death of each animal, including the time and place thereof. This motion was overruled, and the defendant has appealed from such ruling.—*Affirmed.*

*Stipp, Perry, Bannister & Starzinger and Thomas J. Graydon*, for appellant.

*Dunshee, Haines & Brody*, for appellee.

EVANS, J.—It appears from the petition and from the exhibits attached thereto that the plaintiff was engaged in purchasing a large number of horses for the purpose of shipment to foreign countries of Europe. The defendant issued to the plaintiff its policy of insurance, purporting to insure the plaintiff against loss by death from accident or disease of such horses, the insurance being limited to \$120 on each horse. The policy is what is known as an "open policy," No. 10261. No particular horses were specified or identified on the face of the policy, but provision was made therein that such specification was contained in schedules attached to the policy. Such schedules were in fact attached, and each animal insured was identified therein by a hip brand and by a hoof number and by geographical location. This open policy also contained the following proviso:

"Also this policy may include further and additional insurance under the same conditions and at the same premium, and individual amount of insurance. Requests for

1. PLEADING:  
bill of particulars:  
authorized general pleadings:  
conditions and exceptions.

further or additional insurance to be made by the assured by telegraph or registered letter. Said insurance to in no instance become effective until receipt of request by the company and payment of premium."

Pursuant to the foregoing provision, 58 supplemental contracts of insurance were attached to the policy, together with the schedules of identification. These supplemental contracts were entered into on successive dates, running from December 28, 1915, until January 31, 1916. Four thousand two hundred horses were thereby included in the policy and its supplements. The petition averred in substance that 260 of the animals thus insured died from disease and accident covered by the terms of the policy. The petition also averred that the plaintiff had complied with all the conditions precedent of the policy, and it asked to recover its loss to the extent of \$120 per horse thus lost. It attached to its petition a schedule of identification of each horse thus claimed to have been lost, giving the hip brand and the hoof number thereof, the date of its purchase, the date of its death, the date of death certificate, and the date of the supplemental contract which covered the loss. The defendant filed a motion for more specific statement, as follows:

"1. Let the plaintiff be required specifically to state where and at what place each of the 260 horses referred to in Paragraph 6 of its petition died.

"2. Let the plaintiff be required specifically to state from what disease or cause or causes each of the 260 horses mentioned in Paragraph 6 of its petition died.

"3. Let the plaintiff be required specifically to state when each of said 260 horses mentioned in Paragraph 6 of its petition became ill, and the nature of the illness or disease.

"4. Let the plaintiff be required specifically to state the length or duration of the illness or disability of each

of the 260 horses mentioned in Paragraph 6 of its petition.

"5. Let the plaintiff specifically state whether it gave immediate notice by telegraph to the home office of defendant of the illness of each or any of the 260 horses mentioned in Paragraph 6 of its petition, and set out copies of such telegraph notices (if any) so given the defendant.

"6. Let the plaintiff be required to state whether the death of any of said horses (and, if so, which ones) was caused by any person, whether acting under or by virtue of law or otherwise.

"7. Let the plaintiff specifically state, in respect of each or any of said 260 horses, whether it secured the services of a licensed veterinarian to attend same; and if it did secure the services of a licensed veterinarian to treat said horses when ill, the name of said veterinarian, when he attended said horses with respect to the date of the illness of each animal so attended, and which specific animals were so attended.

"8. Let the plaintiff state whether its interest in said 260 horses mentioned in Paragraph 6 of its petition was sole, entire, unincumbered and unconditional ownership, or whether the said horses were in any wise pledged or a lien or mortgage given thereon, and, if so, to whom.

"9. Let the plaintiff state whether it had parted with its ownership of, or interest in, any of said horses mentioned in Paragraph 6 of its petition, prior to the death thereof; and, if so, which horses and to whom.

"10. Let the plaintiff state whether the death of any of said horses was caused by anthrax, or drowning.

"11. Let the plaintiff state whether the death of said horses or any of them (and, if so, which ones) was from an unknown cause; and, if so, whether a post mortem was had by a licensed veterinarian, and the cause of death thereby

determined, and a report thereof immediately furnished the defendant.

"12. Let the plaintiff specifically state whether it gave immediate notice by telegraph to defendant at its home office, Peoria, Illinois, of the death of each of the 260 horses mentioned in Paragraph 6 of its petition, therein stating: First, number of policy and number and hoof mark of horse; second, date and cause of death; third, name of attending veterinarian and his address; and if plaintiff answers that it did give such immediate telegraphic notice of the death of each or any of said horses, let plaintiff state when said telegraphic notice was given in each case and set out copies thereof.

"13. Let plaintiff be required specifically to state if, and when, and in what cases, if at all, it gave defendant immediate telegraphic notice of the illness of the horses for the death of which it seeks to recover, and to set out copies of such telegraphic notices, if any.

"14. Let the plaintiff be required specifically to state if, and when, and in what cases, if at all, it gave defendant telegraphic notices of the death of the horses, for which death it seeks to recover; and to set out copies of such telegraphic notice of death, if any."

This is the motion that was overruled by the trial court. Grounds 5, 12, 13 and 14 are not pressed upon our attention. The other grounds are insisted upon by appellant upon this appeal.

While the policy in suit purports in general terms to insure against loss by death from disease or accident, it nevertheless specifies certain diseases and certain forms of accident which are excepted from the insurance. These specifications are for the most part set forth upon the back of the policy. All the grounds of the motion except the first are predicated upon these purported exceptions in the policy and upon the back thereof. Some of these excep-

tions, such as Numbers 7, 8, 9 and 11, are in the nature of conditions precedent.

Under our statute, the plaintiff was not required to negative the exceptions, nor to plead other than in general terms the performance of conditions precedent. It is quite plain, therefore, that none of the grounds of the motion here specified were well taken.

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Ground No. 1 of the motion presents a somewhat different question. On first impression, it would seem quite reasonable in such a case to require the plaintiff to state the time, place and circumstances of the death of an animal for the loss of which he sues. After much consideration, and contrary to our first impressions, we have reached the conclusion that this ground also was properly overruled. It is undoubtedly true that a defendant is entitled to sufficient allegations in the plaintiff's petition to enable the defendant fairly to prepare for trial. On the other hand, one of the functions of any pleading is to enable the court to know in advance the general nature of the controversy, without undue and burdensome detail.

3. PLEADING :  
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ing evidence.

The petition as it is, with all its exhibits, covers more than 60 printed pages. The specifications called for would, to some extent at least, amount to a pleading of evidence. A consideration of the petition in the light of a certain provision of the policy which is a condition precedent, satisfies us that the defendant cannot be prejudiced by way of surprise for want of further specification in the petition, as called for in Ground No. 1. Such provision of the policy is as follows:

"C. This company shall not be liable for loss under this policy if the assured shall fail to immediately give notice thereof by telegraph to the company at its home

office, Jefferson Building, Peoria, Illinois, stating in such notice: First, number of policy and name of animal; second, date and cause of death; third, name of attending veterinarian and his address. This company shall not be liable for loss under this policy if the assured shall in any manner dispose of the carcass of the animal without this company's inspection or examination; or if the assured shall fail to make under oath due and acceptable proof to the company of all facts and circumstances relating to the loss and the animal insured, such proof to be made *on blanks to be furnished by the company* at the assured's request."

The defendant has here specified in its policy the particular details which it deemed itself entitled to know as a condition precedent to its payment of the loss, either with or without suit. The petition must be construed as averring compliance with this condition precedent. The plaintiff must prove such compliance. If its proof fails at this point, its action fails. If it has furnished these details to the defendant in the form of proofs of loss, we see no persuasive reason why the record should be burdened with a repetition of such details in the petition. That these proofs of loss have in fact been furnished to the defendant, was asserted by appellee before us on oral argument, and not denied by the appellant. While such alleged fact is outside of the present record, it is nevertheless consistent with the construction which we have put upon the petition. The defendant directs our attention to the following allegation:

"That during the time when the said policy was in full effect and force, 260 of the animals therein and thereby insured died *from a risk covered by the terms of said policy* and the riders or supplements hereinbefore described."

4. **APPEAL AND ERROR:** reservation of grounds: points first raised on appeal.

Except the foregoing, there is no direct allegation in the petition that the horses in question died from disease or accident. The appellant urges in argument that the allegation as made is a naked conclusion, and that it should be condemned on that ground. There is much force in the argument, but the point was not made one of the grounds of the motion which was presented to the consideration of the trial court.

Upon the whole record before us, we have reached the conclusion that the order of the trial court overruling the motion for more specific statement was proper, and it is accordingly—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

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ANNA RATIGAN et al., Appellees, v. PATRICK RATIGAN, SR., et al., Appellants.

**LIS PENDENS:** Purchase Pending Suit—Rights Acquired. Prin-

1 ciple recognized that he who purchases real estate pending record proceeding to quiet title takes subject to the outcome of such litigation.

**APPEAL AND ERROR:** Review—Presumption—Equity—Trial De

2 **Novo.** It will be presumed, in support of an equity decree, that the trial court found the existence of a material fact of which there was supporting evidence.

**EVIDENCE:** Parol as Affecting Writing—Express Trusts—Partial

3 **Execution.** Parol evidence, if clear and strong, is competent to ingraft an express trust upon an absolute deed, *provided the trust has been wholly or partially executed.* (Sec. 2918, Code, 1897.)

**PRINCIPLE APPLIED:** A son, married and having one child, had lived upon, owned, and for ten years had been in the exclusive possession and enjoyment of, a farm and the income therefrom. He became a drunkard and heavily indebted. *For the sole purpose of preventing the son from squandering the farm, the father of the son induced the son and his wife to give*



him (the father) an absolute deed to the farm. Subsequently, four other children were born. The father took the deed with the oral agreement that the farm should belong to the son and wife during their lifetime, and should then descend in fee to the children. No reconveyance was contemplated, because that would defeat the very end sought to be accomplished. The son remained a drunkard, and died 11 years after the deed was given, during which time the exclusive possession and enjoyment of the farm as a home by the son and wife continued as before. After the death of the son, the same possession and enjoyment continued in the wife and children. The son and his wife, during the lifetime of the son, and the wife, after the son's death, openly and notoriously, and under a claim of right, claimed to own the farm, in accordance with said above trust agreement. The son and wife paid all taxes on the farm, and the incumbrance and interest thereon. *Held*, the act of the father in permitting the son and wife to exercise absolute dominion over the farm while he held the paper title, and the act of the son and wife in maintaining such possession and enjoyment, *were an execution of the trust*, and opened the door to parol evidence of such trust.

**TRUSTS: Express Trusts—Evidence—Admissions of One Against**  
4 **Whom Trust Sought—Competency.** Oral admissions of the one against whom a partially executed trust is sought to be established, to the effect that he was holding the property in trust, may be competent as *corroborating* the oral testimony of the existence of such trust.

**TRUSTS: Express Trusts—Evidence—Declaration of One Cestui Not**  
5 **Binding on Others.** Declarations of one joint beneficiary under a trust agreement as to real estate, denying all interest therein, are not binding on the other beneficiaries.

**ADVERSE POSSESSION: Nature and Requisites—Unprovable Claim**  
6 **of Right.** Open, notorious, continuous and hostile possession of real estate, under claim of right, with the express or implied knowledge of an adverse claimant, ripens into an absolute title after the lapse of ten years, *even though said claim of right originally was legally unprovable.*

*Appeal from Pottawattamie District Court.—O. D. WHEELER, Judge.*

MAY 14, 1917.

REHEARING DENIED SEPTEMBER 29, 1917.

## SUPPLEMENTAL OPINION ON REHEARING NOVEMBER 21, 1917.

THE appellees, who were plaintiffs below, procured the cancellation and setting aside of a deed to certain real estate which had been executed and delivered by one Patrick Ratigan and the plaintiff and appellee, Anna Ratigan, his wife, to the father of Patrick. The appeal is from the decree thus canceling.—*Affirmed*.

*John M. Galvin and H. L. Robertson*, for appellants.

*I. N. Flickinger, Clifford Powell, and Tinley, Mitchell, & Pryor*, for appellees.

SALINGER, J.—I. The investigation and decision of this appeal have been made exceedingly difficult. The original abstract for the appellants contains 37 pages; their amended and additional abstract, 124; the abstract and denial of the appellees, 37. An attack upon this last adds 6 more pages of print. When it comes to stating the issues, appellants, in effect, do no more than to refer us to pages 3 to 29 of their abstract. Of this, page 3 to 19, inclusive, mostly set forth various pleadings which were afterwards substituted for, and appear to be out of the case. The arguments presented and the citations made afford opportunity for months of work. It is impracticable to attempt an exhaustion of this presentation. We find ourselves able to reach a conclusion satisfactory to us by a consideration of the paper issue made on parts of the amended and substituted petition, undisputed or conceded matters, the evidence, some of the authorities cited, others gathered by an independent investigation, and of the decree of the trial court.

The following matters are found either by well supported findings of the trial judge or are otherwise fully established, to wit: About the first day of March, 1892, the defendant Patrick Ratigan, Sr., by deed conveyed to his son

Patrick the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , the NW $\frac{1}{4}$  NW $\frac{1}{4}$ , and the NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 34, Township 76, Range 42, in Pottawattamie County, Iowa. The son at once entered into possession of said lands under said deed, and continued to occupy the same and use them until his death, on November 5, 1913. The son was vested with full and complete title to said lands absolutely and in fee simple. Prior and up to December 2, 1902, he became addicted to the use of intoxicating liquors to excess, and an habitual drunkard, and the property conveyed to him by the father was, by reason of said acquired habits, in great danger of being lost and squandered by the son, who was, on account of such habits, squandering the property, or some portions thereof, and had incurred debts in what were, to one of his means, large amounts. On December 2, 1902, the father induced the son Patrick and his wife, the plaintiff Anna, to execute and deliver to the father a deed conveying all of said lands, subject to a mortgage thereon. This was done to prevent the lands from being lost and squandered by the son. The sole purpose of the last conveyance by husband and wife, and of the father in receiving the conveyance, was to preserve and conserve the said lands and to save the same for the benefit of the son, his wife and their children. At the time this last named deed was made, the son and his wife had one child, the plaintiff Catherine Ratigan, who was then an infant. Since then, four other children, also plaintiffs, have been born to them, and the youngest, John Ratigan, was four years old in October, 1914. This suit was brought in the year 1914.

After the deed from son to father was made, the father sold 40 acres of the land, to wit, the NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 34 aforesaid, to one Setz, with the consent and acquiescence of his said son. The father received therefor the sum of \$3,600, out of which he subsequently paid debts owed by his son in about \$1,000, paying same out of the proceeds

of said sale, and he has not otherwise accounted for the proceeds. The said Anna Ratigan, widow, and her said children began suit to recover possession of said lands, and in the same filed their petition on the 10th of February, 1914. Pending the suit thus instituted, the defendant Patrick Ratigan, Sr., made conveyance of the land remaining to parties who appear here as interveners, and upon his conveyance, base a claim to have their title quieted.

These matters, being established, dispose of the following contentions made by the appellants, thus:

i. **LIS PENDENS:**  
purchase  
pending suit:  
rights acquired.

(a) The plaintiffs are not barred to recover in this suit on the claim of appellants that the deed from son to father, of date December 2, 1902, was made to hinder, delay or defraud creditors. That was not the purpose of said deed. The purpose for which it was made does not operate to deny to plaintiffs the relief they seek.

(b) The suit brought is not barred by the statute of limitations. The defendants and interveners deny that the plaintiffs ever had a right to sue. The plaintiffs concede that they had no such right until after the son Patrick died, which was in 1913, and they began this suit in 1914.

(c) The defendant Patrick, if indebted at all on account of the sale to Setz, owes the sum found due by the trial court, to wit, \$2,600, with interest at 6 per cent thereon from and after the 5th day of November, 1913.

(d) It is contended that the conveyance *pendente lite* was meritorious and justified, because the son Patrick had received much more from the father than the other children, who were grantees in the conveyance pending suit. Let these last conveyances have been ever so well justified, the grantees therein must stand or fall by the outcome of this suit. If that puts the title of what was last conveyed in these plaintiffs, then these last grantees can take nothing,

because their grantor had nothing to give.

II. We now reach the controverted matter. The plaintiffs assert that the deed made to the defendant Patrick Ratigan on December 2, 1902, was without consideration, and that it was agreed, in a separate writing contemporaneously made, that said land should be and remain the property of the grantors, Patrick and his wife, plaintiff Anna, during the life of said Patrick and his wife, and thereafter be the property of the children born to these two and living at the time of the death of their father. The defendants deny, of necessity, that there was such writing, and urge upon us: (a) That, to establish a parol trust in real estate, either resulting or constructive, the evidence must be clear, satisfactory and conclusive; (b) parol evidence is not admissible to establish an express trust in real estate; (c) in the absence of fraud or mistake, parol evidence is not admissible to vary the consideration stated in a deed or to change its legal effect; (d) where an express trust is pleaded and relied upon, parol evidence to show a basis for a constructive trust is not admissible; (e) that a deed is without consideration is not sufficient to ingraft a trust upon it; (f) the continuance in possession of the premises conveyed by warranty deed with the consent of grantee is not admissible to establish a parol trust in such premises; (g) the denial of the alleged trust agreement is not sufficient proof of fraud to take the case out of the statute which requires declarations of trust to be in writing; (h) a party continuing in possession of real estate, after conveying same to another by warranty deed, with the consent of the grantee in such deed, is presumed to be a tenant at will of such grantee; (i) declarations of a deceased grantor tending to contradict the legal effect of a deed are not admissible; (j) mere relationship between the parties to an alleged

2. APPEAL AND  
ERROR: review:  
presumption:  
equity: trial  
de novo.

trust transaction does not raise a presumption of fraud; (k) a widow is an incompetent witness to testify to communications between her and her deceased husband made during the marriage relation; (l) in a suit wherein the grantee or assignee of a deceased grantor or assignor is a party, and the surviving wife of said grantor is also a party, said wife is incompetent as a witness to testify to any personal communication or transaction between her and her deceased husband.

Grant, for the sake of argument, that all these are relevant, and correctly state abstract law. Grant further, for the sake of argument, that complaints made of reception of testimony would be, in the ordinary case, well made. These concessions eliminate much from our consideration, and subtract much from the support of the decree complained of. But manifestly it does not follow that granting what we have deprives that decree of all support. It is self-evident that the inhibition upon establishing an express trust by parol evidence is not material if the court can find that the trust was created by a writing which is in the control of the party charged with the trust. There was a claim that such is the situation here.

The trial court may well have found that there was such written declaration of trust. To be sure, it does not declare by its expressed findings that it so has determined. But that is immaterial. Findings in an appeal in a case triable *de novo* do not bind us, and their absence does not affect us. It suffices that, under the pleadings and the evidence, the relief awarded can rest upon a determination that there was such a writing. Appellant concedes that the testimony was in sharp conflict, and enough will be said in another connection to make clear that we should not interfere with such finding by the trial court. That is to say, we shall point out elsewhere why the testimony for the appellee is entitled to more weight than that which counters it.

III. Where nothing appears beyond  
3. EVIDENCE: that A made an absolute deed to B for a  
parol as af- consideration recited, it is, of course, not  
fecting writ- to be doubted that the grantor may not, by  
ing: express  
trusts: partial  
execution. parol, ingraft upon such absolute deed an  
agreement that the property conveyed shall be held in trust  
for the grantor, and devolve upon his heirs at his death.  
But that this is true is not more clear than that, if the al-  
leged trust is shown to have been partly or wholly carried  
out, the trust may be established in parol. The sole limita-  
tion is that the proof must be clear and strong. See *Johns-*  
*ton v. Jickling*, 141 Iowa 444, at 450; *Schurz v. Schurz*, 153  
Iowa 187, 193. So it finally becomes a question whether  
the proof here, measured by that rule, justifies the decree.

It is conceded that, at the time the deed was made,  
upon which it is now sought to ingraft a trust, the plain-  
tiff Anna and her said husband were in possession of said  
lands, and living in a dwelling house thereon; they were  
then enjoying the use of said lands and farming the same,  
and continued to make use thereof as a home up to the death  
of the son Patrick in November, 1913; Patrick and the said  
Anna, from 1902 on, claimed to own the land, and posses-  
sion thereof was open, notorious and adverse; it was main-  
tained under a claim of right to own the same for use dur-  
ing the life of the son and his wife, and thereafter, fee was  
to vest in any children living at the decease of Patrick, Jr.  
During all the time between December, 1902, and Novem-  
ber, 1913, the son and wife paid all taxes assessed against  
the land; the incumbrance upon the same when the deed of  
December 2d was made was continued upon the land; and  
plaintiff Anna and her husband discharged interest accru-  
ing thereon from time to time. Since the death of the son,  
the said Anna, his wife, and his said children have occupied  
said lands and have used the same and enjoyed all the in-

come therefrom, paid the taxes and the interest on said mortgage, and are still in the use, occupancy and enjoyment of the said lands.

The alleged trust agreement is that, notwithstanding the absolute deed to the father, the grantee should deal with the lands as a trustee, to the end that the son might not impoverish his wife and children. How could such trust be executed? Clearly, it would defeat it to make a reconveyance to the son while he was living, since it is undisputed that the habits which it is claimed made the trust agreement necessary continued to the time of his death. Since a reconveyance was no part of the claimed trust arrangement, its performance could be effectuated only by permitting the son and his family to use the land, to deal with it as owners in every way except to alienate or encumber it. When the father permitted such use while keeping the paper title where it was put for safety, he was executing the trust on his part. The *cestuis* were executing it by maintaining possession, cultivation, and the payment of taxes and interest on incumbrances. We are of opinion that, in such circumstances, most of the testimony complained of was rightly received; that the sole question is sufficiency; and that the trial court did not act without sufficient support in the evidence in declaring that the trust agreement claimed had been entered into, nor in holding that the time had come when the deed relied upon by the defendants should be allowed effectiveness no longer. In the very nature of things, we cannot go into an analysis of that evidence, and to do so beyond stating our conclusions upon it would serve no useful purpose. In the words of the appellants themselves, what was said and done in the office of the conveyancers when deed to the father was executed is in conflict, the plaintiff Anna relating one story, and the defendant Patrick a different one; and these were the only two witnesses present.



4. TRUSTS: ex-  
press trusts:  
evidence: ad-  
missions of one  
against whom  
trust sought:  
competency.

We do, as we should, attach some weight to the fact that the trial judge saw and heard these witnesses. The defendant Ratigan time and again made declarations which tend strongly to show that he deemed himself a trustee, as the plaintiffs claimed. We are not holding that such admissions will of themselves establish an express trust, where they are not made by the party charged with the trust, as a witness. See *Westheimer v. Peacock*, 2 Iowa 528. What we do hold is that such admissions corroborate the testimony of the plaintiff Anna where, as here, the doors to ordinary parol testimony have been opened because of partial or full execution of the alleged trust. Again, the possession and occupancy which the evidence shows without dispute differ utterly from what the grantee in an absolute deed would have permitted for long years. And then the sale of part of the land and paying debts of the son from the proceeds. We think all these things taken together compel us to find that the trial court did not err in holding that the preponderance was with the plaintiffs. The citation from 1 Devlin on Deeds (3d Ed.), Sec. 167, is controlling only if part of the evidence be eliminated.

5. TRUSTS: ex-  
press trusts:  
evidence: dec-  
laration of  
one *cestui* not  
binding on  
others.

We do not overlook that, in his lifetime, the son declared, in an application to be adjudged a bankrupt, that he had no interest in any real estate. This is a most solemn act, the effect of which we have not the least desire to weaken. If the declarant were now living, and sought to assert his own interest in these lands, we should hold him concluded by his declaration. But he, of course, is making no claim, and is not a party to this suit. Death has deprived him of whatever interest he once may

have had, as effectively as any declaration made by him in court could do. But the fact remains that his conduct in court can no more bind these plaintiffs than the declarations of one legatee or heir can bind the other. Whatever his act has done to his own rights, the plaintiff, his wife, had, under the trust arrangement, the use of the lands in question for her life, and the children had the right to the fee after the mother died. The trust arrangement was made for the purpose of preventing the son from alienating or encumbering this land, to save it for his wife and children. He had no power to take these rights from them by executing a conveyance or making a mortgage or suffering a judgment; his doing either would not affect these plaintiffs. What he might not do directly, he cannot accomplish by indirection, and his said declaration left the rights of these plaintiffs untouched, no creditors' rights being involved.

IV. But if we are in error as to this, another reason appears why we may not disturb the finding below. That there was possession and full use and occupancy for more than 10 years after the making of the deed of December 2, 1902, is undisputed and indisputable. If the defendant Patrick believed there was no trust arrangement, then he knew that parties who had no interest in the land were openly dealing with it as owners, by taking its profits and discharging the burdens upon it. There is no claim that the possession was not open, or that it was unknown to defendant. It is alleged, and we think proven, that this possession was under a claim of right, based on the good-faith belief that said trust arrangement had been entered into and was subsisting. It does not matter if it were true that such an arrangement may not here be established by parol evidence. It is not essential to the claim of right which makes the basis for title by adverse possession

6. ADVERSE  
POSSESSION:  
nature and req-  
uisites: un-  
provable claim  
of right.

that the claim shall be enforceable. See *Sater v. Meadows*, 68 Iowa 507, and *Close v. Samm*, 27 Iowa 503. In *Quinn v. Quinn*, 76 Iowa 565, we held that the adverse possession could rest on a claim of right to possession by virtue of a parol agreement between plaintiff and defendant, his father, that plaintiff should have the land in controversy in consideration of services performed in carrying on the farm in pursuance of a contract to that effect. Concede, for the sake of argument, that the claimed trust arrangement could not be established by parol. Concede, if you please, that in truth no such arrangement was ever made. But if one holding possession in good faith believes there was such an arrangement, and thereunder remains in possession, openly claiming title, the required lapse of time will ripen possession on such claim into a title in the nature of a grant by acquiescence. Relief on the claim of title by adverse possession is expressly made in the pleadings of plaintiff, and we think that, upon that issue alone, the decree below can and should be sustained. This is so if we concede the claim which appellants make for *McClenahan v. Stevenson*, 118 Iowa 106, 110, *Luckhart v. Luckhart*, 120 Iowa 248, 254, *Beechley v. Beechley*, 134 Iowa 75, 81, *Walsh v. Doran*, 145 Iowa 110, 113, 114, to wit, that to establish title by adverse possession, it must be shown that the claimant's possession was open, hostile and notorious; that is, that the holder of the legal title had express or implied knowledge that such possession was adverse and under claim of right or color of title. If he believed that no arrangement was made beyond that which is expressed by the deed made to him, how can it be avoided that defendant Ratigan had express or implied knowledge that the plaintiffs were holding in hostility to him, and under some claim which they believed was strong enough to overcome the deed which they knew he had?

In our opinion, the decree and judgment below should be—*Affirmed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

Supplemental Opinion on Rehearing.

SALINGER, J.—I. The trial judge found that the father of Patrick Ratigan, with the consent and acquiescence of the son, sold and conveyed to one Setz 40 acres of the tract involved in this suit, to wit, the NW $\frac{1}{4}$  NW $\frac{1}{4}$  Section 34; that he received therefor \$3,600, out of which he subsequently paid \$1,000 to extinguish debts owing by the son; and it ordered that the plaintiffs have of the said Patrick J. Ratigan, Sr., the sum of \$2,600, together with interest at 6 per cent from the 5th day of November, 1913. We held that this finding was sustained by the evidence. We are asked to reconsider this holding on the claim that the evidence does not sustain this finding. The appellees counter that this claim is "now set up as the basis for the reversal of the personal judgment for the first time in this case." The record does not sustain this assertion. The very point now urged to induce us to reconsider was fairly made in the presentation on original submission.

II. There crept into our opinion a statement that the father raised the \$1,000 which he applied on debts of the son out of part of the land covered by the deed from son to father, which we have impressed with a trust, and which said part the father sold to Setz with the acquiescence of the son. There is no conflict in the testimony, and plaintiff Anna Ratigan herself is one witness who makes it clear that this \$1,000 was raised on the father's own land "across the road," and on an 80 which he bought from Day and Hess, and that the payment to the creditors was made about 7 years before any land was sold by the father to Setz. We find on reconsideration that this is an erroneous statement,

and that the money was raised on land which the son never owned, and that the son did not acquiesce in said sale to Setz. But this error is clearly not a prejudicial one. The trial court credited the father with this \$1,000. This being done, it becomes immaterial where the father obtained the money, and whether the son consented to the sale to Setz. In either view, all the father could have was credit for what he paid for the son, and this he had.

III. It will be remembered that the plaintiffs, and not the father, Patrick Ratigan, are seeking a change in the wording and effect of the deed made from son to father. That is to say, if the deed remains as written, the plaintiffs have no title to or interest in any of the 120 acres, 40 of which were sold by the father to Setz. It follows that, though 80 acres of this 120 stand affected by a trust, it may still be true that the 40 acres sold were not so impressed. The burden was on the plaintiffs to establish the trust as to each and every part of the 120-acre tract. We held that there was such trust, influenced to a great extent by the declarations made by the father. On re-examination, we find that, while he did make many such declarations as to 80 acres of the land, whereupon the dwelling house of his son was, he never made any such as to this 40 acres sold to Setz; that as to it he always took the position that he owned it absolutely; that he qualified all his admissions by referring to the 80 acres; and that the physical condition and relation of the 40 acres to the balance of the tract is such as that a trust for the benefit of the son and grandchildren might well have been intended as to the 80 acres, and not intended as to the 40 acres. We are constrained to hold, upon this further examination, that the plaintiffs have not established their case as to said 40 acres, wherefore Patrick Ratigan, Sr., is not chargeable with the \$2,600 and interest thereon with which he was charged by the trial

court, on the theory that he had sold land in violation of a trust.

The opinion will, therefore, be modified to the extent of relieving Patrick Ratigan, Sr., from liability to pay said sum to the plaintiffs, or any of them. In all other respects, the petition for rehearing is overruled, and the original opinion adhered to.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

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STATE OF IOWA, Appellee, v. OLIVER BROOKS, Appellant.

**TRIAL: Instructions—Objections and Exceptions—Waiver—Failure**

- 1 to Request Instruction. An exception, under Section 3705-a, Code Supplement, 1913, to an instruction, on the ground that it is incorrect as a statement of substantive law, is not waived by a failure to ask a specific instruction on the point in controversy. So held where defendant, in a criminal cause, excepted to an instruction which *excluded* assault and battery from the jury's consideration, but did not specifically request an instruction *including* such offense.

**RAPE: Included Offenses—General Rule.** Assault and battery and

- 2 simple assault should, on a charge of consummated rape on an adult or on an *infant*, be submitted, in the absence of some special reason justifying their exclusion.

**CRIMINAL LAW: Trial—Instructions—Included Offense.** Formula

- 3 for submitting or refusing to submit included offenses (assuming that the included offense is necessarily or expressly charged in the indictment):

- (1) Submit if, in view of the evidence, the jury *might*, in the exercise of their right to believe or disbelieve, find the accused guilty of the included offense.

- (2) Refuse to submit if, in view of the evidence, it would be the duty of the court to direct an acquittal were the accused charged with nothing more than the included offense.

Evidence reviewed, on a charge of consummated rape on an *infant*, and held to demand the submission of assault and battery and simple assault.

**WITNESSES:** Impeachment—Impeaching an Impeaching Witness. An impeaching witness may not be impeached. So held where such a witness testified that the reputation of a certain party was bad, and that named parties had so told him, such named parties not being permitted to testify that they had not made the statements attributed to them.

**TRIAL:** Reception of Evidence—Exclusion on Insufficient Objection  
5 —Effect. Excluding offered evidence on an *insufficient* objection will be sustained if a *sufficient* objection did, in fact, exist.

**EVIDENCE:** Opinion Evidence—Proper Subject of Expert Testimony. "Whether or not it is a physical impossibility for a young person to have sexual intercourse and sleep through it all," is a jury question—not a proper subject of expert testimony.

**RAPE:** Evidence—Infant Prosecutrix—Materiality of "Force."

7 Assault and battery cannot exist, *even as to an infant*, without unlawful force. Unlawful force cannot exist if there be valid consent. A mature infant may consent to force. It follows that, on the cross-examination of an infant prosecutrix in a charge of forcibly consummated rape, any line of examination is material, *on the included issue of assault and battery*, which tends to show that the condition of her mind was such as to render improbable any occasion to apply unlawful force to her person. So held where, on such examination, effort was made to show that, prior to the alleged rape, prosecutrix had indulged in lascivious language and conduct.

PRINCIPLE APPLIED: See No. 8.

**WITNESSES:** Cross-Examination—Scope and Extent—Antecedent

8 Character of Witness—Credibility. The permissible range of cross-examination embraces not only matters bearing more or less directly upon pending issues, but may, as bearing on the general subject of credibility, embrace a showing of the *depraved habits, antecedents and character* of the witness.

PRINCIPLE APPLIED: An accused was on trial on a charge of forcibly consummated rape on an infant under 15 years of age. The testimony for the State tended to support the charge in all its fulness. On the cross-examination of the prosecutrix, she was, in substance, asked:

(1) If she had not, prior to the alleged rape, discussed with a named male person the advisability of sexual intercourse be-

tween herself and said person provided a rubber instrument was used; and

(2) If she had not, prior to the alleged rape, gone swimming, in a naked condition, with boys.

An objection of immateriality was sustained.

*Held* admissible, because it bore not only (a) on the improbability of the necessity to use force sufficient to constitute the included offense of assault and battery, but also (b) on the credibility of the prosecutrix, as reflected by her depraved habits, antecedents and character.

**CRIMINAL LAW: Reception of Evidence—Order of Proof—Belated Testimony as to Venue.** Testimony as to venue may be permitted even after part of the arguments have been made.

**TRIAL: Instructions—Form, Requisites and Sufficiency—Singling Out Witness—Criminal Law.** Instruction reviewed, in a criminal case, and held not to unduly and prejudicially single out the defendant and his testimony.

**RAPE: Trial—Instructions—Nature of Offense.** A charge which, as given, fully impresses upon the jury that great care should be exercised in arriving at a verdict in a rape case, sufficiently meets a request for the giving of the ordinary instruction as to the gravity of the charge, the ease with which it may be made, the difficulty attending an attempt to disprove, etc.

**RAPE: Nature and Elements—Rape on Infant.** The elements of force, consent, and resistance, on the part of an infant prosecutrix, are not material on the issue of defendant's guilt of rape.

**CRIMINAL LAW: Instructions—Requests—Refusal—Harmless Error.** Refusal of a requested instruction as to the matters which might be taken into consideration in determining whether an accused was guilty of a named offense is harmless, when, as to such offense, the jury rendered a verdict of "not guilty."

**CRIMINAL LAW: Instructions—Conflicting Instructions.** Instructions reviewed, and held not contradictory.

*Appeal from Wapello District Court.*—SENECA CORNELL, Judge.

NOVEMBER 21, 1917.



THE defendant appeals from a conviction of assault with intent to commit statutory rape.—*Reversed and remanded.*

*Jaques & Jaques*, for appellant.

*H. M. Harnier*, Attorney General, and *H. H. Carter*, Assistant Attorney General, for appellee.

SALINGER, J.—I. The court charged affirmatively that the jury was limited to considering the charge of rape, and of assault with intent to commit it, and submitted forms of verdict covering these and acquittal only. Complaint of this charge was made by definite exceptions asserting that assault and battery and simple assault should also be submitted. The State raises the preliminary question whether this may now be complained of, in the absence of requested instructions covering the point specifically. So far as simple assault is concerned, there is no such question, because Instruction 10, offered and refused, did ask that assault be submitted. As to assault and battery, the complaint was made by definite exceptions to an instruction which excluded that offense, but made in no other way. We have, then, to determine whether a complaint that assault and battery should have been charged upon is waived because there was no request that it be submitted. In quite a number of our decisions made since the statute providing for advance exceptions to instructions was enacted (Section 3705-a, Code Supplement, 1913), we have held by very clear implication that complaints of instructions may be made on appeal though no requests cover the point, if the point is specifically made by exceptions duly taken. See *State v. Nott*, 168 Iowa 617, at 620; *Thomas v. Illinois Central R. Co.*, 169 Iowa 337; *Parkhill v. Bekin's Storage Co.*, 169 Iowa 455, at 468; *State v. Cooper*, 169

1. TRIAL: instructions: objections and exceptions: waiver: failure to request instruction.

Iowa 571, at 579; *American Fruit Co. v. Davenport Vinegar Works*, 172 Iowa 683; *Hanson v. City of Anamosa*, 177 Iowa 101; *Sawyer v. Hawthorne*, 178 Iowa 407. But the record in these cases does not disclose whether the error was a misstatement of law or merely a failure to charge all that might properly have been charged. Even before the passage of this statute, we held that no request was necessary if the charge given is a misstatement of the law. *State v. Pennell*, 56 Iowa 29. *In re Estate of Rule (Rule v. Carey)*, 178 Iowa 184, does not help appellant here unless the instruction here given amounts to a misstatement, because it appears that the complaint of the instruction was that it was not justified by the evidence. However, in *State v. Fisher*, 172 Iowa 462, the complaint was of a failure to charge, and we declined review on the express ground that specific objections covering the very point—such as are required by the statute—were not made. And the case states the rationale of the matter by putting it on the ground that complaints may not be raised for the first time on appeal. We incline to think that charging a jury, in effect, that it must convict of no less than a stated offense, is, if error at all, a misstatement of law. Be that as it may, still said statute requires that the judge shall, before he reads his charge to the jury, present the instructions to counsel; provides they shall have a reasonable time to examine same; must make all objections or exceptions there to before the instructions are read, and point out the grounds thereof specifically and with reasonable exactness; and that no objections that do not thus point out specifically the exact grounds thereof shall be thereafter considered. It is difficult to understand why this statute was enacted if, despite it, errors of omission in instructions may not be complained of unless a request for an instruction covers the omission. The making such request is but an effort to keep the trial court from making an error which might require

reversal, by inducing it to refrain from committing such error. The statute, if it does anything, provides a method for avoiding error by pointing out that, in regard specified, what is proposed to be charged is error. If the failure to make a formal request for instructions is fatal to review, it would seem the statute accomplished nothing, except that where, before, it was necessary to aid the trial court by one method, it is now necessary to use that method and also the statute method—the effect of using both being to call attention to the same error twice, and by different methods which accomplish just the one thing, i. e., to advise the court of a claim that the charge proposed to be given is erroneous. We think that, since the passage of said statute, any complaint of instructions can be made here if the same complaint was definitely made below, either by a request to charge or by objections to the charge.

II. This brings to us whether it was  
2. RAPE: includ- error to exclude assault and battery and  
ed offenses: simple assault from consideration. If there  
general rule.  
be no special reason that justifies their exclusion in the particular case before us, we are constrained to say the exclusion was erroneous, because all authorities agree that, on a charge of rape, these are included offenses, and that all included offenses should ordinarily be submitted. No one will question this in cases where the one assaulted is above the age of consent. The same is ordinarily true of assault when she is below that age. *State v. Vinsant*, 49 Iowa 241, 243; *State v. Desmond*, 109 Iowa 72; *State v. Blackburn*, 136 Iowa 743; *State v. Butler*, 157 Iowa 163; *State v. Hutchinson*, 95 Iowa 566; *State v. Trusty*, 118 Iowa 498; *State v. Egbert*, 125 Iowa 443. As to assault and battery, the same is held by the strongest of implication in *State v. Steffens*, 116 Iowa 227. In *State v. King*, 117 Iowa 484, there is added that assault and battery should be submitted unless it appears that a

prosecutrix under the age of consent consented. But, the indictment covering the included offenses, it is still required that the evidence justify their being submitted.

2-b

There is no question as to the general rule. A multitude of decisions hold that included offenses need not be submitted when the court may hold, as matter of law, that, if any wrong was done, the highest offense charged was committed. As applied to the subject in hand, it has been held that included offenses need not be submitted where (1) the evidence "shows beyond question" that defendant was guilty of the major offense, if guilty at all (*State v. Beabout*, 100 Iowa 155); (2) where the evidence so clearly shows the major offense was committed as that no other conclusion can be reached on the evidence (*State v. Sherman*, 106 Iowa 684, at 687, *State v. Harrison*, 167 Iowa 334, *State v. Marselle*, [Wash.] 86 Pac. 586, at 587); (3) if there be no evidence on which the finding of a lower offense may properly rest, and the jury could not convict of such lower offense on the evidence (*State v. Ralston*, 139 Iowa 44, at 47, *State v. Novak*, 151 Iowa 536, 540); (4) if there be no room to claim that assault and battery should be submitted (*State v. Snider*, 119 Iowa 15, at 20); (5) if there is no evidence of an included offense charged, as construed in *State v. Trusty*, 118 Iowa 498, at 500; (6) if there be "not the slightest evidence" of opposition by an infant, and she herself testifies to full consent (*State v. Jones*, 145 Iowa 176); (7) if the evidence of consent is conclusive, and there is no evidence of any offense below attempt to rape (*State v. King*, 117 Iowa 484, at 492). *State v. McDevitt*, 69 Iowa 549, holds that, mere pursuit being shown in an attempt to commit rape, assault and battery should not be submitted. On the other hand, included offenses should be submitted if (1) there is any evidence of their commission; (2) if, under

the evidence, "the jury might believe the defendant guilty" thereof (*State v. Mitchell*, 68 Iowa 116, *State v. Atherton*, 50 Iowa 189, *State v. Trusty*, 118 Iowa 498, at 500); (3) if there be some evidence from which a jury may believe the included offense only was committed (*State v. Vinsant*, 49 Iowa 241, at 244, *State v. Woodworth*, 168 Iowa 263, *State v. Perkins*, 171 Iowa 1, at 2). In *State v. Egbert*, 125 Iowa 443, the State insisted that, if the jury found the defendant guilty of anything, it must have been no less than assault with intent to commit rape, because the prosecutrix was under the age of consent. We answered that this was not so, because the jury might have found assault and battery, or assault to inflict great bodily injury, upon the testimony of the prosecutrix alone, though prevented from finding assault with intent to rape, because there was no corroboration.

It is said in *State v. Cody*, 94 Iowa 169, that an instruction which excludes lower degrees charged operates to take from the jury the right to convict of a lower degree, which has full support in the evidence, because the same evidence as conclusively warrants a conviction of the higher degree. The effect of *State v. Sayles*, 173 Iowa 374, is that, in the haste of the trial, and in view of the fact that error therein may be corrected later, the trial court does not have to nicely balance evidence in determining whether to submit the major offense, and that it may submit the same unless "the record contains no evidence having a tendency to favor the higher offense," even though the evidence as finally put in will not sustain a conviction of the higher offense. Though there is some confusion in the cases, we think the right rule is: Since a verdict may not be directed against the defendant, and since an exclusion of an included offense is, in a sense, a direction for

3. CRIMINAL LAW:  
trial: instructions: included offense.

him, it is proper to rule that defendant shall not be put on

trial for an included offense if it would be proper to direct a verdict of acquittal were he charged with that offense alone. In other words, if an indictment charge rape, or an attempt to rape with force and arms, and the jury can find force was used, assault and battery should be submitted, and if, on such indictment, the jury can find from the evidence that there was no force, but still an assault, then simple assault should be submitted.

2-c

The charge here is consummated rape upon an infant, committed with force and arms. The testimony on part of the State asserted most positively that such an offense was committed. Consent not being involved, the verdict of assault with intent to commit rape of necessity declares that rape was not committed. In the language of *State v. Ralston*, 139 Iowa 44, at 47, there was a completed rape in this case, had the jury believed prosecutrix. And see *Commonwealth v. Cooper*, 15 Mass. 180; *State v. Walters*, 45 Iowa 389; *State v. Vinsant*, 49 Iowa 241; *State v. Cross*, 12 Iowa 66; *State v. Peters*, 56 Iowa 263. We said in *State v. Barkley*, 129 Iowa 484:

"But such a verdict may involve the credit to be given the witnesses for the State to such an extent as that it should not be allowed to stand."

It is true that a verdict for an included offense which there is evidence to sustain does not base a claim that it is not warranted because the jury failed to convict of a higher offense of which the evidence is conclusive. *State v. Cody*, 94 Iowa 169, at 172. And see *State v. Archer*, 54 N. H. 465, at 468; *Pratt v. State*, (Ark.) 10 S. W. 233; *State v. Barkley*, 129 Iowa 484; *Wilson v. State*, 24 Conn. 57; *Commonwealth v. Cooper*, 15 Mass. 180; *State v. Morris*, 128 Iowa 717. But that does not quite meet the situation. To make it applicable, it must first be assumed that the evi-

dence of the major offense was so conclusive as that a finding of the lower one exhibits mercy rather than judgment. At all events, the rendition of such a verdict as was here returned has some tendency to establish that the testimony concerning the major offense was such as that it became a fair question for a jury which offense was committed. As for the rest, following the rule in *State v. Asbury*, 172 Iowa 606, we have to say that, if the prosecutrix is to be believed, there was force, resistance to the utmost of her powers, and no consent, and the jury could find, as it did, that no rape was committed, and none attempted. It follows the court erred in stopping the consideration of the jury at assault with intent to rape. See *State v. Vinsant*, 49 Iowa 241; *State v. Mitchell*, 68 Iowa 116; *State v. Barkley*, 129 Iowa 484, at 486; *State v. Harrison*, 167 Iowa 334, 336; *State v. Trusty*, 118 Iowa 498; *State v. Blackburn*, 136 Iowa 743; *State v. Mitchell*, (Kan.) 38 Pac. 810.

III. There was an attempt to do what may be described, typically, as an effort to show that witnesses who had said a reputation was not good, and that certain persons had so told them, had not been told this by such persons. The court refused to permit this, we think rightly. See *Hofacre v. City of Monticello*, 128 Iowa 239; *State v. Woodworth*, 65 Iowa 141.

IV. The defendant sought to have a medical witness say "whether or not it is a physical impossibility for a young person to have sexual intercourse and to sleep through it all." To this an objection that it was incompetent, not rebuttal, and that no foundation had been laid in the evidence for it, was, over exception, sustained. It is probable that the objections made are not well taken. But where an objection is sustained, it is not controlling

4. WITNESSES:  
impeachment:  
impeaching an  
impeaching  
witness.

5. TRIAL: re-  
ception of evi-  
dence: exclu-  
sion on insuf-  
ficient objec-  
tion: effect.

that the objections made do not state a good reason for the ruling made upon them, and we inquire only whether there is any sound reason for sustaining them. We are of opinion that this testimony was rightly excluded.

6. EVIDENCE: opinion evidence: proper subject of expert testimony.

The matter inquired into is not peculiarly within knowledge obtainable only by special study, and to have permitted the witness to answer would have been an invasion of the province of the jury. See *State v. Peterson*, 110 Iowa 647, 651; *State v. Taylor*, 103 Iowa 22, 23; *People v. Clark*, 33 Mich. 112; *People v. Baldwin*, (Cal.) 49 Pac. 186; *State v. Teipner*, (Minn.) 32 N. W. 679; *Cook v. State*, 24 N. J. L. 843, 852; *Gould v. Schermer*, 101 Iowa 582, 590; *Woodin v. People*, 1 Parker's Crim. Rep. (N. Y.) 464; Lawson, Opinion Evidence, page 148; Underhill, Criminal Evidence, Par. 412, page 691; Rogers, Expert Testimony, page 152.

At some stage of the trial, defendant made offer to show what he expected to prove by medical witnesses, whom he had interrogated as above shown, and explained that failure to offer earlier was due to oversight. On objection, *inter alia*, that the offer was not timely, same was rejected. We have no occasion to go beyond saying that, since we hold such testimony to be inadmissible, it was not error to decline this proffer, no matter at what stage of the trial it was made.

V. On the cross-examination of prosecutrix, she testified that she knew one Curtis Duke. She was then asked:

7. RAPE: evidence: infant prosecutrix: materiality of "force."

"Q. You have been with Curtis Duke, have you?"

To this, the objection that it was immaterial was sustained, under exception. Then came the question:

"Before this night you claim you were out automobile riding, you were out with Curtis Duke, going on West Second Street toward your home, discussing with him the



advisability of going up into the park, and he promising you to use a rubber instrument when he had sexual intercourse with you, were you not?"

Answer to this was excluded on the same objection, and so of the question next propounded:

"Before this night in question, you went in swimming in the Des Moines River, naked, with boys?"

Was this testimony immaterial? A thousand authoritative decisions may readily be found that such testimony is admissible on the cross-examination of an adult prosecutrix, because it tends to show that force would not be apt to be necessary as to one

8. WITNESSES:  
cross-examination: scope  
and extent:  
antecedent  
character of  
witness: credibility.

guilty of such acts. In the cases wherein it is held that such cross-examination is not permitted as to an infant, the holding is put on the sole ground that, in statute rape and the like, consent or want of it is immaterial. These decisions would be sound if the use of force can never be material in the charge of raping an infant. It is unquestionable that, for some purposes, consent is immaterial; for instance, against the claim that force must, in such case, be proved, because the indictment charges the use of force. *State v. Scroggs*, 123 Iowa 649; *State v. Anderson*, 125 Iowa 501, 502; and see *State v. Erickson*, 45 Wis. 86. But does it follow that force is wholly immaterial? It would seem that, whenever this is asserted, it is overlooked that, if testimony tending to negative force is admissible on the cross-examination of an adult prosecutrix because it tends to negative force, that, therefore, such testimony cannot be immaterial if force or its absence becomes material in the trial for assault upon an infant.

There can be no assault and battery without force, and surely that offense can be committed upon an infant. See *State v. Fetterly*, (Wash.) 74 Pac. 810, and *State v. Heft*, 148 Iowa 617. And it has often been held that, though

prosecutrix be below age, the presence or absence of force must be considered on whether assault and battery should be submitted to the jury. *State v. King*, 117 Iowa 484, at 492; *State v. Jones*, 145 Iowa 176; *State v. Stevens*, 133 Iowa 684; *State v. Steffens*, 116 Iowa 227; *State v. Trusty*, 118 Iowa 498, at 500.

The questions asked were, in the light of the situation existing when they were asked, and of the whole record, an attempt to show that the use of force was wholly unnecessary. If the jury reached a point where it considered whether to find defendant guilty of assault and battery, rather than of simple assault, or to acquit, anything that bore on whether or not force was used was material. It may be suggested that letting in such testimony might lead to its being considered for more than that, and that it would have a tendency to divert the jury from where its consideration should be centered. That is no more true here than where such testimony is admitted in assaults committed upon persons above the age of consent. In both cases, this possibility does not justify exclusion, but merely requires proper instructions limiting the effect of such testimony. We are of opinion that answer should have been permitted, if for no other reason than because, for all that could be told at the time when answer was excluded, the jury might reach a point where the presence or absence of force would determine what the verdict should be, as between assault and battery, simple assault, and acquittal. Nor is that the sole reason for its admissibility.

In *Bessette v. State*, 101 Ind. 85, the prosecuting witness, a child, under age, was not permitted to answer on cross-examination whether she had not, on an occasion when absent from home with her stepfather, occupied the same bunk with him, and whether or not she had not told persons, whose names were given, that her stepfather had told her about matters relating to the begetting of children

and commerce between the sexes, and other matters, which indicated, if true, an utterly debased and depraved condition of mind in both. The court says that, while the rule that specific acts of immorality or misconduct of a witness cannot be proved for the purpose of discrediting him is well settled, and is not to be infringed upon, that rule is not involved in the question under consideration, because the question here is as to the extent to which a cross-examination of a witness may go, when the object of it is to impair his credibility by questions tending to show, say, that he is depraved in character, or that his habits and antecedents are immoral and infamous, which are ordinarily collateral to the main inquiry, and cannot become the subjects of independent proof from other witnesses, except in the manner provided by statute. *State v. Dudley*, 147 Iowa 645, at 651, sustains this position, at least inferentially. It involves statute rape. Defendant offered to show that prosecutrix had, prior to the alleged rape, a note in her possession saying the writer would meet her "tonight" and have intercourse with her. On objection, this evidence was excluded as immaterial and incompetent, and we said, in sustaining this ruling:

"That the mere possession of such a paper, addressed to no one and unsigned, did not tend to show that she had indulged in sexual intercourse, is too evident for discussion."

Up to this point, it is at least inferentially conceded that the examination would have been material if it *had* tended to show such intercourse. This is made more clear by the further statement that "possibly it might tend to prove an unchaste mind, but no inference of the commission of the act could properly have been inferred therefrom. For this reason, *State v. Bebb*, 125 Iowa 494, and *State v. Height*, 117 Iowa 650, are not in point."

Another reason is that cross-examination is always permissible to reveal the antecedents of the witness. Wharton, Evidence, Secs. 544, 545; *Johnson v. Wiley*, 74 Ind. 233;

*Commonwealth v. Bonner*, 97 Mass. 587. It is said in *Real v. People*, 42 N. Y. 270, a witness, on cross-examination, may be asked whether he has been in jail or state prison, and how much of his life he has passed in such places. *People v. Arnold*, 40 Mich. 710, was a prosecution for larceny from a store, committed while the merchant's attention was engaged by defendant. The merchant being the complaining witness, and having stated that he had once been in a banking firm, it is said he should have been allowed to answer, on cross-examination, "Did you not, while a member of that firm, extract from an envelope securities which were left in your vault for safe-keeping, and use their proceeds in stock speculations in New York?" and this though the witness might refuse to criminate himself. And in *Zanone v. State*, (Tex.) 36 S. W. 711, it is held that a witness in a murder trial may be questioned, on cross-examination, as to recent specific acts of moral turpitude on his part not involving a criminal offense, for the purpose of affecting his credibility. And it is a general rule that any cross-examination is permissible which will serve substantial justice, by permitting the trier to determine credibility by being given insight into the character of the witness. *Wroe v. State*, 20 Ohio St. 460; *Wilbur v. Flood*, 16 Mich. 40; *City of South Bend v. Hardy*, 98 Ind. 577, at 580; *Great Western Turnpike Co v. Loomis*, 32 N. Y. 127; *Shepard v. Parker*, 36 N. Y. 517.

The true rule may not be obscured by the fact that credibility is not affected by all depravity, and that much depends upon the nature and degree of the moral obliquity. That a jury may believe the witness, though depravity appear, is no argument for not letting it consider depravity. It is simply impossible that child or adult, being shown to have indulged in such practices as were here sought to be inquired into, are, as matter of law, as worthy of belief as they would be if not guilty of them.

9. CRIMINAL  
LAW: recep-  
tion of evi-  
dence: order  
of proof: be-  
lated testi-  
mony as to  
venue.

VI. After one argument had been made, and defendant had waived his argument, counsel for the State applied for and was given permission to recall the prosecuting witness, to have her make clearer proof of venue, counsel being uncertain as to just what the record made at that time showed on that point. This action of the court is complained of. It was one that is very largely indeed within the sound discretion of the trial court, and never interfered with unless abuse of such discretion clearly appears,—and no such showing is made in this case. See *State v. Thomas*, 158 Iowa 687.

10. TRIAL: in-  
structions:  
form, requi-  
sites and suffi-  
ciency: sing-  
ling out wit-  
ness: crim-  
inal law.

VII. It is complained of Instruction 14 that it singles out the testimony of defendant and calls special attention to it and to his interest in the case, and to the unreasonableness or reasonableness of his story; that these general matters are fully covered in Instruction 17, and therefore there was no occasion for using Instruction 14 to direct the jury's particular attention to defendant as a witness; and that there was especially no reason why he should be singled out and his interest dwelt upon, without dwelling upon that of the prosecuting witness. A mere setting out of the instruction complained of meets the objection. It was:

"The defendant has testified in this case as a witness, which he had a right to do under our laws, which gave him that privilege and made his testimony competent. You should consider his testimony and apply to it the same tests that you would to that of any other witness, taking into consideration, among other things, the extent of his interest in the result of the case; his apparent candor, or want of it; the reasonableness or unreasonableness of his narrative of events; and all the other tests you apply to the testimony of other witnesses; and then give to his testi-

mony such weight as you may find it justly entitled to."

VIII. The refusal of Instruction 7 is

11. **RAPE: trial: instructions: nature of offense.** complained of. While it might well have said so in terms, it did say in effect—and that suffices—that the crime charged here is a serious one, and such charge is easily made and hard to contradict or disprove; it is that character of crimes that tends to create prejudice against any man who is charged with such an offense; that, for this reason, it is the duty of the jury to weigh the testimony carefully, to scrutinize all of the circumstances in the light of reason and common sense, and then determine with deliberate judgment what is the very right of the matter, uninfluenced by the nature of the charge made against the defendant. And the charge fully and sufficiently impressed that great care should be given the verdict.

IX. Instruction 9 is that a rape may

12. **RAPE: nature and elements: rape on infant.** be committed or attempted upon a female child under the age of consent, though force is neither used nor intended, and though the child consents, or fails to resist. It is said to be erroneous, because there cannot be an assault without force used or intended. The instruction states the law correctly, as far as it goes. Neither the use of force nor intention to use it, consent or failure to resist, are material on whether an infant was raped—and that is all the instruction rules.

X. Defendant offered an instruction

13. **CRIMINAL LAW: instructions: requests: refusal: harmless error.** going into very full detail as to what the jury might take into consideration in determining whether the rape charged was established by the evidence. It was refused.

But the request was substantially embodied in an instruction which the court did give, and its thought further covered by the usual general instruction on what the jury might consider. Moreover, the refusal was at all events,

without prejudice, because the jury did not find defendant guilty of rape.

XI. Instructions 10 and 11, offered and refused, are, in effect, that, if there is a reasonable doubt that defendant is guilty of rape, the jury should consider next whether he is guilty of assault with intent to commit rape; that, if the jury finds defendant is guilty of some crime, but has doubt as to the degree or included offense of which he is guilty, it should find him guilty of that lower degree or included offense as to the commission of which it has no reasonable doubt. A mere inspection of Instructions 6 and 7 which the court gave shows that they are the substantial equivalent of the ones offered, in so far as consideration, step by step, is considered.

14. CRIMINAL  
LAW: instructions: conflicting instructions.

XII. Instruction 7 tells the jury that, if it finds that, within 18 months before finding the indictment, the defendant unlawfully, wilfully and feloniously made an assault upon prosecutrix, a female child under 15 years of age, with the specific intent to have carnal knowledge of her, then there should be a verdict finding him guilty of assault with intent to commit rape.

It is said that this and Instruction No. 9 conflict. The last tells the jury that, if it finds prosecutrix was, at the time at which it is claimed such assault was committed, under the age of 15 years, then neither the use of force, consent or failure to resist, are material either on rape or assault with intent to commit it. The mere setting out of the two instructions demonstrates that the complaint that they conflict is not well made.

For not submitting assault, and assault and battery, and for the refusal to allow the cross-examination of prosecutrix, there must be a reversal.—*Reversed and remanded.*

GAYNOR, C. J., LADD and EVANS, JJ., concur.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,  
Appellant, v. J. E. MERSHON, Judge, Appellee.

**VENUE:** Change of Venue—Carriers—Agency. A common carrier,  
1 sued in a county in or through which it does not operate any  
line of railway, is entitled to a change of venue to the county  
where it does so operate, even though it does have, in the county  
where sued, an agency, but such agency had nothing what-  
ever to do with the subject matter of the action. (Sections  
3497, 3500, Code, 1897.)

**VENUE:** Change of Venue—Estoppel—Evidence. Evidence in the  
2 form of correspondence reviewed, and held insufficient to estop  
a carrier from insisting on its right to a change of venue.

**CERTIORARI:** Orders Reviewable—Change of Venue. Certiorari  
3 will lie to review an order of the municipal court denying a  
change of venue in an action involving \$30.

*Appeal from Des Moines Municipal Court.*—J. E. MERSHON,  
Judge.

NOVEMBER 26, 1917.

ORIGINAL proceeding in this court brought to test the  
legality of an order by the municipal court of the city of  
Des Moines, refusing to the plaintiff herein a change of  
place of trial in a certain action pending in such municipal  
court wherein Levich was plaintiff and the complainant  
herein was defendant.—*Annulled.*

*Thos. R. Morrow and J. M. C. Hamilton, for appellant.*

*Jordan & Jordan, for appellee.*

EVANS, J.—I. The case pending in the  
1. **VENUE:**                      municipal court is entitled *Hymon Levich v.*  
change of                      *Atchison, Topeka & Santa Fe Railway Com-*  
venue: car-                      *pany.* The action was brought upon a pay  
riers: agency.



check issued by the railway company to one Ignacio Mendez, and purporting to have been endorsed by such payee. Such check was not payable at any particular place. The defendant in such action (plaintiff herein) filed a motion to change the place of trial to Lee County, Iowa, and supported such motion with a showing that such railway company operated a line of road in Lee County, Iowa, and that it neither operated nor owned any line of road in any other county in the state of Iowa. It claimed the benefit of the provisions of Section 3497 of the Code of Iowa, whereby suit against it could be brought only in said Lee County. The plaintiff in said action resisted such motion with the following affidavit:

"Polk County, }  
 "State of Iowa, } ss.

"I, Hyman Levich, being duly sworn, depose and say that I am the plaintiff in the above action; that the Atchison, Topeka & Santa Fe Railway had and has an agency in the city of Des Moines; that the check in question was mailed from the paymaster to the local agent or agency, and by or under the authority of said agent, the check was delivered."

Under this affidavit the plaintiff therein claimed the benefit of Code Section 3500, which provides that, when such corporation maintains an office or agency for the transaction of business in any county, actions may be brought in such county upon any transaction growing out of the business of such agency. This contention was met by a showing that one Larrimer was the only agent of the defendant railway company in Polk County, and that the business of his agency was confined to matters connected with the transportation of passengers and freight over said railway; that such agency had no duty to perform in the distribution of pay checks to employees; and that such office or agency

had never had anything to do in any manner with the check involved in suit. It will be noted that the affidavit of Levich above set forth specifies no name of alleged agent, and states a mere conclusion. The affidavits presented on the part of the railway company are undisputed as to any fact therein stated.

We think the showing of the railway company was definite and undisputed, that it had no office or agency in Polk County except that of Larrimer, and that the check upon which the suit was founded did not grow out of the business of such office or agency in any manner; and that, therefore, the only proper place for the bringing of suit against the railway company was in accordance with the provision of Section 3497, which would require such suit to be brought in Lee County.

There is a claim in the nature of a plea  
 2. VENUE: change of venue: estoppel: evidence. of estoppel made by the plaintiff Levich by reason of certain correspondence had with the defendant railway company after payment had been refused on the check. The plaintiff therein put in evidence the following letters received from the railway company:

"Mr. W. N. Jordan,  
 "304 Clapp Block,  
 "Des Moines.

"Dear Sir: Replying to your letter of February 13th, relative to our Arkansas River Shop Check No. 28601 in favor of Ignacio Mendez, amounting to \$30.01, which was cashed by Mr. Hyman Levich and the check dishonored by this office account payee, claiming forged endorsement. Beg to state this check was forwarded to the agent of the C. R. I. & P. lines at Valley Junction, Iowa, on June 22nd, 1916.

"Yours truly,

"E. L. Copeland, Treasurer."

"Mr. W. N. Jordan, Attorney,  
"304 Clapp Block,  
"Des Moines, Iowa.

"Dear Sir: Referring to your letter of February 13th, and to mine of the 15th regarding forged endorsement on our Arkansas Division Shop, pay check No. 28601, drawn in favor of Ignacio Mendez, amounting to \$30.01, covering his May, 1916, wages. Attorneys for Mendez are pressing me for a duplicate pay check in settlement of these wages. And before issuing same, I should like to ask if any action is being contemplated by Mr. Levich, the first endorser of the check. Unless some action is taken immediately, I shall have to make settlement with Mendez on the basis that his endorsement on the above mentioned check was forged and his money never received by him.

"Yours truly,  
"E. L. Copeland, Treasurer."

The letters thus set forth purport to be in response to a letter written by the plaintiff's attorney, which is not included in the record. The full significance, therefore, of this correspondence cannot be ascertained from this record. The claim for the plaintiff is that this correspondence lulled him into a sense of security, and in effect induced him to bring his action in Polk County, because the check had been mailed to Polk County to an agent of another railroad company. It does appear therefrom that the correspondence was had after the purported endorsement of the check had been repudiated, on the ground that the payee of the check challenged the alleged endorsement as a forgery. We see nothing in the correspondence which can be said to have lulled the plaintiff into a sense of security; nor does it contain any admission inconsistent with the showing made by the affidavits. The correspondence indicates further that no objection or defense is urged against the check as orig-

inally issued by the railway company. It is the endorsement to Levich that is challenged as a forgery. The place where such endorsement was made, whether genuine or a forgery, could not affect the right of the railway company to insist upon Lee County as the proper place for bringing suit. The purported endorsement of the payee of the check does not purport to have been made by the railway company nor by any agency thereof. Upon the record, therefore, we think the railway company was clearly entitled to a change of the place of trial to Lee County.

II. It is urged, however, that certiorari will not lie, because the plaintiff in such suit had a complete remedy by a direct appeal from the intermediate order overruling the motion. It has been held by this court, however, that no appeal will lie from an intermediate order sustaining or overruling a motion for a change of venue. The order can be reviewed only by a direct appeal from the final judgment. *Allerton v. Eldridge*, 56 Iowa 709; *Horak v. Horak*, 68 Iowa 49; *Edgerly v. Stewart & Hunter*, 86 Iowa 87.

There is the further consideration that the amount involved was only \$30, and no appeal from a final judgment thereon could be had except upon certification. We have held that, in such a case, certiorari will lie for want of a right of appeal. *Chicago, B. & Q. R. Co. v. Castle*, 155 Iowa 124. It is also urged that we cannot interfere with the discretion of the trial court, nor with its finding of facts upon conflicting evidence. We find no real conflict in the evidence. The facts are undisputed. The statute confers no discretion upon the trial court to refuse a change of place of trial upon such showing.

We must hold therefore, that the order of the trial court was an illegality, within the meaning of the statute. It is accordingly—*Annulled*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

W. C. BROWN, State Treasurer, Appellant, v. HATTIE N. GULLIFORD, Appellee.

**TAXATION: Collateral Inheritance Tax—Deeds—Reservation of**  
1 **Life Estate—Waiver—Effect.** Property conveyed by deed to a collateral heir, but with a reservation unto grantor of a full life estate,—life possession, use and enjoyment of the property,—is not subject to a collateral inheritance tax if, as a part of the deed transaction, or later and prior to the death of the grantor, that is done which amounts to a good-faith sale or waiver by the grantor of the life estate and an immediate vesting in grantee of full possession, use and enjoyment of the property.

Phrased differently, the tax is avoided if, prior to the death of grantor, the parties in good faith substitute a new consideration in lieu of the life estate and thereby let the remainderman into full and immediate possession, use and enjoyment of the property.

**PRINCIPLE APPLIED:** Three grantors jointly, by warranty deed, conveyed a farm, then under lease and worth \$8,000, to their niece, but reserved unto themselves a full life estate, together with the possession, use and enjoyment of the property. These grantors, at other times, declared that they had given the niece the land in order that they might have a home, if they so desired. This deed made no reference to any contemplated lease, but, as a part of the same transaction, the grantors and grantee entered into a ten-year lease (terminable at the death of the grantor last surviving, if he died prior to the expiration of said ten years) at an annual rental of \$400. This lease referred to the fact that the said deed reserved a life estate in the grantors. Said lease provided that rental accruing from the prior tenant should belong to the niece. It was understood that the grantors should have a home on the land if they so desired, and the last survivor did have such home. This last survivor, subsequent to execution of the lease, devised all unpaid rentals to the niece. The niece went into possession under this arrangement, and, years prior to the death of any of the grantors, built a residence on the land sufficient to accommodate her own family and also her aunts. Other extensive improvements were made on the land by the niece.

*Held*, full title, with possession and enjoyment, was complete in the niece prior to the death of the last grantor—that the niece took nothing *by succession* upon the death of the aunts.

**TAXATION: Collateral Inheritance Tax—Deed Postponing Enjoyment, But on Consideration—Effect.** Full consideration for a conveyance which is intended to take effect in possession and enjoyment in a collateral heir after the death of the grantor, does not work an avoidance of the collateral inheritance tax.

*Appeal from Sac District Court.*—M. E. HUTCHISON,  
Judge.

NOVEMBER 26, 1917.

THE trial court sustained an objection on part of appellee to the imposition of a collateral inheritance tax, and directed a cancellation of said tax by the clerk of the court. Hence this appeal.—*Affirmed*.

H. M. Harner, Attorney General, H. H. Carter, Assistant Attorney General, Malcolm Currie, County Attorney, and R. L. McCord, for appellant.

W. A. Helsell, for appellee.

SALINGER, J.—I. Appellee contends

1. **TAXATION: collateral inheritance tax: deeds: reservation of life estate: waiver: effect.** there has been a change in statute law, and that the State is asserting superseded law. In regard to what is vital here, we find no statute change. While the wording of successive enactments is, as to the point in consideration, somewhat different, it remains the law that, if a conveyance be made to one of a class not exempted, the tax attaches as a privilege upon collateral succession if the deed is "intended to take effect in possession, or in enjoyment after the death of the grantor." With this in mind, the outstanding and controlling facts are, first, that, on the 17th day of October, 1902, Deborah, Susan and Mary Bodine, the aunts of the appellee, conveyed the land involved here to appellee by the

ordinary warranty deed, with full covenants of warranty, "reserving, however, unto the grantors herein, or to the survivor or survivors of them, a life estate in said land, and the use and occupancy, rents and profits of the same for the term of the natural life of the said grantors, or the survivor or survivors of them." It is, of course, well settled that a deed is not deprived of the attribute of being a conveyance *in praesenti* merely because the grantor reserves the right of enjoyment and possession in himself during his lifetime. But that this is so is not at all decisive here. Leaving out of consideration how far the legislature may act retrospectively in the matter, it is unquestionable it has the power to put a succession tax upon those who receive a deed *in praesenti*, with such a reservation in the grantor as is found in the deed here. See *Lacey v. Treasurer of State*, 152 Iowa 477, 483; *Herriott v. Potter*, 115 Iowa 648; *Mason v. Sargent*, 104 U. S. 689. That is to say, though the grantee in such deed becomes the owner upon delivery of the deed in such sense that his title may be the subject of levy and seizure, and that only time is wanting to make a title which includes the right to possession and enjoyment, the legislature may subject him who takes such a conveyance to a collateral inheritance tax. It is well settled that reservation of a life estate is such postponement of possession and enjoyment as that the tax attaches, under such a statute as we have. See *Reish v. Commonwealth*, 106 Pa. St. 521; *In re Green's Estate*, (N. Y.) 47 N. E. 292; *In re Brandreth's Estate*, (N. Y.) 62 N. E. 563; *Wright v. Blakeslee*, 101 U. S. 174, at 176, 177. We think *Lacey v. Treasurer of State*, 152 Iowa 477, decides nothing except that, where a life estate becomes vested, *it*, the life estate, should not be taxed under a statute which speaks prospectively, and was not in existence when such estate vested. If all else said be not dictum, the case declares that, when one takes with the burden of a

life estate reserved, he takes a grant which postpones enjoyment of possession until after the life estate terminates. To be sure, *Saunders v. Saunders*, 115 Iowa 275, holds a deed to be valid though possession is postponed until the grantor's death, but this is but deciding that such a reservation does not make the deed void as an improperly executed testamentary disposition. Of course, this in no way avoids a statute provision that a conveyance which contains such a reservation, though a good deed, still leaves the grantee liable to a succession tax.

The State challenges the sufficiency of the consideration for the deed from the aunts to the niece. It is responded, first, that no one but a party to that transaction or a creditor can raise that question, and second, that the consideration is in fact sufficient.

We are of opinion that, were it necessary for it to do so, the State, seeking to enforce this tax, can challenge a covinous conveyance, or one which, pretending to be on full consideration, is in truth voluntary. But is it a material contention? Under our statute, the tax may not be avoided merely because the grant is upon full consideration (see *In re Gould's Estate*, [N. Y.] 51 N. E. 287); and consideration is material only where a question arises as to whether the conveyance is a method of avoiding the tax. There, though the presence of consideration works no exemption, it would still be material on the question of whether it was in truth a conveyance or a mere subterfuge to evade the tax. In other words, it would bear on good faith. Here, it is practically confessed no such question arises; that the parties were in fact ignorant of the very existence of an inheritance tax law; and that evading it was not thought of. It appears, too, that the grantors were possessed of ample means which did pass under wills to collateral heirs.

If this were all, we should hold that the tax was due



because a life estate was reserved, and that it was error to hold otherwise.

II. But though the deed, by reserving a life estate, worked liability to the tax, all this could be changed by terminating the reserved estate in the lifetime of the grantor and changing the grant by adding to remainder the right to immediate possession and enjoyment. See *Lamb v. Morrow*, 140 Iowa 89. The same case is authority for holding that, in determining in this case whether such a change was made, we may take into consideration all that was done and intended.

As part of the same transaction, the parties entered into what is, in form, a lease. At this time, another held an unexpired lease. Appellee, as part of her "leasing," was permitted to collect and keep what this tenant paid after the leasing to appellee. The annual "rental" she paid was arrived at by computing five per cent on what the grantors had paid for this land when buying it to give to appellee. The deed is silent as to a lease to grantee, but the lease recites the reservation of a life estate in the deed. The lease has a term of ten years, but provides that, because a life estate has been reserved, the lease shall end when the last of the grantors deceases, if that shall occur before the ten years have run. The last survivor made a will later than the deed and the lease, giving to appellee any sum that may at her decease be due for rent. The parties understood that, if the grantors should in future desire that grantee make them a home on this land, this should be done by her. The last of the grantors surviving was given a home there and died there. While the "fine print" in the lease gives these grantors the usual powers of a landlord, grantee did what no mere remainderman or lessee would do, years before the lease expired, and years before it could be known when the life estate would terminate.

She built a house large enough for her own uses and the accommodation of the grantors. She built other buildings and fences and made general improvements and paid the taxes. The grantors declared the farm was given to appellee so that they could have a home upon it if they desired. It is stipulated appellee went into and remained in possession, not under the lease, but "under and by virtue of the aforesaid transaction."

We think the "transaction" was a commutation or exchange of the life estate reserved in the deed and recited in the lease; that the parties estimated that such estate would terminate in ten years, and agreed to substitute for that estate an annuity to be paid by grantee until the last grantor should die,—in effect, that grantees sold their life estate for \$400 a year, to be paid by grantee out of her own means. Had there been an honest agreement in terms that the life estate was sold to the remainderman, and that, in consideration, the owner of the life estate should be paid a stated sum, with a stated rebate if the seller lived less than ten years, the case would not differ in legal effect from the one we have. It would effect that, in the lifetime of the parties, there was added to the remainder title the right to immediate possession and enjoyment. As we view it, appellee, though originally not so endowed, had later vested in her, and as an addition to the grant in the deed, the right to immediate possession and enjoyment, and exercised that right before the death of her grantors, and that, therefore, the trial court held rightly that she got nothing by succession upon death of her aunts, and was not liable to a succession tax.—*Affirmed.*

GAYNOR, C. J., LADD and EVANS, JJ., concur.

MARY CARLIN, Appellant, v. FRED DAY et al., Appellees.

**CONTRACTS: Requisites, Etc.—Implied Contract Supplanting Express One on Same Subject—Work and Labor.** An express agreement for a specified wage for a specified service, excludes an implied agreement for a different wage for the same service.

*Appeal from Polk District Court.*—W. H. MCHENRY, Judge.

NOVEMBER 26, 1917.

SUIT to recover the value of services upon a *quantum meruit*. At the close of plaintiff's evidence, the trial court directed a verdict for the defendant. The plaintiff appeals. —*Affirmed.*

*B. J. Cavanagh*, for appellant.

*James A. Howe*, for appellees.

EVANS, J.—It appears from the evidence of plaintiff that she was employed by the defendants to work for them during the period of time covered by her claim, at an agreed price, first, of \$12 per week, which was later advanced to \$15 per week; and that she had received such amount so agreed upon in full, payment thereof being made in monthly installments. The plaintiff was a "practical nurse." What is meant by this designation is that the plaintiff did nursing, although she is not a graduate nurse. The occasion of her employment was that Mr. Davis, the father of the defendant Mrs. Day, was an invalid, and a member of the family. The defendants advertised for help, and the plaintiff answered the advertisement. She testifies as follows:

"They talked to me on this occasion about the work I was to do and about wages. She asked me what I would charge, and I said \$15 a week, and she said, 'That is too

much; don't you think you could take a little less?" I said, 'For nursing and lifting a heavy man like that, that can't move only as he is lifted, night and day, it is a serious position. I am good for it all right, but I don't like to go for \$12.' She spoke about other things, and gave as a reason I won't mention that she only could pay \$12. I said, 'If you can't do it, I will take \$12.' I said, 'I don't want to do much housework at \$12.' She said, 'I don't care; if you take good care of dad, you won't have much housework to do.' On Friday I went. She said she couldn't pay any more wages. I said I wouldn't like to do much housework and work for \$12, for I wouldn't get much rest with that old gentleman. She said, 'Fred and me will do the work; you won't have much bother; you come and take care of dad, and you won't have much bother with the housework.' I was good for the case when I went there, and it seemed Mr. and Mrs. Day were both pretty sickly people, and I helped all the time."

The plaintiff began work on the 3d day of July, and did general housework in connection with her care of Mr. Davis, the family consisting of five persons. On November 19th, Mr. and Mrs. Day left for Rochester, Minnesota, where Mrs. Day underwent a surgical operation. They returned five weeks later. During their absence, the family consisted of three persons, including a young nephew, 17 years of age, whose duty it was to take care of the furnace. This duty was not faithfully performed, according to plaintiff, and, upon her complaint, the young man ceased to be a member of the family shortly after the return of the defendants. The plaintiff testified further as follows:

"When they were going away to the hospital at Rochester, in November, they and myself had a talk about my doing the housework. This conversation was about November 19th. I said, 'You are going away, and there is

nobody left here to help, and the boy and the old gentleman are here, and my patient is here, and winter is here, and the furnace is here; and if I undertake this work I expect to be paid for it;' and Mr. and Mrs. Day said, 'We will pay you for it; we will give you all it is worth;' and I said that was satisfactory."

She also testified that, shortly prior to the 19th day of November, her wages had been raised by an express agreement to \$15 a week, and such sum was thereafter paid to her. After the return of the defendants, the plaintiff continued in the service, doing the same kind of work as before, and receiving therefor \$15 per week at stated periods, receipting therefor in full each time of payment. It appears also that, shortly after the date of the return of the defendants from Rochester, the plaintiff received an excess payment of \$10. No reference to such excess payment is made in the oral evidence. All receipts given by plaintiff were "in full." Some of them recited the fact that they covered nursing and housework. Others contained no reference to the nature of the plaintiff's services. The plaintiff continued in the service of the defendants until the death of Mr. Davis, which occurred on May 16, 1915. A few days later, she presented a statement of her bill for \$65.35, which was paid, and for which she receipted "in full." She has brought this action for 25 weeks of domestic service at \$5 per week, alleging that the price charged is the going wage for such services. Her petition is bottomed, not upon any express agreement for extra pay, but wholly upon an implied agreement therefor.

The sum of the situation is that the plaintiff entered the employment of the defendants under an express agreement fixing her wages, and that she performed her work in pursuance of her employment, and received her express wages therefor. Her own testimony shows that she understood the general nature of the service expected from her

to be *nursing* and *housework*. It goes without saying that the two lines of service are very closely associated. The express agreement between the parties covered the field of their contractual relation. The plaintiff sold her working time for \$15 a week. If improper service was demanded of her, she could terminate the contract. But she could not continue under and yet ignore it. The express agreement as to wages left no room for an implied one for a different wage. She did not plead an express agreement for additional wages. The case is quite similar in its facts to *Jerome v. Wood*, 39 Colo. 197, wherein recovery was denied. See also *Voorhees v. Executors of Woodhull*, 33 N. J. Law 494; *Mathison v. New York Cent. & H. R. R. Co.*, 76 N. Y. Supp. 89; *Meginnes v. McChesney*, 179 Iowa 563.

We think the trial court properly directed a verdict, and its order is—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

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MARIA E. COCHRAN et al., Appellants, v. W. F. MAIN et al., Appellees.

**MORTGAGES: Validity—Fraud—Evidence—Sufficiency.** Evidence  
1 reviewed, and held insufficient to show that a mortgage had been obtained by fraud.

**DEEDS: Validity—Fraud—Failure to Read.** One who knows that  
the instrument he is signing is a deed may not predicate fraud or invalidity on the plea that he signed the instrument without reading it.

**MORTGAGES: Foreclosure—Prayer for Alternative Relief.** A  
3 prayer that plaintiff's title be quieted absolutely, with prayer for foreclosure as alternative relief, entitles the pleader to foreclosure when it is found that he is not entitled to the former relief but is entitled to the latter.

**FRAUD: Evidence—Admissibility.** Fraud perpetrated by a hus-  
4 band upon his wife in inducing her to execute a mortgage is not

admissible against the mortgagee unless such mortgagee is connected therewith.

**HOMESTEAD: Transfer or Conveyance—Joinder of Husband and Wife.** Where both husband and wife joined in the execution of an absolute deed to a homestead, it is immaterial to the validity of such transaction that the wife was not a party to a subsequent arrangement between the grantee and the husband by which, under specified conditions, the husband was to receive a reconveyance.

*Appeal from Johnson District Court.—R. P. HOWELL, Judge.*

MAY 14, 1917.

REHEARING DENIED NOVEMBER 26, 1917.

CONSOLIDATED suits. The inquiry on appeal resolves itself into whether it was error to deny the alternative prayer of appellants that a deed and contract to reconvey given to appellant be foreclosed as a mortgage.—*Reversed.*

*Grimm & Trewin*, for appellants.

*Ranck & Messer, A. E. Maine and C. H. Van Law*, for appellees.

SALINGER, J.—I. W. F. Main answers, separately, that the relations between him and Cochran were confidential, in the sense that Cochran knew that business reverses and conditions obligated Main to borrow; that, when Main, according to custom, conferred with Cochran as to how to obtain a loan of \$6,000, Cochran suggested a mortgage to him upon the Main homestead, known by Cochran to be worth from \$12,000 to \$15,000. Finally, Cochran pointed out that he was loaning at low interest, and if an ordinary mortgage were given, it would be taxed, and that, to avoid this, Main and his wife should make a deed, and there should be made a contemporaneous writing, in the nature of

1. MORTGAGES:  
validity:  
fraud: evi-  
dence: sum-  
ciency.

a defeasance or agreement to reconvey upon payment of the loan. Main acquiesced. Cochran agreed to prepare, and there were prepared, papers to effectuate this arrangement in such way as that the papers would amount to a mortgage. Main, his wife and Cochran met in the office of Milton Remley on November 7, 1908, to carry out this plan. Main concedes that there a deed and contract were produced that were the equal of a mortgage. He and his wife signed the deed, but the wife did so without having same read or reading it. Immediately after signing, Mrs. Main was told that she had signed a deed, but, as soon as the proposed contract of defeasance was read to her, she refused either to convey or encumber her homestead rights. Main was under belief that the arrangement was therefore abandoned, and the deed and proposed contract destroyed. But he was and remained "in dire and absolute need" of the \$6,000. Finally, on January 11, 1909, he obtained the loan and secured it by signing a contract in substance like the one his wife had refused to sign, and delivering to Cochran the deed which Main had supposed was destroyed.

II. The answer builds a claim of fraud, in effect this. Cochran and Main knew that Main's wife believed that the deed was destroyed and the loan abandoned. They knew that no lien upon the homestead could be effected unless Mrs. Main acquiesced in a delivery of the deed by her husband; Cochran and Main knew that she was not acquiescing, because she did not know there was anything to acquiesce in; and Cochran induced the husband to keep her in ignorance. Both Cochran and Main believed that what Main was asked to do constituted at most no more than an equitable mortgage, and in truth it could amount to no more. Cochran induced Main to give such equitable mortgage. The vitals are that Cochran, by false and fraudulent representations, which were true and which Main



knew to be true, induced Main to take \$6,000 of Cochran, and in return to give a security which Cochran knew was worthless, with purpose to deprive the Mains of their homestead by means of what Cochran knew could not affect any right to or in the homestead, and that, because Cochran sought to enforce the contract against the homestead, Main is relieved from repaying what Cochran loaned him.

We are relieved from passing upon whether this rather unusual defense would avail if sustained by the evidence, because the vitals of such defense are not proved. If there be anything that even tends to show that Cochran made any representations or was guilty of any fraudulent conduct, it consists of: (1) Testimony aptly objected to, which was incompetent because Cochran was dead when same was offered; (2) testimony of Main that he asked Remley whether delivering deed when both Cochran and Main knew that Mrs. Main refused to deal would be effective and get Main into trouble, and Main was assured that neither was so, relying upon which Main claims that he delivered the deed and made contract—and this is improbable and denied, and is not binding upon Cochran; (3) a statement by one Maize that Remley told him, later, that a deed delivered in the circumstances such as the Mains assert would not, in law, be delivered at all, which is a statement fully denied, and is also not binding on the Cochrans; (4) alleged confidential relations, consisting of paying J. C. Cochran something like \$25 or \$35 a month for services enabling Main to obtain loans, and of Cochran's having knowledge of W. F. Main's business affairs, with a view to knowing what loans were justified.

It may be added in passing that, when later W. F. Main filed his schedule in bankruptcy, he listed the claim of Cochran as being a promissory note secured by mortgage on the premises occupied by the Mains as a homestead.

The briefs on what constitutes actionable, false and fraudulent representations are sound, but neither they nor pleading is a substitute for evidence on whether any such representations were or were not made. In this condition of the record, we are unable to formulate any theory upon which the action of the trial court denying all relief against W. F. Main can be supported.

III. As to the case of Janet L. Main:

There is no occasion to refer to the voluminous pleadings on her part beyond saying that there is sufficient pleading to give her the benefit of whatever proof she has, and pointing out some admissions they contain.

In substance, her claim is that she  
2. DEEDS: valid- signed a deed to her homestead without  
ity: fraud:  
failure to knowing its contents, believing it was a  
read. mortgage. No serious claim is or can be  
made that a fraud was thus worked upon her, because she concedes that, immediately after signing, she was informed that she had signed a deed, and asked to join in a contract which would restore the property conveyed by the deed upon repayment of a loan to be made her husband.

In the circumstances disclosed by this record, Mrs. Main gains nothing from the fact, if it be one, that she signed the deed without reading it or having it read. *Chirurg v. Ames*, 138 Iowa 697; *Kimball v. Eaton*, 8 N. H. 391; 13 Cyc. 737. This leaves her nothing except a complaint that there was this "fraud." Upon being thus advised, she refused to do anything that would either encumber or convey her homestead rights; that thereupon the negotiations were abandoned; that she then was under the belief that the deed and the proposed contract had been or were to be destroyed; that the deed was not destroyed; and that thereafter her husband, without her knowledge or consent, entered into a contract with Cochran different from the one which she had refused to sign,

and in connection delivered to Cochran the deed which she supposed had been destroyed; that thereupon the said loan was made, and Cochran and her husband placed said deed of record, thus creating a cloud upon her title or rights. Both husband and wife testify in support of this claim.

In this transaction claimed to have been abandoned, Mr. Milton Remley took an active part, and he positively denies the essentials of the claim made by the Mains. In effect, he says that the deed was read over to Mrs. Main. All agree that the proposed contract of defeasance or for restoration was. Mr. Remley says that this phase of the transaction was canvassed for more than an hour; that he suggested that it was an unwise thing to encumber a homestead if there was any other course left open; the upshot was that all parties agreed that the husband would make an effort to obtain the loan he desired of someone other than Cochran, by some method other than encumbering the homestead. The deed was left with Remley against the contingency that Main might be unsuccessful, and the deal was then postponed temporarily, but indefinitely as to time; that, before Mrs. Main left, he requested a distinct direction, and she agreed that the deed should be left with him, and that, when Cochran signed an agreement in substance that they could have reconveyance, the deed was to be delivered to Cochran, upon his paying \$6,000. When Main found that he could not get the loan elsewhere, a new contract was drawn, which was made up from the notes of the one that had been proposed at the meeting, the last being in substance like the one proposed. The deed was turned over to Main or Cochran, or both. It is conceded that thereafter the husband delivered the deed to Cochran and entered into the said new contract, which is the one that Cochran seeks to enforce.

Mr. Remley says positively that there never was re-

refusal to encumber the homestead. The testimony of one Maize does no more on this head than to corroborate the claim of refusal by an alleged admission of Cochran's that there had been a refusal. But the alleged admission is qualified, in that it stated also that the refusal came after Mrs. Main was advised of the option to buy back, and told that it was not a good thing to deed the home place. There is testimony that Cochran felt very much upset because of loss occasioned by this alleged refusal. But it appears without dispute that he arranged with a bank to furnish funds to Main without interest charged to Cochran until he actually took the money.

The plaintiffs have some corroboration in admissions claimed to have been made by the Mains, to the effect that the wife fully realized, at a time when she claims not to have authorized it or known it, that a loan had been made to her husband and security therefor given upon the homestead. But admissions such as here asserted by both sides are not strong evidence, and the Mains deny making these last.

Which version is to be sustained? While, in effect, it is the claim and testimony of Mrs. Main that she was deceived into executing a deed when she had been led to believe it was a mortgage, an analysis of it shows that what she really complains of is having been led to believe that she was signing the usual form by which a mortgage is created, when in fact she was deceived into signing a mortgage created by a deed to be supplemented by an agreement to reconvey upon payment of a loan; that it was a fraud to induce her to sign a mortgage unless it was one written upon an ordinary mortgage blank,—and, as seen, she was told she had signed a deed.

Many things aid in settling who has the better evidence. The testimony of Remley comes from one who has no direct or substantial interest, and is full, clear and

frank. The Mains are vitally interested, and both are quite evasive, where they are not overready. It took much pressure to have the husband admit that he got the \$6,000 and to have Mrs. Main say that she consented to join in a mortgage because her husband was in dire need of the \$6,000. Both testify that, before they went to Remley's office, nothing had been said or done to arrange for a loan or giving security for one; but it appears, by their own sworn pleadings and their own other testimony, that there was a prearrangement, and that husband and wife went to the office of Mr. Remley to give a mortgage upon the homestead as security for a \$6,000 loan. On their testimony, when they reached Remley's office to make the mortgage, the papers by which it was proposed to make it were, by some miracle, already prepared for signature. Starting with the premise that both knew that the husband *must* have the money, Cochran was willing to lend, and it could not be got except upon mortgage to Cochran, and that both had agreed and were present to mortgage the homestead to secure the loan, how can it reasonably be found that Mrs. Main, after being truthfully told that a deed and a proposed contract would make that mortgage, refused to make deed *or mortgage*? Her husband, who attempts to support her claim, admits, in his sworn pleadings, that the mutual purpose was to have the deed and the contract constitute a mortgage. The record overwhelmingly demonstrates that Cochran considered himself a mortgagee only. The proposed contract and the one finally entered into by the husband gave the Mains possession, and shows on its face that it makes the deed operate as a mortgage. Mrs. Main describes the one she refused to sign as one giving privilege to get back the house by paying \$6,000 within a stated time. When the deed was offered on the trial, one objection was that the pleadings disclose that an instrument was to be executed in conjunction therewith which Mrs. Main

had refused to sign. In her cross-petition, she declares that the paper she refused to sign was part of the transaction of signing the deed. Her husband says, in a pleading which he verifies, that a deed to the homestead was produced and a contract purporting to show the necessary terms and conditions to make the deed into a security for said loan, and that Cochran *falsely* represented to him the nature of the deed by stating that it was equivalent to a mortgage and would be treated as such, and was only for the purpose of protecting Cochran. It is beyond question that Cochran regarded the making of the deed and a contract like the one proposed as a mortgage. Maize says that Cochran said he thought as much of Main's family as of his own, and would not take their home, and that they had an option to pay back. A memorandum found in his papers and a letter he wrote Main demonstrate that this was his attitude. So does an answer he filed. While the contrary is urged for it, the very suit he brought proves he did not claim title by deed. While he prayed that this title be quieted, it was not on the ground that he had a deed, but because his contract, which provided for a forfeiture on nonpayment, had been breached. On this appeal, appellants assign as error that the court would not hold that the deed and contract were in effect a mortgage.

We are unable to reach any conclusion save that it was agreed by all that the matter in hand should be kept in abeyance pending an attempt by Main to borrow elsewhere, and upon the failure of that, the husband could deliver the deed and make the contract he did make. We are abidingly persuaded that the evidence fully sustains the claim of the appellants that, at worst, they were entitled to be dealt with as mortgagees.

We have no occasion to say whether, even if there were no conflict, the alleged refusal would have made the subsequent dealing ineffective as a mortgage upon the home-

stead. Where, as here, there is plea and proof that plaintiff had the rights of a mortgagee, and a prayer for general relief, rights as mortgagees may be enforced though the general prayer asked that full title be given because of said breach of contract. *Hoskins v. Rowe*, 61 Iowa 180, at 182; *Pond v. Waterloo Agric. Works*, 50 Iowa 596; *Thomas v. Farley Mfg. Co.*, 76 Iowa 735; *Reiger v. Turley*, 151 Iowa 491. But this need not control, because appellants expressly prayed foreclosure as alternative relief.

Owing to the manner in which we dispose of the case, it is quite immaterial, if true, that Cochran told Maize that he would not want Mrs. Main advised of what he and Main had done, explaining that the deal was a personal one between him and Main—a statement that Cochran admitted that he had taken a worthless security.

The proposed contract and the one finally entered into were not substantially different. But what we have said makes plain that it is not material if they were. . . Fraudulent representations, if any, to the wife, made by her husband, do not affect Cochran. *Warthen v. Himstreet*, 112 Iowa 605, at 607.

We have given the fact that the trial court saw and heard the witnesses all the effect it is entitled to on this review, but, notwithstanding, find that the appellants have a mortgage. That being so, it is no argument, if true, that the property is worth from \$16,000 to \$17,000. The appellees can retain this property, no matter what its value, by paying the mortgage debt.

We are furnished able and exhaustive citation of authority upon whether Cochran may have relief against so much of the premises as exceeds one-half acre, and for

3. MORTGAGES:  
foreclosure:  
prayer for al-  
ternative re-  
lief.

4. FRAUD: evi-  
dence: admis-  
sibility.

5. HOMESTEAD:  
transfer or  
conveyance:  
joinder of hus-  
band and wife.

the undeniable proposition that the homestead can be encumbered only upon written instrument signed by both husband and wife, and that signing by one spouse and verbal authority to mortgage given by the other is ineffective. They are irrelevant. They would be applicable if an alienation of the homestead, rather than an agreement to restore it, were involved. The *alienation* was jointly signed. Whatever was verbally done or authorized relates to avoiding what was so signed.

The elaborate briefs on what does and does not constitute an effective delivery have furnished little, if any, help to determining whether there was a delivery in this case.

In view of the disposition made of the appeal, it is unnecessary to consider the claim of title by adverse possession made by the appellees.

The decree of the district court is reversed, with direction to enter decree of foreclosure as prayed.—*Reversed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

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T. D. CONROY, Appellant, v. COUGHLON AUTO COMPANY et al.  
Appellees.

**SALES: Rescission—Reasonable Time.** Rescissions of sales must  
1 be made promptly upon discovering the inducing fraud, but there is no exact standard of diligence in following up and verifying suspicions of fraud, and no exact standard of *time* in which the vendee must rescind after obtaining proof of the fraud. *Held*, a rather belated rescission was timely.

**SALES: Rescission—Delay—Change of Position of Other Party.**  
2 One guilty of fraud may not defeat rescission by the naked fact that he has disposed of the property which he received from the one seeking rescission, even though part of such property was a note and mortgage.



**SALES: Rescission—Trading Contract With Inflated Values.** Trading contracts with inflated values will, on rescission, be adjusted on the basis of the actual values of the properties.

*Appeal from Webster District Court.*—H. E. Fry, Judge.

NOVEMBER 26, 1917.

SUIT to rescind a contract resulted in the dismissal of the petition. The plaintiff appeals.—*Reversed.*

*S. A. Frick and E. C. Stevenson*, for appellant.

*M. J. Fitzpatrick and M. C. Coughlon*, for appellees.

LADD, J.—The plaintiff exchanged a  
1. **SALES: re-** Ford automobile, 1911 model, at \$225, a  
**scission: rea-**  
**sonable time.** team of horses, with double harness, blankets and wagon, at \$280, to defendants for a Detroit touring car, Model 2-A 2779, at the price of \$930, executing his note for the difference of \$425, and securing payment thereof by mortgage on the last mentioned machine. This happened on December 4, 1914, though the agreement was entered into two days previous. In this suit, rescission of the trade is sought, on the ground that defendants represented the Detroit car to have been a 1914 model, with 30-horse power engine, whereas it was a 1913 model, with 25-horse power engine; and that such representation was made with knowledge that plaintiff's purpose in exchanging was to acquire a new automobile that he could sell. The evidence leaves small room for doubt as to the misrepresentation. The plaintiff testified to inquiring of Jeremiah Coughlon, on December 2, 1914, "Is that a new 1914 model?" and to his answer, "These all are;" and again on the 4th, immediately prior to the consummation of the deal, "Now Mr. Coughlon, this is a brand new 1914 model?" and to his answer, "Yes, these are all 14's here." Culver, who accompanied plaintiff, and also a son, Frank Conroy, swore

to having heard this question and answer in substance. On the other hand, Jeremiah Coughlon admitted having had no 1914 models, stated that he showed the Detroit car to plaintiff, and swore that "not a thing was said about the model of the car to my knowledge, nor the size of the engine."

We are convinced that, though this car had been on hand since June, 1913, and was a model of that year, defendants, through Jeremiah Coughlon, falsely represented it to be new and of 1914 model. There was not much difference in the models of the respective years, being priced alike, and the 1914 model having engine with factory rating of 5-horse power higher, and, according to the A. L. A. M. ratings, 1.2-horse power greater. But for the purposes of sale,—and this was plaintiff's object in making the exchange,—the newer model evidently would be much the more desirable. Indeed, plaintiff would not have exchanged had he not supposed he was acquiring a Detroit touring car of the latest model. It is quite clear from the record before us that the plaintiff was overreached by defendants in the trade, and that this was in consequence of the fraud practiced in the misrepresentation of the Detroit touring automobile.

But it is urged that the election to rescind was not made within a reasonable time. The car was not used by plaintiff otherwise than in demonstrating for the purpose of sale, and, when this was done, objection was interposed that it was an old car; and in June, 1915, defendant called Coughlon's attention to the fact that he had traded it to him as a 1914 car, when it was made in 1913, and asked what he was going to do about it. In September following, in answer to inquiries by him, he was informed by the manufacturer that it was a 1913 model, and on the 28th of that month, caused to be delivered to defendants written notice that he had discovered the misrepresentation and that

he tendered to them the car and demanded the return of the property exchanged for it. This suit was begun October 26, 1915, again offering in the petition to do with the car as by the court directed.

While a party is bound to act promptly, if he would rescind, upon discovery of the fraud, how soon this must be depends on the facts of each particular case. One is not bound to suspect fraud, in the absence of anything to arouse suspicion. He may rely upon having been dealt with fairly until the discovery of evidence tending to show the contrary, and the degree of diligence in following up the clues uncovered by such evidence depends so much upon circumstances that no unvarying rule can well be laid down. Nor can it be said with certainty within what time after the perpetration of fraud has been ascertained, or in the exercise of ordinary diligence should have been ascertained, an election to rescind must be exercised, save that this must be done at once, or within a reasonable time after the discovery. *Strothers v. Leigh*, 151 Iowa 214. In *Moore v. Howe*, 115 Iowa 62, the former continued to treat the stock of goods as his own, sell therefrom, and appropriate the proceeds for four months after discovery of the defects complained of; and the court held this tantamount to an election to confirm the contract. In *State Bank of Iowa Falls v. Brown*, 142 Iowa 190, there were several renewals of the note given after the fraud should have been discovered. In *Mattauch v. Riddell Auto Co.*, 138 Iowa 22, the purchaser concluded that the automobile did not comply with the warranty, and did not tender its return until the latter part of December following.

Here the plaintiff was without evidence

2. SALES: re-  
scission: delay: of the deception in June, when he talked  
change of with Coughlon, and did not know that the  
position of car was not of a 1914 model until so in-  
other party. formed by a letter dated September 22, 1915, received from

the manufacturer of the car. He tendered the automobile within a week thereafter, and then brought this suit. He made no use of the automobile after his suspicions of the perpetration of fraud were aroused, and defendants have not been prejudiced by the delay. In view of all the circumstances, it ought not to be said that there was unreasonable delay in rescinding the deal. True, defendants have disposed of the property received, as well as the note and mortgage; but this may be adjusted by an accounting for the value of the property and an appropriate provision in the decree with respect to the note and mortgage, whereby both parties may be protected. See *Creveling v. Banta*, 138 Iowa 47, 67; *Jefferson v. Rust*, 149 Iowa 594, 606; *Fulton v. Fisher*, 151 Iowa 429, 439.

It should be added that the contract rescinded was a mere trading contract, and values appear to have been estimated for that purpose. Therefore the plaintiff should be allowed no more than the value of the Ford automobile, team, wagon, harness and blankets, the estimated values not being conclusive, but evidence merely of the worth thereof. *Fagan v. Hook*, 134 Iowa 381.

The cause will be remanded to the trial court, with instructions to determine from the evidence such values and enter a decree in harmony with this opinion.—*Reversed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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INGVAL ESTREM, Appellee, v. TOWN OF SLATER, Appellant.

**MUNICIPAL CORPORATIONS: Severance of Territory—Petition**

- 1 —Failure to Attach Plat. The statutory requirement that a plat of the territory sought to be severed shall be attached to the petition for severance, is sufficiently complied with by attaching the same by way of amendment made prior to the pub-

lication of the required notice of the action. (Sec. 622, Code Supp., 1913.)

**MUNICIPAL CORPORATIONS: Severance of Territory—Notice—**

- 2 **Jurisdiction.** Jurisdiction of a proceeding, under Sec. 622 *et seq.*, Code, 1897, to sever territory from an incorporated town, is not acquired, either over the *subject matter* or over the *inhabitants* of the town (who are given by statute the right to defend), by the publication of the required notice for a period of *less* than four weeks previous to the commencement of the succeeding term of court.

**COURTS: Jurisdiction—Subject Matter—Voluntary Appearance—**

- 3 **Effect.** Principle recognized that jurisdiction of the subject matter of an action may not be conferred by consent.

**PROCESS: Service by Publication—Requirements—Jurisdiction.**

- 4 Principle recognized that statutes authorizing service by publication must be strictly followed.

*Appeal from Story District Court.*—R. M. WRIGHT, Judge.

NOVEMBER 26, 1917.

THE corporate limits of the town of Slater originally included the  $W\frac{1}{2}$   $SW\frac{1}{4}$  of Section 29,  $SE\frac{1}{4}$  and  $E\frac{1}{2}$   $SW\frac{1}{4}$  Section 30, and the north 20 acres of the  $NE\frac{1}{4}$   $NE\frac{1}{4}$  Section 31, in Township 82 North, Range 24 West of the 5th P. M., or 340 acres. In 1911, the territory was extended so as to include all of Sections 29, 30, 31 and 32, except the  $SW\frac{1}{4}$  of Section 31, which is a part of Sheldahl, or 2,400 acres. On August 6, 1915, a majority of the property holders residing in Section 29, except the  $W\frac{1}{2}$   $SW\frac{1}{4}$   $SW\frac{1}{4}$  thereof, the  $N\frac{1}{2}$  and the  $W\frac{1}{2}$   $SW\frac{1}{4}$  of Section 30 and Lot 3 in the  $N\frac{1}{2}$   $SE\frac{1}{4}$  of said section, the  $N\frac{1}{2}$  and the  $SE\frac{1}{4}$  of Section 31, except the north 20 acres of the  $NE\frac{1}{4}$   $NE\frac{1}{4}$  of said section, and Section 32, filed with the clerk of the district court a petition praying that said land be severed from the corporation of Slater. This petition was amended on the following day by attaching a plat thereto. Notice was published and the incorporated town

answered. On trial, the jury returned a verdict favoring the severance of the territory, thereby reducing the corporate limits by Lot 3 in the N $\frac{1}{2}$  SE $\frac{1}{4}$  Section 30, and 60 acres in Section 29, below those established originally. Judgment was entered on the verdict, and the incorporated town of Slater appeals.—*Reversed.*

*A. O. Wydell and Bert B. Welty, for appellant.*

*E. H. Addison, for appellee.*

LADD, J.—Slater is at the intersection of the lines of railway of the Chicago, Milwaukee and St. Paul Railway Company and the Chicago & Northwestern Railway Company, and has about 670 inhabitants. As originally incorporated, its corporate limits included 340 acres. In 1911, these were extended so as to include 2,400 acres. By the judgment entered on the petition of severance, from which defendant has appealed, its territory has been reduced to the original corporate limits, less the 60 acres in Section 30, and possibly Lot 3 in the N $\frac{1}{2}$  NE $\frac{1}{4}$  of Section 30, whatever that may be. Several errors are assigned, which, if argued, may be considered as we proceed.

I. A plat did not accompany the petition when filed, but was filed the next day. Section 622 of the Code provides that the petition shall describe the territory proposed to be severed from town or city and "have attached thereto a plat thereof." The plat was attached by amendment, before notice, as required by the next section, had been published, and therefore was in apt time. The plat was not very artistic or accurate, but about such as a lawyer would draw; and such as, in connection with the description, would enable anyone readily to ascertain the precise territory sought to be severed. This was a substantial compliance with the statute.

1. MUNICIPAL  
CORPORATIONS:  
severance of  
territory: pe-  
tition: fail-  
ure to at-  
tach plat.

2. MUNICIPAL  
CORPORATIONS:  
severance of  
territory; no-  
tice: jurisdic-  
tion.

II. The petition was filed August 6, 1915; the notice thereof was published in four issues of a local newspaper, the first August 12th and the last September 2d; and the term of court began September 6th.

The defendant appeared and filed answer November 1st following, and now contends that the court was without jurisdiction, for that notice was not given four weeks prior to the commencement of the succeeding term of court.

The procedure prescribed by Section 622 *et seq.* of the Code for the severance of territory from that of a city or town is special, and jurisdiction to grant the relief prayed may be acquired only by compliance with these statutes. Those controlling may be set out:

"Sec. 622. When the inhabitants of a part of any town or city, whether the same is or is not laid out in lots and blocks, desire to have the part thereof in which they reside severed therefrom, they may apply by petition in writing, signed by a majority of the resident property holders of that part of the territory of such city or town, to the district court of the county, which petition shall describe the territory proposed to be severed, and have attached thereto a plat thereof, and shall name the person or persons authorized to act in behalf of the petitioners in the prosecution of said petition.

"Sec. 623. Notice of the filing of the same shall be given by publication in a newspaper published in said city or town, or by posting a notice of the same in five public places therein, four weeks previous to the succeeding term of court, which notice shall contain the substance of the petition, and state the term of court at which the hearing thereof will be had.

"Sec. 624. The hearing of said petition may be had by the court, or either party may demand a jury, and the proper authorities of such city or town, or any person in-

terested in the subject matter of said petition, may appear and contest the granting of the same. Affidavits in support of or against said petition may be submitted and examined by the court or jury, and the court may, in its discretion, permit the agent or agents named in the petition to amend or change the same, except that no amendment shall be permitted whereby the territory embraced in said petition shall be increased or diminished, without continuing the case to the next term, and requiring new notice to be given as above provided."

It is to be noted that, to confer jurisdiction, the filing of a petition such as described, and the publication of the requisite notice as exacted, are required. The petition was filed in apt time. The form of notice is not criticised. But it was not published "four weeks previous to the succeeding term of court." The statute does not exact a publication each week. One publication is all it requires. That one publication, however, must be four weeks prior to the time named,—that is, the succeeding term of court. By "succeeding term" is meant the term next following or the term first in order after the publication. The notice, then, was not published in time for the succeeding term to which returnable, nor, as we think, in time to confer jurisdiction. Indeed, appellee does not appear so to contend, but relies on the appearance and defense interposed by the incorporated town conferring jurisdiction. There are two obvious objections to this, and the first of these is that the manifest design of the publication of the notice is that the inhabitants of the city or town may have notice, as well as the municipality. If the latter only might defend, there would seem no occasion for the publication; for in that event, notice might as well be served on mayor or clerk, as authorized by Section 3531 of the Code, in which event voluntary appearance would seem permissible (though we do not so decide). See *McCartney v. City of Washington*, 124



Iowa 382; but "any person interested in the subject matter of said petition may appear and contest the granting of the same." Any such person, though accorded the opportunity of defending, is not bound to appear or defend until the statutory notice has been given, and there was no showing of acquiescence in the jurisdiction of the persons of any of these.

3. COURTS: jurisdiction: subject matter: voluntary appearance: effect.      The second objection to the acquirement of jurisdiction by the defense interposed by the town is that jurisdiction of the subject matter may not be conferred by consent.

These statutes declare precisely what is essential to a hearing and determination of the issue involved by the court. Observance thereof is essential in order that the court acquire authority to hear and determine. Among other things made essential is the publication of notice as

4. PROCESS: service by publication: requirements: jurisdiction.      specified. Service being by publication, the rule obtains that the statute prescribing service of said notice must be strictly pursued, in order that jurisdiction be acquired

over the subject matter. That may not be conferred by consent, and never save as given by law. 17 Am. & Eng. Encyc. of Law (2d Ed.) 1060. Even were it conceded, then, that the trial court may have acquired jurisdiction over the defendant town (a point not determined), yet the service was not sufficient as to the inhabitants thereof, any of whom, if interested, might have appeared and defended. Nor was there jurisdiction of the subject matter.

We are of opinion that the court was without jurisdiction, and for this reason the judgment is—*Reversed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

GEORGE GILLING, Appellee, v. B. P. HELD, Appellant.

**APPEAL AND ERROR: Reservation of Grounds of Review—In-**

- 1 **structions—Failure to Except.** Allowing a cause to be submitted to the jury on a certain theory of law, as reflected in the instructions, without objection or exception thereto, precludes subsequent complaint by the non-objecting party.

**NEW TRIAL: Grounds—Misconduct of Parties—Discussing Cause**

- 2 **With Jurors.** Improperly discussing one's cause with members of the jury panel is not ground for new trial when no discussion of any kind was had with the jurors who actually heard the cause.

*Appeal from Hardin District Court.—R. M. WRIGHT, Judge.*

NOVEMBER 26, 1917.

ACTION at law to recover on a *quantum meruit* for alleged services rendered as a cement mason and for certain other services rendered as a carpenter and for certain overtime as a farm laborer. The answer was a general denial, a plea of settlement, and a counterclaim. Verdict for plaintiff, and defendant has appealed.—*Affirmed.*

*J. H. Scales, for appellant.*

*Lundy, Peisen & Soper, for appellee.*

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| <ol style="list-style-type: none"> <li>1. <b>APPEAL AND ERROR: reservation of grounds of review: instructions: failure to except.</b></li> </ol> | <p>EVANS, J.—1. The material facts in the case are not greatly in dispute. The parties were both residents of Ackley, Iowa. The defendant was the owner of a large farm, situated in North Dakota. In April, 1913, the parties entered into an oral agreement, whereby the plaintiff agreed to render the services of himself and wife to the defendant at \$60 per month. They were to go upon the defendant's farm in North Dakota and keep house</p> |
|--|---|

thereon, and the defendant was to furnish all provisions. The service of the plaintiff's wife contemplated the boarding of help on the place. The service of the plaintiff was to be of the general nature incident to such a farm. The farm buildings thereon were only partially built, and considerable work was done in their completion. This work consisted in part of cement work and in part of carpentering. Much of this work was done by the plaintiff. Field work also was done by him. This service contracted for was rendered to the defendant for a period of something more than 5 months. The plaintiff received payment from time to time at the contract rate of \$60 per month. He has not sued upon the contract. His petition was in three counts. The first count was for mason work at a *quantum meruit* of 50 cents an hour. His third count was for carpenter work at the same rate per hour. His second count was for overtime for farm work, at 20 cents per hour. The trial court dismissed the second count, and submitted the case to the jury on the first and third counts only. The jury rendered a verdict for the plaintiff for \$350. Upon motion for a new trial, the trial court reduced the verdict to \$200, and entered judgment for such amount.

The appellant specifies no particular errors relied on for a reversal, but submits his brief upon the general merits of the case. He challenges the general theory upon which the case was submitted, and contends, in effect, for the conclusiveness of his express contract. Upon the record before us, there is no way that we can reach that question. Appellee insists that no exceptions were taken to the instructions. The record sustains this contention. The instructions, therefore, are not subject to review, and they have become the law of the case. The theory on which recovery was permitted is set forth in Instructions Nos. 10 and 11. Following these as the law of the case, no legal ground of complaint is left to the appellant. Whether, in

view of the express agreement of the parties, there was any room for the operation of an implied agreement, is a question upon which we cannot pass herein, and upon which, therefore, we express no opinion. See *Carlin v. Day*, 181 Iowa 903.

In fairness to the veteran counsel for the appellant, it should be said that he conducted the litigation under the distractions of painful illness, and this doubtless accounts for much of the condition of the record.

2. One of the grounds for a motion for new trial was misconduct of the prevailing party, in that he had discussed his case in advance of the trial with members of the regular jury panel. This ground of complaint was supported by the affidavits of three of such members, each of whom made affidavit that the plaintiff had made certain statements in his hearing, pertaining to his case. These members of the panel, however, were not jurors in the trial of this case. A counter showing was made in resistance to this ground of the motion, supported by the affidavits of the twelve jurors who sat on the trial, whereby each juror testified that the plaintiff had not approached him in any way nor at any time concerning his case. This was an abundant showing in resistance to justify the finding of the court adversely to the defendant on such ground.

3. As already indicated, the appellant presses upon our attention the larger merits of the case and the manifest injustice of the judgment. To this it would be sufficient to say that the judgment as entered is not without support in the evidence. The case, however, has its unique features, which have not failed to attract our attention. The merits of the contention, pro and con, are deeply concealed in many incongruities on both sides.

As to plaintiff, though he purported to do farm work at \$60 per month for somewhat over 5 months, yet he has

sued for 1,057 hours for mason and carpenter work done during the same period of time at 50 cents per hour. This would mean more than 105 days of 10 hours per day, which would cover every working day in a period of 4 months. This would leave but little more than one month for farm work, which was paid for at the rate of \$60 per month for 5 months. But in addition to the mason and carpenter work, he sued also for 248 hours *extra time* for farm work. This would be the equivalent of 25 days at 10 hours a day, and would take practically all of the working days in the other month. So it is manifest that the claim of the plaintiff, added to what he had already received under the express contract, involved considerable expansion.

On the other hand, the defendant sent the plaintiff and his wife to North Dakota and deferred starting their wages until after they got there. He charged against them their railroad fare and freight paid on their goods amounting to \$117. It would cost them presumably the same amount to return. If the defendant's farm had been a few miles further distant, the expense of going and coming would have absorbed the plaintiff's entire summer's wage. As it was, it left him a very little margin. The oral agreement, as testified to by the plaintiff, would not justify the charging of the traveling expenses to the plaintiff, and it is at least doubtful if such charges could be justified under the testimony of the defendant himself as to the original agreement.

It further appears that, on the day of the separation, the parties had a fight "before breakfast." Though the fight preceded the breakfast, no breakfast followed the fight. The preparation of the breakfast for that morning was the function of the plaintiff, his wife being absent. He had overslept somewhat; and, when the defendant was ready for breakfast, the breakfast was not ready for the defend-

ant. This lapse on the part of the plaintiff could have been passed in silence by the defendant, but it was not. In excusing himself, and by way of mitigation presumably, the plaintiff said that the defendant was a miser. The defendant met this assertion with a general denial, duly verified, and supported by the poker as an exhibit. The chronological order of events was lost at this point. The details of what transpired while the parties were on the floor are involved in some confusion, the only specification being that the neutrality of a washing machine was violated by one or both of the belligerents. A peace by negotiation having been attained, the plaintiff left. The counterclaim interposed herein by the defendant claimed damages from the plaintiff, not for assault and battery, but for quitting. In support of his counterclaim, the defendant proved, by himself as a witness, that the plaintiff was worth much more than he was getting, and that the defendant had found it impossible to find anyone who could fill his place. By such proof of his counterclaim, the defendant exposed his flanks in the main case, and suffered the usual military consequences. In view of the defendant's adroit bookkeeping, whereby he made the plaintiff's employment to begin *after* his arrival in North Dakota instead of *before*, and in view further of the great value and indispensable character of the plaintiff's service, as testified to by the defendant, it would have required a course of study in a law school for any juror before he could be expected to see clearly the legal reasons why the plaintiff's compensation should be further diminished. Even legal reason must have a basis of proved facts, and these proved facts must be attained through the jury. Manifestly, the jury did not adopt the defendant's point of view. Manifestly, also, if a new trial were granted, it would be of doubtful value, if not a new danger, to the defendant, unless he were ready to shorten his front by a withdrawal of his counterclaim.

Looking at the case, therefore, in its entirety, helpless to correct specific errors, if any, and considering the case only on its larger merits, we should be unable to find that the judgment as entered was not approximate justice.

For the reasons indicated, we cannot interfere. The judgment is accordingly—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

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HOME SECURITIES COMPANY, Appellant, v. GEORGE W. TODD, Appellee.

**BROKERS: Compensation—When Earned—Evidence.** Evidence reviewed, and held to show that the broker had earned his commission under the terms of the contract.

**BROKERS: Compensation—Avoidance—Improper Payment to Another.** One who has agreed to pay his broker a commission may not avoid paying the same by settling with another who was merely assisting the broker, but was not his partner.

*Appeal from Des Moines Municipal Court.*—O. S. FRANKLIN, Judge.

NOVEMBER 26, 1917.

ACTION for the commission alleged to have been earned in finding a purchaser for real estate resulted in a directed verdict and judgment thereon for defendant. The plaintiff appeals.—*Reversed*.

*Chas. L. Snyder*, for appellant.

*A. L. Steele*, for appellee.

LADD, J.—The action is by plaintiff, as assignee of Snyder Bros., a copartnership engaged in the real estate business, to recover for services rendered in finding a purchaser.

1. **BROKERS: compensation: when earned: evidence.**

chaser for defendant's residence, located in the city of Des Moines. He listed it for sale with said firm, with the understanding that a commission would be paid, if a purchaser were found. 5 per cent on the first \$1,000 and 2½ per cent on the remainder of the purchase price is conceded to be reasonable compensation for such services. Subsequent to listing the property, defendant called at the firm's office and asked if the house had been advertised the day before, and, upon receiving a negative answer, asked that the sale be pushed. Wallace, who was in the room, inquired what kind of property they were speaking of, and defendant told him. Wallace then suggested that he knew a person who wanted to exchange an automobile for a house and, on inquiry, said the automobile was a "six-cylinder Buick," and priced at \$1,200. Thereupon, W. L. Snyder inquired of defendant if he would trade. The latter said he didn't know; whereupon Snyder remarked:

"Your property has been listed with us for \$5,500. You have been talking of taking \$5,200. They always exaggerate the price of a secondhand automobile. You put your price to \$6,000, take the \$1,200 automobile, and get \$4,800."

Defendant replied, "By George, I will do it." Thereupon, Snyder told Wallace to take defendant over and introduce him to the proposed purchaser. Wallace pertinently inquired, "What will I get out of it?" and Snyder said, "I will split the commission." Snyder testified that "Todd was standing by my desk and heard it." Wallace then went out with Todd and introduced him to Sharp, and they exchanged on the terms suggested by Snyder. Subsequently, defendant and Sharp each paid Wallace \$15 for his services, and the former declined to consider Snyder Bros.' claim for compensation.

Such was the evidence, and, as we think, it would have warranted a finding by the jury that a commission was



earned, in that a purchaser was found, and that Snyder Bros. were entitled to at least half of it. Wallace was assisting the firm in bringing defendant and the proposed purchaser together, on the express agreement that he and the firm would divide the commission to be earned. That defendant knew of this arrangement is undisputed, and, as he proceeded to take advantage thereof without objection, he would not seem to be in a situation to object to the payment of a commission for the services rendered. But ap-

2. BROKERS: compensation: avoidance: improper payment to another.

pellee suggests that, inasmuch as Wallace was acting for Snyder Bros., and the terms of sale on which a purchaser must have been found had not been agreed upon, it was competent for Wallace, defendant and Sharp to settle upon the amount of compensation for the agent's services, as a part of the terms of exchange. The trouble with this is that no such a state of facts is inferable from the evidence, or at least the jury might have found otherwise. For all that appears, Wallace introduced Sharp to defendant, and they exchanged properties and thereafter settled with Wallace. But, as the jury might well have found that Snyder Bros. were entitled to one half of the commission, and this defendant so knew, he could not settle with that firm by paying Wallace, the latter being in no sense a partner.

The court erred in sustaining a motion to direct, and the judgment is—*Reversed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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INDEPENDENT SCHOOL DISTRICT OF LIBERTY, Appellee, v. ROSA PENNINGTON, Appellant.

**APPEAL AND ERROR:** Dismissal—Want of Controversy—Non-

1 **Moot Cases.** Lapse of time will not render a cause moot *if an enforceable right is involved*. So held on an appeal involving

the validity of a contract of employment of a teacher, it appearing that, at the time of the appeal, the time in which the contract might be performed had expired.

**SCHOOLS AND SCHOOL DISTRICTS: Teachers—Contract of Employment—Limitations.** The board of directors of a rural independent school district has no power to employ a teacher under a contract which calls for performance wholly within the term of office of the board *thereafter to be organized*. (See Sections 2757, 2772, 2773, Code Supp., 1913.)

*Appeal from Boone District Court.*—H. E. FRY, Judge.

NOVEMBER 26, 1917.

SUIT to enjoin defendant from teaching school in pursuance of a contract entered into prior to the organization of the board of directors of plaintiff district, but to be performed thereafter, resulted in a decree as prayed. The defendant appeals.—*Affirmed*.

*Dugan & Dugan*, for appellant.

*F. W. Ganoë and F. L. Mackey*, for appellee.

LADD, J.—The plaintiff is a rural independent school district. At the election on the second Monday of March, 1916, H. C. Davisson was elected director, to succeed Arthur S. Whiting. Fessler and McCormick were the other directors, and they held over. On June 21st following, the board of directors as then constituted entered into a contract with defendant, employing her to teach the school of the district 32 weeks, beginning September 4, 1916. This was effected by the votes of Whiting and McCormick as against the negative vote of Fessler. Whiting's term expired July 1st, and Davisson, having duly qualified, succeeded him, whereupon the board of directors organized as required by statute. The new board of directors, denying the validity of defendant's contract, proposed to employ her for a shorter period, but she declined, and, in pursuance thereof, commenced teaching

on the day stipulated. Thereupon this suit was commenced, enjoining her from teaching or interfering with the school, and another was employed instead. There appears to have been no objection to the defendant as a teacher, the trouble arising over the period of the employment and the assumption by the expiring board of authority to enter into a contract wholly to be performed during the term of the board of directors thereafter to be organized.

I. Appellee moves that the appeal be dismissed, for that, as the period of appellant's employment has elapsed, nothing but a moot case remains. It is true that, even though we should disagree with the trial court, defendant's contract must remain unperformed; for she was to teach 32 weeks, commencing September 4, 1916, and of course that time is past. But the question of her right to teach under the contract and to recover for the time she did teach remains undetermined. Whenever a case involves rights vital as between the parties, it is not a moot case. If the appeal were to be dismissed, the decree declaring the contract invalid and making the injunction permanent would stand, and the defendant would thereby be precluded from recovery (1) for services actually rendered in pursuance of the contract; (2) for damages consequent on the breach of the contract; and (3) for damages flowing from the restraining order on the injunction bond. Manifestly, then, there is a substantial right depending on the review of the question raised in this court, and the motion to dismiss must be overruled. See *Kaufman v. Mastin*, (W. Va.) 25 L. R. A. (N. S.) 855. None of the decisions, save possibly one, relied on by appellee, are inconsistent with this conclusion.

In *Chicago, R. I. & P. R. Co. v. Dey*, 76 Iowa 278, the plaintiff dismissed the cause, and all held was that the cause would not be retained on the calendar for the assess-

1. APPEAL AND  
ERROR: dis-  
missal: want  
of contro-  
versy: non-  
moot cases.

ment of damages. In *State v. Porter*, 58 Iowa 19, the term of office of a subdirector of a school district had expired; and the court held that, as there were no emoluments attached to the office, neither party had anything to gain or lose, and the appeal was dismissed. In *Potts v. Tuttle*, 79 Iowa 253, the issue was as to who had been elected constable; and the court said that, as the term had expired and the appellant could not obtain the office or its emoluments, the title thereto ought not to be passed on. See *Brown v. Tama County*, 122 Iowa 745. *Moller v. Gottsch*, 107 Iowa 238, was an action of forcible entry and detainer, and, as the decision could only be determinative of the costs, the appeal would be dismissed. Citations might be multiplied to the effect that courts will not pass on merely abstract questions, and that, to invoke a decision, something other than a mere abstraction such as an enforceable right must be involved. *Berry v. City of Des Moines*, 115 Iowa 44; *Hatz v. Board of Supervisors*, 173 Iowa 366; *Sawyer v. Termohlen*, 144 Iowa 247; *Cutcomp v. Utt*, 60 Iowa 156. The case somewhat inconsistent with our conclusion is *Sullivan v. Garvey*, not officially reported, but to be found in 92 N. W. 672; and, in so far as inconsistent herewith, it is to be regarded as overruled. Whenever an enforceable right is involved, the question raised is not moot, and the appeal ought not to be dismissed.

2. SCHOOLS AND  
SCHOOL DIS-  
TRICTS: teach-  
ers: contract  
of employ-  
ment: limita-  
tions.

II. Had the board of directors the authority to enter into a contract for the services of a teacher wholly to be performed during the period of the succeeding board?

Is it permissible under the law for an outgoing board to thus tie the hands of its successor, regardless of the bad taste involved? We do not think so. Only such powers are conferred on the board of directors as are expressly granted and necessarily implied in order to carry these out. In a rural independent school district, the man-

aging board consists of three directors. The term of office is three years, one member being elected on the second Monday of March of each year. Section 2754, Code Supp., 1913. The board of directors organize, by the election of a president, on the 1st day of July each year, unless that day is Sunday, when the organization is to be effected on the day following, and also elect a secretary and treasurer. Section 2757, Code Supp., 1913. On that day the retiring board is required to "meet, examine the books of and settle with the secretary and treasurer for the year ending on the thirtieth day of June preceding, and for the transaction of such other business as may properly come before it."

Section 2758 of the Code Supplement, 1913, requires directors elect to qualify on or before the date of the organization of the new board, and their term of office begins at that time. *State v. Cahill*, 131 Iowa 155. Whiting was a member of the board, then, when the contract was entered into, and it must be upheld if the board as then organized had authority to enter into the contract, wholly to be performed subsequent to the organization of its successor, July 1st following. In *Burkhead v. Independent School District*, 107 Iowa 29, the defendant district was adjudged to be without power to employ a teacher for a period longer than one year, the court saying that:

"An examination of the statutes leads to the inevitable conclusion that the legislature intended such contracts to be limited in duration to the school year as determined by the board of directors. If not so limited, then the directors might employ teachers for any number of years, tie up the hands of their successors in office, and wrest from the control of the people the schools which they are required to support. The spirit of these statutes is repugnant to the idea that one board of directors, by contract wholly to be performed in the future, can divest future boards of the power to select teachers and make contracts therefor, and

indirectly take from the people all the advantages to be derived from annual elections."

Though the statute (Section 2778, Supplemental Supplement, 1915) now permits a contract for a longer period in certain districts, it has no application to a rural independent school district, and what is said above is precisely what might result were a board of school directors permitted to enter into contracts with teachers wholly to be performed during the terms of succeeding boards. Of course, as pointed out in the case last above cited, it is not essential that a contract be limited by the terms of individual members. But the purpose of the organization of the district is the appropriate education of those of school age residing therein, and the legislative purpose, plainly manifested in the statutes, is that the common school shall be, as nearly as may be, within the direct control of the people upon whom is cast the burden of support. A meeting of the voters of the district is held annually on the second Monday of March, at which a majority may change the text books, order the sale of the district's property, add branches of learning to be taught, allow school buildings to be used for public meetings, order the transfer of building fund to teachers' fund, authorize better access to the schoolhouse, vote a tax for the acquirement of a schoolhouse site and the erection of a schoolhouse, order the purchase and loan of books to pupils. Section 2746, Code. Other matters may, on petition, be submitted for decision by the voters. But the purposes expressed by the electors can be better executed through a board of directors than directly by the larger body of voters, and therefore a director is elected each year, thereby enabling the patrons of the school to control its policies through the ballot box. Moreover, the board of directors organize on the 1st day of July each year, when the necessary examination of accounts is made by the old

board and the new board enabled to begin the discharge of its duties with a clean slate. It is required to "prescribe a course of study for the schools of the corporation, make rules and regulations for its own government and that of the directors, officers, teachers and pupils, and the care of the schoolhouse, grounds, and property of the school corporation, and aid in the enforcement of the same." Section 2772, Code Supplement, 1913.

"Every school shall be free of tuition to all actual residents between the ages of 5 and 21 years, and each school regularly established shall continue for at least 24 weeks of 5 school days each, in each school year commencing the first of July, unless the county superintendent shall authorize the board to shorten this period in any one or more schools, when in his judgment there are sufficient reasons for so doing." Section 2773, Code Supplement, 1913.

The school year begins, then, on July 1st of each calendar year, and on that day the board of directors organize as such. Upon it was conferred the right to "designate the period each school shall be held beyond the time required by law." Section 2773, Code Supplement, 1913. It was authorized to prescribe the course of study. This much is necessarily to be inferred; for surely it could not have been intended that a board of directors might do so for a school year other than when it acts as such. What any particular board might determine as to how long school should be held or what studies should be taught would not be binding on succeeding boards, but each board of directors must decide these matters in harmony with present conditions. If, then, only the board organized July 1, 1916, might determine the period school should be held and the course of study, it would seem that the applicants for the position of teacher should be considered in connection with the branches to be taught, and that a contract for any specified time could not well be entered into before this had been deter-

mined by the only body authorized to say how long beyond the statutory limitation the school should be taught, and at what periods during the school year. The board of directors prior to that organized July 1st could not know how long the school would be taught during the school year thereafter beginning, nor the course of study which would be pursued, and therefore was not in a situation to contract for services of a teacher wholly thereafter to be rendered. We are of opinion that the outgoing board of directors was without authority to employ defendant as a teacher for a term commencing after the organization of the board of directors for the ensuing year. Doubtless decisions are to be found to the contrary, but construing different statutes. Some of them will be found cited in *Burkhead v. Independent School Dist.*, supra.—*Affirmed.*

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellant,  
v. SAMUEL G. TJENTLAND, Appellee.

**SALES: Construction of Contract—Entire or Severable Contracts—**

- 1 **Rescission.** Separate contract orders for separate machinery, in view of the *oneness* of purpose for which the machinery was ordered and the practical construction placed upon the orders by the parties, may constitute one indivisible contract, in the sense that a fraud-induced acceptance of the machinery covered by *one* of the orders will not bar a rescission of *all* the orders.

**SALES: Rescission of Contract—Waiver of Rescission—Evidence—**

- 2 **Sufficiency.** A buyer does not elect to waive rescission and to proceed for damages by inquiring of the seller whether he (the seller) will stand for the damages or whether the buyer must look to the seller's agent for damages.

**SALES: Rescission of Contract—Effect. *Rescission works a waiver***

- 3 **of damages.** So held where the buyer of farm machinery rescinded the contract and, in addition, sought to recover dam-



ages by reason of the loss of his crops, directly traceable to the seller's default.

*Appeal from Polk District Court.*—W. S. AYRES, Judge.

NOVEMBER 26, 1917.

SUIT in equity to foreclose a chattel mortgage. The answer admitted the execution of the mortgage and notes sued on, and averred, in substance, that they were obtained by false and fraudulent representations. It averred further that the same were executed in payment for certain implements delivered and proposed to be delivered by the plaintiff to the defendant, and that the defendant rescinded the purchase of said implements because of such false representations. The answer also avers that the defendant was specially damaged by such false representations. The answer prays for a cancellation of the mortgage and notes, and for a decree rescinding the contract of purchase, and to recover \$98 of purchase money paid, and for special damages by reason of such false representations. The trial court found a rescission and cancelled the mortgage and notes, and found also damages to the amount of \$400 in favor of the defendant. The plaintiff has appealed.—*Modified and affirmed.*

*George Wambach, Victor A. Remy and Edgar A. Bancroft*, for appellant.

*Cummins, Hume & Bradshaw and Struble & Stiger*, for appellee.

EVANS, J.—The plaintiff is a corporation engaged in the manufacture and sale of farm implements. Thompson was its traveling agent. Thompson, with one Musel, a local implement dealer, appeared at the defendant's farm in Tama County on June 25, 1915. The defendant then contracted to buy for immediate delivery a tractor,

1. SALES: construction of contract: entire or severable contracts: rescission.

a threshing machine, and a hay press. These were bought for a particular purpose, which was made known to Thompson and which was manifest. The defendant was the owner of 120 acres of growing timothy and of 130 acres of mixed timothy and clover. The hay harvest was near at hand. The defendant proposed to press and bale a considerable part of his timothy and clover, and to cut and thresh for seed the principal part of his clear timothy. The tractor shipped was intended to operate both the threshing machine and the power press for baling. The defendant signed two written orders, one covering the tractor and the other covering the thresher and the baling press. Each order called for delivery "at once." Thompson also assured the defendant, in substance, that the articles thus ordered were ready for immediate shipment, and that they would arrive not later than July 5th. On July 8th the tractor did arrive. Thompson again appeared and asked for a full settlement by notes and mortgage for the three implements. It is the contention of the defendant that at that time Thompson assured the defendant that the thresher and the baling press were in transit and would arrive either that night or the next day, and the defendant, relying upon such representation, executed the notes and mortgage in suit, covering the purchase price of his entire order. The thresher and baling press were not in transit, and Thompson had no reason to believe that they were. They did not arrive until the 25th day of July, which was too late to be of any service to the defendant for the year 1915. The defendant, therefore, refused to receive the thresher and baling press, and, as he contends, tendered back the tractor, coupling with his tender a demand for \$98, which he had paid thereon.

1. One of the first questions to be considered is whether there was *one* contract or *two*, and whether the defendant was bound to keep the tractor even though he was entitled to refuse the threshing machine and the baling press. The

plaintiff's contention is that the contract for the tractor was separate and complete, and that there was a timely delivery thereof on July 8th, and that the subsequent failure as to the other units would not affect the relation of the parties under the tractor contract. The contention for the defendant is that there was but one transaction represented by the two orders and two notes, and that one chattel mortgage covered both notes, and covered indiscriminately all the machinery thus purported to be purchased. In other words, the mortgage given purported to secure the purchase money of all the mortgaged machinery without any separation of the units. He contends also that he was induced to accept the tractor on July 8th by the false representations of Thompson that the other units were in transit, and that he would not have accepted the delivery of such tractor at that time, except in reliance upon such false representations; that the three units were purchased by him in pursuance of one purpose; and that he had no use for the tractor except for the purpose of operating the press and thresher. If the defendant was induced by false representations to order any or all of these articles of machinery, he would be entitled to interpose such defense against the order thus obtained, whether it was divisible or indivisible. The importance of the question of divisibility now is that it is claimed by plaintiff that all objection to the tractor was waived at the time of its delivery and acceptance. But if such acceptance was induced by false representations that the other machinery was in transit, we see no good reason why the fact is not available to the defendant as a ground of rescission of the acceptance of the tractor, as well as a ground of refusal of the other articles. A significant circumstance appears in evidence which indicates the construction which the parties themselves put upon the contract as an indivisible one, at and immediately after the time of the execution of the orders. The written order for the tractor

included a proviso that 10 per cent of the purchase price should be paid at the time the order was signed. No payment was in fact made at that time. The other order contained no such proviso. On June 29th, Thompson appeared again, with a request for the 10 per cent to be paid. In the meantime, he had not sent in either order. The reason given by him for deferring the same was the fact that the first payment on the tractor had not been made. If the two orders were not parts of the same transaction, the failure to make the first payment on the tractor would have furnished no warrant for delay in sending in the other order. The defendant immediately paid the amount demanded, and both orders were sent in on the following day. Thompson sent in the order to the plaintiff's office at Cedar Falls. This office, being unable to fill the order, forwarded the same to the Chicago office. The Chicago office, being unable to fill the order, forwarded the same to the factory at Springfield, Ohio. The factory, being unable to fill the order, immediately proceeded to manufacture the articles. We think it quite clear that the act of Thompson in holding up both orders until the stipulated payment should be made on the tractor was a practical construction which was accepted by the defendant, and that both parties ought now to be held to it. We are also strongly inclined to the view that the construction thus adopted was the correct construction. As to the weight of the evidence on the question whether grounds of rescission existed, we think the circumstances strongly corroborate the defendant, and that the trial court properly found for him on such issue.

2. It is urged by the plaintiff that the defendant did not in fact exercise his right to rescind, if any, but that, on the contrary, he affirmed the contract, and thereby waived his right of rescission. It is undisputed that
2. **SALER:** rescission of contract: waiver of rescission: evidence: sufficiency.

the defendant refused the thresher and the baler when they arrived on the 25th. These, therefore, never came into his possession. It is undisputed also that he demanded the return of \$98 that he had paid upon the tractor. These implements were not shipped by the plaintiff directly to the defendant, but were shipped to the local implement dealer, Musel. The tractor was never moved from the implement house of this local dealer, although it was under lock and key, and the defendant had a key. It is the contention of the plaintiff that the defendant demanded damages as a condition of surrendering the tractor. This is denied by the defendant. Whatever was done by the defendant in the assertion of his right of rescission was quite informal, and apparently without any very definite idea of the exact nature of his right. But on the whole, we think his intent and offer to rescind were made clear, and that there was no misunderstanding about it on the part of the plaintiff's agents. Plaintiff places some reliance upon a letter written by the defendant on July 20th, which was as follows:

"Tama, Iowa, July 20, 1915.

"The International Harvester Company of America,

"Dear Sirs:

"On the 25th of June I purchased from one of your agents with the name of R. H. Thompson of Cedar Rapids one 8-16 H. P. Mogul Engine, one new Racine Thresher, with 20-inch cylinder and 32-inch rear with 100 feet of belt, one 17x22 International Hay Press, belt power, and that on the 27th day of June said R. H. Thompson accepted \$70 (Seventy dollars) under the agreement that said machinery should be at Chelsea and delivered on the fifth (5) of July and that on the 8th of July the Engine was here and I paid the freight on same, \$8.25, and give said R. H. Thompson Chattel Mortgage and notes for same machines, and on same day, the 8th of July, said R. H. Thompson told me to go to work and cut my hay as he would guarantee

the rest of the machinery would be here in two days for sure. So I could depend on to get it baled and so I did but too late. It is the twentieth of July and no (baler) hay press has showed up yet. That I have had between 50 and 60 tons of hay laying flat on the ground awaiting on the hay press to come, and that I had said hay sold to be delivered baled, but now the hay is spoiled and contract is past. Said money was to be paid—the first note on said machinery due August 1st. I am just writing to you to find out if the International Company will stand for the damage or if I should hold R. H. Thompson responsible in own person. Please advise me what to do.

“Yours truly,

“(Signed) S. G. TJENTLAND.”

The claim is that this letter amounted to a waiver of the right of rescission, and that it amounted to a demand for damages. We do not think that the letter could be construed as a waiver of his present rights. Even though he had been willing, on July 20th, to affirm the contract and claim damages for the false representations, it does not follow that he consented to wait until July 25th, or that he consented to accept delivery at such deferred date. We think, however, that the letter cannot be fairly construed either as a waiver or as a demand. It only purported to be a letter of inquiry, and such inquiry was pertinent, under the circumstances. We think, therefore, that the trial court properly found that the defendant had not waived his right to rescind.

3. The trial court in its decree not only allowed a rescission, and thereby cancelled the notes and mortgage sued on, but it also allowed damages for \$400. This sum was made to include \$98 which had been paid by the defendant as a part of the purchase price of the tractor. The remaining \$302 was necessarily allowed as damages suffered by

3. SALES: rescission of contract: effect.

the defendant in the loss of his hay crop by reason of delay. Complaint is made by appellant of this feature of the decree. In this respect the decree cannot be sustained. If the defendant was entitled to recover any damages, he was entitled to recover *all* his damages. If he recovered any damages, the amount recovered must be deemed all his damages. If he should receive all his damages, he would be made whole, and there would be no occasion for awarding rescission. The defendant had his election of the two remedies: either to denounce the contract and rescind it, or to affirm it and claim damages. To take one remedy was to waive the other. Having declared upon a rescission, he was entitled to be put *in statu quo*, and to recover whatever of the purchase price he had paid. This would doubtless include any expenses incident to the purchase, such as the payment of freight. But, the rescission being awarded, such remedy must be deemed complete. He cannot have rescission without repudiating the contract, nor damages without affirming it. *Van Vliet Fletcher Auto. Co. v. Crowell*, 171 Iowa 64; *Wicks v. German L. & I. Co.*, 150 Iowa 112; *Bamberger v. Burrows*, 145 Iowa 441; *Price & Teeple Piano Co. v. Sheenan*, 150 Iowa 189, 193; *American Fruit Product Co. v. Davenport V. & P. Works*, 172 Iowa 683. To the same effect see *Wilson v. New U. S. Cattle-Ranch Co.*, 73 Fed. 994; *Stuart v. Hayden*, 72 Fed. 402; *Bowen v. Mandeville*, 95 N. Y. 237.

For the reason indicated, the decree entered below will be modified. The order of rescission and cancellation will stand. The defendant will be allowed to recover \$98 with interest, and no more, being the amount paid by him on the purchase price of the tractor, including freight. This will restore the *status quo*. No damages will be allowed.—*Modified and affirmed.*

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

J. R. OWENS, Appellant, v. NORWOOD-WHITE COAL COMPANY,  
Appellee.

**APPEAL AND ERROR: Reversal—General Order of Reversal—Effect.** A *general* order of reversal in a law action tried in the lower court to a jury has the effect of sending the cause back to the lower court for *full retrial* on the former issues, even though the opinion on reversal is based upon the insufficiency of the evidence for plaintiff.

*Appeal from Polk District Court.*—CHARLES A. DUDLEY,  
Judge.

NOVEMBER 26, 1917.

ON a former trial, the present appellant recovered a judgment. This was, on appeal, reversed, on the ground that, upon the record, the plaintiff had failed to make a case by the evidence. *Procedendo* issued in the usual way; the plaintiff had the cause reassigned for trial. Defendant moved for judgment, on the theory that the effect of the appellate decision was to put the cause of plaintiff in the same condition as if the Supreme Court had held on review *de novo* that plaintiff had failed to make a case. The trial court sustained this motion, and plaintiff appeals.—*Reversed.*

J. L. Gillespie, for appellant.

Parker, Parrish & Miller and C. Woodbridge, for appellee.

SALINGER, J.—I. The foregoing statement fairly presents what must of necessity be, and is, the position of the appellee. It insists that the aforesaid judgment of reversal, being based upon insufficiency of the evidence for plaintiff, operates as a final judgment, and that it should so operate because the law purposes "that a man shall not be twice



vexed for one and the same cause;" that "it is to the public welfare that there be an end of litigation;" and that "it concerns the commonwealth that things adjudged be not rescinded." Practically nothing is added to this statement, except to call our attention to the fact that no offer to amend the petition, and thus to tender any new issue or cause of action or new defense to the plea of settlement interposed by the defendant, was attempted, and that there was no attempt to offer or introduce any evidence additional to that which had been introduced on the former trial and fully considered by this court on appeal. We are of opinion that this contention is fully answered, and against the appellee, by *Landis v. Interurban R. Co.*, 173 Iowa 466. To the same effect is *Sanders v. Sutlive*, 175 Iowa 582.

We held, in *Landis'* case, that the maxims "that a man shall not be twice vexed for one and the same cause," and "it is to the public welfare that there be an end of litigation," are not applicable to the case of a remand on appeal for retrial or resubmission of the facts under the same issue; that a general order of reversal in a law action tried below to a jury has the effect of sending the cause back to the lower court for full retrial, even though the opinion on reversal shows that the evidence was insufficient to sustain the judgment of the lower court; and that, while the Supreme Court may in such case avoid a retrial, if that is what should be done, in its judgment, it does not so order by a general reversal, but must do so by entering special order, or by specifically directing the lower court to enter a final judgment. We applied this principle to an action for personal injury where, on appeal from a judgment in favor of plaintiff, the Supreme Court found that he was guilty of contributory negligence, and was not entitled to recover on the doctrine of the last clear chance, and where the final language of the opinion on reversal was, "for the reasons pointed out, the judgment must be and it is reversed," and

the procedendo directed the district court to proceed in the manner required by law, and in harmony with the opinion.

Our final conclusion was that, therefore, the court erred in sustaining the motion of the defendant for judgment. We adhere to this position. Wherefore, the order and judgment appealed from must be—*Reversed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

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**JEWETT LUMBER COMPANY, Appellee, v. ANDERSON COAL COMPANY, Appellant.**

**EVIDENCE: Weight and Sufficiency—Inconsistency in Proof.** No  
1 privilege is extended to a defendant to be inconsistent in his proofs. So held where defendant practically admitted the correctness of an account, claimed he had paid it, yet contended that the account had not been proved.

**PAYMENT: Requisites and Sufficiency—Authority to Receive—**  
2 **Prima-Facie Proof.** Prima-facie proof of authority in a supposed officer of a company to receive payments for the company is shown by the fact that the payments so received were properly turned over to, and accepted by, the company.

**ASSIGNMENTS: Mode and Sufficiency—Oral Assignments.** No  
3 formality is required to make a valid oral assignment of an account.

**APPEAL AND ERROR: Reservation of Grounds—Refusal of Referee to Grant Continuance—Failure to Except to Report.** Objections to the refusal of a referee to grant a continuance must be made by exceptions to the report of the referee, and in the trial court, or such objection will be waived.

*Appeal from Polk District Court.*—W. H. McHENRY,  
Judge.

NOVEMBER 26, 1917.

THIS is an action at law upon an account for lumber and cement. The defense was a general denial, plea of payment, plea of novation, plea of estoppel. The case was

heard in the first instance by a referee, who found for the plaintiff for the full amount of its claim. The report of the referee was approved and confirmed in the district court, and judgment entered accordingly. The defendant appeals. —*Modified and affirmed.*

*Roy Cabbage*, for appellant.

*Brammer, Lehmann & SeEVERS*, for appellee.

EVANS, J.—The plaintiff corporation is a lumber dealer in Des Moines. The defendant corporation deals in coal mining and jobbing. Another corporation which figures prominently in the evidence is the B. B. Lumber Company, which was, at the time involved herein, a corporation engaged in the wholesale lumber trade. Practically all the stock of the Anderson Coal Company was owned in one family, known as the Evans Brothers. The same stockholders, together with a brother-in-law, Miller, owned practically all the stock in the B. B. Lumber Company. The plaintiff sold lumber and cement at retail to the Anderson Coal Company. The B. B. Lumber Company sold lumber at wholesale to the plaintiff company. It is undisputed that, in their previous dealings, there had been more or less novation of accounts among these three corporations; that is to say, the amount owing by the Anderson Coal Company to the plaintiff on a given date was by agreement paid to the B. B. Lumber Company, and credited to the plaintiff on the account of the B. B. Lumber Company against it. It is the claim of the defendant that such an arrangement was entered into and carried out as to the account here sued on. This is denied by the plaintiff, and much of the evidence in the record is directed to this issue of fact. The defendant introduced evidence tending to show that it had paid to the B. B. Lumber Company the amounts necessary to extinguish this account, and that this was done in pursuance of an arrangement with Jewett, the president of the plaintiff com-

pany. The account sued on purports to have accrued between December 2, 1907, and October 7, 1908. The evidence for plaintiff tended to show that, on November 30 and December 4, 1907, it had a settlement with the B. B. Lumber Company, whereby the plaintiff was found to be indebted to such company for a balance of \$366; that of such balance it paid, on December 4th, \$150, and again \$150 on December 9th; and that it never afterwards incurred any account with the said B. B. Lumber Company, and that it has never owed the said B. B. Lumber Company since said time any other sum than the balance of \$66. This will indicate the general nature of the controversy made by the evidence, and the case is argued before us very largely upon its general merits.

I. As to the defense of general denial of the account, we have little occasion to deal with it. Miller, the chief witness of the defendant, admitted its substantial correctness, raising a question of doubt only as to two items, totalling less than \$10. There was, therefore, no room for any other finding than that the account was proved. The proof offered by the defendant showed payments to the B. B. Lumber Company, purporting to be sufficient to pay the full amount of the account. This proof was of itself in the nature of an admission of the amount of the account. While the defendant may *plead* inconsistent defenses, no privileges of inconsistency are extended to it in its *proofs*. In the state of the record before us, therefore, the question of the competency of the books of the plaintiff, which has been argued somewhat, becomes quite immaterial, and we shall pass it by. It is enough to say that the amount of plaintiff's account was established by the practical admission of the defendant.

1. EVIDENCE:  
weight and  
sufficiency: in-  
consistency in  
proof.

2. PAYMENT: re-  
quisites and  
sufficiency:  
authority to  
receive: prima-  
facie proof.

II. The plea of payment made by the defendant was bottomed upon the claim that the payment had been made to the B. B. Lumber Company for the credit of the plaintiff company in pursuance of a mutual arrangement therefor. As already indicated, this is denied by the plaintiff company. In support of its denial at this point, the plaintiff company introduced evidence of an alleged settlement with the B. B. Lumber Company through its president, Bricker, whereby a balance was struck between them. As against this claim, the defendant shows that Bricker had ceased to be in the employ of the B. B. Lumber Company on September preceding, and he was in no manner thereafter authorized to represent them in a settlement. Jewett appears to have been in ignorance of the termination of Bricker's relations, and the question is argued whether it was incumbent upon the defendant to show that the plaintiff knew of the termination of Bricker's relation to the company. The B. B. Lumber Company is not a litigant. All the business it had ever done with the plaintiff was through Bricker. Checks were delivered by the plaintiff to Bricker in partial payment of the balance found due, and these appear to have passed through the regular channels of the B. B. Lumber Company. This, we think, was sufficient prima-facie proof of Bricker's authority. In any event, the issue is an incidental one only, and the fact is urged only as corroborative. It appears to be undisputed that the books of the B. B. Lumber Company, at the time of this alleged settlement, did show a larger account against the plaintiff than was agreed upon in the settlement. This is accounted for under the testimony for plaintiff by certain corrections agreed upon for overcharges and for duplications of charges. The contention of the plaintiff has corroboration in the fact that one of the checks relied upon by the defendant as having been paid, was dated October 28,

1907, which was prior to the accruing of any part of the account now sued on. The last check relied on by the defendant was dated January 7, 1908. On that date, less than \$200 of the account sued on had accrued.

We cannot try the question of fact *de novo*. It is enough to say that the state of the evidence was such as to warrant a finding adverse to the plea of full payment.

III. The most serious question we see in the case is why the defendant was not allowed credit for the \$66 which was conceded by the plaintiff to be owing to the B. B. Lumber Company. Mr. Jewett testified for the plaintiff that, at the time of the settlement with Bricker, November 30 and December 4, 1907, there was an agreement for a novation of accounts to the extent of permitting the B. B. Lumber Company to take the accounts held by the plaintiff against the Anderson Coal Company and to credit the plaintiff therewith, and that this was accordingly done. Mr. Jewett testified as follows:

“At this time they said they would like to transfer the amount that was due us from the Anderson Coal Company, and that was done to the amount of \$234.37 from the east side yard, and \$162.39 from our west side yard. *That was the total amount that the Anderson Coal Company was owing us at that time.* So at their request we transferred that. They also said that they would be responsible for a collection which we had against the Nicholson Lumber Company of Ankeny for \$234.52, and that they had a way in which they could collect it. So we credited Nicholson Lumber Company and charged the B. B. Lumber Company with that \$234.52. This was on the 30th, but *we did not get through that day*, as they wished to consult some papers in their office. They came again on the 4th of December, and I then agreed on a balance. I gave them a check for \$150. Our bookkeeper made them a statement

3. ASSIGNMENTS:  
mode and suf.  
ficiency: oral  
assignments.

showing a balance due them of \$216.20 at that time, and the accounts with the coal company were settled upon that date. A few days later, Mr. Bothne came, and I gave him a check for \$150. That left \$66.20 due the B. B. Lumber Company that they have never called for."

He also testified that the amount of the accounts specified in his testimony did not include any part of the account now sued on, his claim being that such account had not accrued. It appears also that the second payment of \$150 made by the plaintiff upon the balance found against it was on December 9th. This payment still left a balance of \$66 which has never been paid. The B. B. Lumber Company immediately went out of business. Indeed, it appears to have sold out to the plaintiff company. No explanation is offered of why this balance of \$66 has remained unpaid. The present suit was brought one day before the expiration of the statute of limitations. On its face, the statute of limitations has run in favor of the plaintiff on the B. B. Lumber Company's account of \$66. Jewett's testimony shows that, at the time of the settlement, it was intended to turn over to the B. B. Lumber Company *all* of the accounts held by the plaintiff against the Anderson Coal Company. The first five items in the account sued on are as follows:

"1907

Dec. 2,	4 3x12-12	3.96
4,	28 3x12-12	28.22
5,	5 3x12-12	5.04
6,	5 3x12-12	5.04
7,	23 2x12-12	23.18"

It will be observed, therefore, that, on December 9, 1907, when the plaintiff made the second payment of \$150, this account now sued on had accrued approximately to the amount of \$66, lacking only a few cents thereof. The turning of this account as far as it had accrued, was entirely consistent with the testimony of Jewett, who con-

cedes a novation as of the time of the settlement. The time of the settlement extended to December 9th, the date of plaintiff's final payment. The only reason given in the referee's report for a disallowance of that item was that the Anderson Coal Company had no *assignment* from the B. B. Lumber Company therefor. The novation was itself an assignment. And if the question of Jewett's consent to the novation were in doubt, the agreement is proved beyond dispute as between the Anderson Coal Company and the B. B. Lumber Company. No formality is required to make a good oral assignment. If proof of Jewett's consent were lacking, the agreement between the defendant and the B. B. Lumber Company was itself sufficient as an oral assignment. Furthermore, the fact that the plaintiff company took the benefit of the credit from the B. B. Lumber Company of \$66 might well be urged as sufficient to sustain the plea of estoppel. We are satisfied that the record does not justify on any theory the disallowance of the item of \$66 as a credit upon the account sued on, and as of the date thereof. To this extent there should be a modification of the judgment.

IV. The defendant complains of the refusal of the referee to grant it a continuance for the purpose of obtaining the testimony of Bricker as a witness. The claim is that it was taken by surprise by the testimony of Jewett as to the alleged settlement with Bricker. The defendant raised no such question in the district court in its exceptions to the report, and for that reason we cannot consider it here. Some other questions are discussed by counsel for appellant, which cannot be considered for the same reason. The ground upon which the appellant is permitted to stand on this appeal is quite narrow. We think it has no other legal ground of complaint than is herein considered. The judgment below will

4. APPEAL AND ERROR: reservation of grounds: refusal of referee to grant continuance: failure to except to report.



be modified in the respect indicated. In all other respects, the judgment is affirmed.

*Modified and affirmed.*

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

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MARIE G. LONGSHORE, Appellant, v. LUELLA COPELAND et al.,  
Appellees.

**BOUNDARIES:** Acquiescence—Controlling Force of Government Monuments. Government monuments take precedence over meager and uncertain testimony bearing on acquiescence in a different boundary line.

*Appeal from Boone District Court.*—R. M. WRIGHT, Judge.

NOVEMBER 26, 1917.

PROCEEDING to establish a boundary line between two quarter-section farms. The plaintiff claimed a line by acquiescence. By cross-bill the defendant claimed a true line, and claimed that the same had been mutually recognized as such by the respective owners of the farms. There was a decree for the defendant.—*Affirmed.*

*Hunn & Jones*, for appellant.

*C. G. Lee, I. R. Meltzer, C. W. Garfield and J. A. Hull*, for appellees.

EVANS, J.—The plaintiff is the owner of the northeast quarter of a certain Section 14. The defendant is the owner of the northwest quarter of the same section. The line in controversy, therefore, extends north and south between these two quarter sections. The plaintiff's land was formerly owned by Miller, who acquired it from the government, and who lived on it until he died, in 1883. The defendants' land was owned by Waterman, who also acquired

his land from the government, and who lived upon it until he died, some 7 or 8 years previous to this suit. The plaintiff acquired her land in the year 1911, and the defendants acquired theirs in 1910. Between the two farms, a cheap wire fence had been maintained for 30 or 40 years at least. Running parallel therewith was formerly a locust hedge, a remnant of which still remains, and the course of which is readily ascertainable. The fence and the hedge are from 3 to 10 feet apart, varying a little in distance at different places. The plaintiff claims that the line of the fence has always been acquiesced in as the dividing line. The defendant claims that the hedge has always been recognized as the true line. Miller set out the hedge. He did not set it out for the full length of the line, because of wet ground. Some time later, Waterman built the fence. The fence has always been maintained up to the time of the beginning of this controversy, one half thereof being maintained by the plaintiff and her grantors, and the other half by the defendant and her grantors. The theory of the plaintiff is that Miller set out the hedge for the purpose of raising posts, and that he set the same inside the line fence and upon his own land. This theory has some corroboration in the fact that he set trees in such manner parallel with his north, east and south lines. It has further corroboration in the fact that it is very doubtful whether the hedge in question was ever used as a fence at any part thereof, although it is claimed by the defendant that there is some evidence to that effect. It is clear, however, that for more than 30 years it has never been used for such purpose; and it is claimed, also, that but a very small part thereof remains upon the ground at the present time. It appears, also, that, for a considerable distance, an open ditch runs between the fence and the hedge, so that the disputed strip had in fact little practical value to either party.

The general theory of the defendant is that the hedge

was intended to mark the true line; that Waterman, desiring to use his land as a pasture, built the wire fence close to the hedge because the hedge was too small at that time to be used for fencing purposes. The value of the intervening strip being at that time insignificant, little attention or concern was awakened by the existence of the parallel lines. The line of the hedge was a straight line. The line of the wire fence was not. It swerved more or less in its direction, and this accounts for the difference in the width of the intervening strip at different places. The plaintiff has not been able to show by any direct evidence the fact of acquiescence between Miller and Waterman, other than the actual maintenance of the fence by both of them. There appear in the record some very significant circumstances which favor the contention of the defendant. One Burkhart owned the south half of the section. His son was a witness for the defendant. He testified that, immediately before the hedge was set out by Miller, his father and Waterman and Miller made a survey in order to locate the center line; that the same was located where the hedge was later planted; that, in pursuance of the same agreement, his father planted a willow hedge, extending the same south across his half section in direct line with such locust hedge of Miller's. Such willow hedge is in existence at the present time. It appears, also, in evidence that the government quarter corner at the northwest corner of plaintiff's farm was found shortly before the trial. This same quarter corner had been found by Miller and Waterman and Burkhart at the time of their survey. It is found to be in direct line with the locust hedge and the willow hedge. The plaintiff's immediate grantor was Giles. He was a witness in behalf of the defendant, and testified to the effect that he had always recognized the hedge as the true line. Giles was grantee of the Millers. One son and heir of Miller, the original owner, testified on behalf of the

defendant to the effect that his father always recognized the hedge as the true line, and to the effect that the Miller heirs did likewise. After the plaintiff acquired her farm, she first built a new fence on her half of the partition line. Because of the irregularity of the line of the old fence, she departed therefrom to some extent and set her fence in a direct line, and thereby yielded some ground to the defendant. This is a circumstance entitled to some consideration as tending to show a want of recognition of the line fence as fixing the true line between the parties.

We are quite convinced from the record that Miller believed that he was setting his hedge upon the true line, at the time of the planting thereof. The evidence of real acquiescence since, however, is very meager and uncertain, because of the subsequent setting and maintaining of the wire fence for so many years. An examination of all the evidence satisfies us, also, that the hedge line is the true government line. This was doubtless the controlling reason with the trial court in entering decree for the defendant. It is true, as claimed by the appellant, that the line of the wire fence would divide the half section practically equally between the two parties, whereas the line of the hedge gives to the defendant an advantage of about 19 feet. This discrepancy, however, is shown to be consistent with the measurements of the government survey. In any event, the discrepancy would not be controlling if the government monuments have been ascertained, as they appear to be in this case. The case involves no disputed legal propositions. We find the facts in accord with the finding of the trial court, and its decree is therefore—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

HERMAN SNITTJER, Appellant, v. JOHN PATERNI et al., Appellees.

**CONTRACTS: Validity—Assent—Drunkenness—Effect.** Drunkenness, in order to avoid a contract with reference to nonnecessaries, must be such as to render the party incapable of understanding the nature and effect of the agreement or its consequences.

*Appeal from Grundy District Court.*—GEO. W. DUNHAM, Judge.

NOVEMBER 26, 1917.

SUIT for specific performance resulted in the dismissal of the petition. The plaintiff appeals.—*Affirmed.*

*Williams & Clark*, for appellant.

*Williamson & Willoughby*, for appellees.

LADD, J.—The defendant, John Paterni, owned 90 acres of land near Wellsburg. About the second Monday of March, 1915, plaintiff, Snittjer, entered into an oral agreement to purchase said land at \$235 per acre, paid \$10 down, and later \$10 for an oat bin, which otherwise was adjusted, and was to pay \$1,000 on the next day, or when required by Paterni, and the remainder of the purchase price January 1, 1916. Snittjer tendered the remainder of the purchase price on that date and demanded a deed, but Paterni refused the money, and would not convey. The object of this suit is to compel the specific performance of this oral contract. It appears that, on June 12, 1915, Paterni entered into a written contract with John Tjaden, by the terms of which the latter paid \$1,000 down, and promised to pay \$1,000 on demand and \$16,500 on March 1, 1916, and upon such payments Paterni undertook to convey the land to

Tjaden. Defendants contend that this contract was executed by Paterni at the request of Snittjer, and in pursuance of a bargain with Tjaden whereby the latter agreed to take the land off Snittjer's hands at a profit to him of \$500. Snittjer contends that, though this may have happened, he was incapable of making such request or of entering into such a bargain at the time, owing to incapacity due to intoxication; and this is the sole issue in the case.

About one o'clock in the afternoon of that day, Paterni, with Peters, a brother-in-law of Snittjer's, went to the latter's house, where he was in bed, but arose when called by his wife. Upon coming out, he remarked that he was not feeling very well. His wife testified that he had become drunk in the morning, had gone to bed, and was drunk when he arose to meet these men. Paterni offered him \$90 or \$100 to let him have the land back. Snittjer refused, and walked on toward a store some 20 steps ahead, talking to himself or to Paterni, the latter being unable to say which. Later, Peters took him in his automobile to the home of Tjaden, and there, after considerable parley about the sale of the land, Tjaden accompanied them to the Wellsburg Savings Bank, where negotiations continued, Tjaden offering an automobile for his bargain in the land, and Snittjer insisting on the payment of \$500. Finally Tjaden took the land on Snittjer's proposition and Peters called Paterni, and the contract was entered into, as previously stated. Tjaden paid Paterni \$500 and executed a check for \$500 to the bank, and that amount was entered on its books to the credit of Snittjer.

The evidence leaves no doubt that Snittjer had been using intoxicating liquors to excess for 25 years, and for 2 or 3 months had been under the influence thereof most of the time. But he had not been permanently incapacitated for the transaction of business, and, to obviate the sale of the land to Tjaden, it must appear that he was so excess-

ively intoxicated at the time as to have been utterly deprived of his reason and understanding. Anciently, no indulgence was extended to a person in such condition, Lord Coke saying:

"As for a drunkard who is *voluntaris daemon*, he hath (as has beene said) no privilege thereby, but what hurt or evil soever he doth, his drunkenness doth aggravate it."

The rigor of this rule has been relaxed, and an agreement for other than necessities made by a person when so drunk as to be incapable of understanding its nature and effect is voidable, at his option. Such a contract may be avoided when (1) the intoxication is brought about by the opposite party, (2) fraudulent advantage is taken of it, or (3) it is so complete as to deprive the party of his reason and agreeing mind. 1 Elliott on Contracts, Section 440.

That plaintiff may have been somewhat exhilarated or intoxicated, so that he did not give the matters involved proper attention, or fully realize the situation, was insufficient, unless he was so drunk as to be incapable of understanding the nature and effect of the agreement, or its consequences. In other words, he must have been incapable of assent, and deprived of the power to know what he was doing. *Willcox v. Jackson*, 51 Iowa 208; *Kuhlman v. Wiaben*, 129 Iowa 188; *Moetzel v. Koch*, 122 Iowa 196; *Drefahl v. Security Sav. Bank*, 132 Iowa 563; *Sievertsen v. Paxton-Eckman Chem. Co.*, 160 Iowa 662; 1 Elliott on Contracts, Sections 440, 441, and cases collected in notes. *Bottineau Land & Loan Co. v. Hintze*, 150 Iowa 646, merely determines that the evidence was sufficient to carry the issue as to intoxication to the jury.

Though Snittjer testified that Paterni did not want the \$1,000 to be paid until final settlement, the evidence shows that the latter was pressing him therefor. It was to "straighten up" the deal that Paterni went to the house, and, though saying that Snittjer was then drunk, he thought

him capable of doing business when the contract was entered into, saying that otherwise he would not have signed it.

Peters swore that plaintiff was drunk, but that, notwithstanding this, he took him to Tjaden's house to sell the land, explaining that he wanted him to make \$500, and feared he would lose it if he waited until he came sober; and yet this witness relates a perfectly rational conversation between Snittjer and Tjaden, beginning at the latter's house and ending at the bank, when Snittjer said, striking a table, "Give me \$500 and the land is yours;" and Tjaden accepted the proposition. Tjaden testified that, though plaintiff had been drinking, he was in a condition to transact business, and Claussen, who prepared the contract, swore that, though he may have had a drink or two, he was not drunk. Beibeshimer agreed with all the other witnesses that Snittjer's appearance was "tough," but thought him sober enough to do business. Ben Paterni and Meint Tjaden met him late in the afternoon, when he told them of having made \$500 on the deal, and attributed his good looks to wearing a corduroy suit. George Gertis testified that said plaintiff was under the influence of liquor at the bank, but understood what he was doing. Daily related that Snittjer came into his barber shop, a few days later, and informed him that he "had made \$500 off Tjaden." Eygabroad, an employe, corroborated Daily's story. Kelly saw him on the street that day, and thought he was not drunk.

On the other hand, plaintiff's wife swore that he was too drunk to transact business, both when he left the house, which she says was 2 or 3 o'clock in the afternoon, and when he returned, at about 5 o'clock P. M. Plaintiff testified to having no recollection whatever of the negotiations with Tjaden, or concerning the execution of the contract by Paterni and Tjaden. Scrogge swore that he drank in his presence shortly before going with Peters, and that "he was



drunk, good and plenty." Gertis saw him at the same time, and thought him so drunk that he did not know what he was doing. Gertrude Snittjer saw him when he went into the bank, and considered him drunk.

That plaintiff had been drinking in the forenoon of the day, and that he was somewhat under the influence of intoxicating liquors when the bargain was made and the contract between Paterni and Tjaden was entered into, we have no doubt. We are equally well convinced that he was not so intoxicated that he did not understand precisely what he was doing, and the consequences to follow. Paterni was pressing him for adjustment of the land deal, and he could not have proceeded more rationally than he did in undertaking to unload his burden at a profit. Nothing in his negotiations with Tjaden evidenced any defect in reasoning or understanding. On the contrary, he persistently rejected all proposals for a trade and insisted on cash for his bargain, which Tjaden finally acceded to. Possibly he might have reaped a larger profit on his \$10 investment had Paterni not insisted on payment of the \$1,000 promised, or he had taken more time to find a purchaser. It is enough that he agreed to the sale, and at the profit stated, when able to understand what he was doing and the effect thereof, though tolerably full of intoxicating beverages.

There was no error in denying specific performance, and the decree is—*Affirmed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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E. B. STARRETT, Appellee, v. EMMA A. BAUDLER, Appellant.

**EASEMENTS:** Creation, Existence, Etc.—Buildings—Easements by  
1 Implication—Lateral Support. An owner of land may, by *implied grant*, obtain the same absolute right of lateral support for

buildings, etc., as he has *by law* for the soil in its natural state: i. e., a grantor who conveys a *part* of a lot or other integral tract of land, upon which part, at the time, is located a permanent, visible improvement, thereby *impliedly* burdens the *retained* part of the lot or land with an easement, running with the land, for the lateral support of the improvement located on the part of the land sold—an easement the *non-negligent* invasion of which matures a cause of action for damages.

PRINCIPLE APPLIED: One Frisbee died seized of Lot 11, upon which a brick building with stone foundation had been built. For some reason, the east foundation, two feet wide, had been built wholly upon the west two feet of Lot 10, which was immediately to the east of Lot 11. Longshore owned Lot 10, upon which stood, by itself, a frame building. Frisbee's heirs, apparently, settled this two-foot encroachment by giving Longshore, without controversy, a half interest in said wall, in return for a conveyance of the two-foot strip. Longshore gave the Frisbee heirs such a conveyance, it reciting that Longshore "reserved absolutely a full one-half interest in the stone and brick wall now situated on said strip, said reservation being the greater part of the consideration hereof." Three days later, and before the said deed to said two-foot strip was recorded, Longshore conveyed the *remaining* portion of said Lot 10 to Fred Baudler, the said two-foot strip being specifically "excepted." Baudler, 18 years later, conveyed Lot 10 to Emma Baudler, "except" said two-foot strip. Three years later, Frisbee's heirs conveyed Lot 11 and said two-foot strip and their one-half interest in the said wall to Starrett, subject to the remaining one-half interest of Longshore in said wall. Neither Longshore nor any of the grantees of Lot 10, less said two-foot strip, ever made use of any part of said east wall. At this point of time, Emma Baudler proceeded to excavate Lot 10 for a building, and in so doing, *but without negligence on her part*, caused said east wall to collapse. Starrett sued for damages *to the wall only*, but alleged no act of negligence.

*Held*, the deed from Longshore to the Frisbee heirs impliedly granted an absolute easement for the support of the wall in the remaining portion of Lot 10; that said easement ran with the land so conveyed; that an interference with said easement was an interference with a "right of property," and actionable irrespective of negligence.

**ADJOINING LANDOWNERS:** Excavations—Encroachments on  
2 Adjoining Soil—Buildings—Negligence. Principles recognized:

(1) That an excavation which removes the lateral support of the soil of another, in its natural state, with consequent damage, ripens a cause of action, irrespective of negligence; and (2) that an excavation which removes the lateral support of buildings of another (no grant appearing) ripens a cause of action only in case of negligence.

**PROPERTY: Ownership and Incidents—Interference with Right of**  
3 **Property—Negligence.** Principle recognized that an invasion of one's "*right of property*" ripens a cause of action, irrespective of negligence.

**EASEMENTS: Creation, Etc.—Prescription—Buildings—Lateral**  
4 **Support.** The right to lateral support for buildings may not be acquired by prescription.

**EASEMENTS: Creation, Etc.—Severance of Ownership of Dominant**  
5 **and Servient Estates—Implied Grants—Notice.** It is quite immaterial that the owner of a servient estate took his deed *subsequent* to the deed to the owner of the dominant estate, and that said servient owner, when he took his deed, had no "record" notice of such former deed, when the easement in question would also have been implied had the order of executing the deeds been reversed, and the servient owner been the first grantee.

**PRINCIPLE APPLIED:** See No. 1. (Note that no explanation was offered as to *why* said wall was placed wholly upon Longshore's land. Being upon his land, the wall presumptively belonged to him. Therefore, had Longshore *first* conveyed to Baudler Lot 10, except said two-foot strip, and had *thereafter* conveyed said excepted strip to Frisbee's heirs, the easement in question would have been implied in favor of Longshore, just as it was implied when the order of conveyance was reversed. This result follows because said easement was (1) *visible and apparent*, (2) *continuous*, and (3) *necessary*.)

**EASEMENTS: Creation, Etc.—Rights as Against Purchaser of**  
6 **Servient Estates.** Ordinarily, a conveyance by an owner of *part* of an integral tract of land will not give rise to an implied grant of an easement in the land so conveyed, but such is not the case when the easement contended for is:

1. *Apparent*—such as one may see if he cares to look;
2. *Continuous*—such as may be enjoyed without interference with the servient estate; and
3. *Necessary*—such that there could be no other reasonable mode of enjoying the dominant estate.

*Appeal from O'Brien District Court.*—WM. HUTCHINSON,  
• Judge.

NOVEMBER 26, 1917.

ACTION for damages consequent upon the removal of lateral support. From judgment against her, the defendant appeals.—*Affirmed.*

*Herrick & Herrick and Faville & Whitney*, for appellant.

*T. E. Diamond*, for appellee.

LADD, J.—It is conceded that the sole question in this case is whether plaintiff had a cause of action against defendant. James Frisbee died seized of Lot 11 in Block 12 in the city of Sheldon. A brick building had been erected thereon, but its east wall, consisting of brick with a stone foundation, in some way not explained was placed on Lot 10, immediately east of Lot 11, and on a strip two feet wide along the west line of the latter lot. This wall extended from Ninth Street northerly 70 feet and 3½ inches. Doctor and Mrs. Longshore owned Lot 10, and on March 20, 1893, conveyed the strip described to the widow and heirs of James Frisbee, “reserving absolute a full and complete one-half interest in and to the brick and stone wall now situated thereon, said reservation being the greater part of the consideration thereof.” Subsequently, on the 23d of the same month, the Longshores conveyed Lot 10, “reserving and excepting” the strip mentioned, to Fred C. Baudler; and on February 22, 1911, he conveyed the property by the same description to his wife, the defendant. Thereafter, and on February 21, 1914, the heirs of James Frisbee conveyed to the plaintiff the east 19 feet of Lot 11, together with one half of the party wall and the strip off the west side of Lot 10, “subject, however, to

1. EASEMENTS:  
creation, ex-  
istence, etc.:  
buildings:  
easements by  
implication:  
lateral sup-  
port.

the reservation stipulated in certain warranty deeds executed by Warren L. Ayres and Frances A. Ayres, his wife, and Maria Longshore and C. Longshore, her husband, whereby the said heirs reserve one half of the stairway on the above first described premises for ingress and egress to the upper story to conform with present wall, and whereby the said Longshores reserve absolute a full and complete one-half interest in and to the brick and stone wall of the last above described premises."

The defendant excavated her lot to a depth of about 8 feet from the street, back about 100 feet and too near the wall heretofore mentioned, and on October 22, 1914, said wall collapsed and fell. The court submitted to the jury whether the excavation done at defendant's instance caused the wall to collapse, and instructed them that, if it did, a verdict for the damages to the building and loss of rental should be returned. It should be added that the wall was never made use of by the Longshores or their grantees acquiring Lot 10 less the strip, a frame building having been thereon up to the time excavating was commenced. Want of care in what defendant caused to be done in excavating for a basement was not alleged, nor was there any claim for damages resulting to land of plaintiff in its natural state. The sole issue is whether plaintiff may recover on an implied grant of an easement in defendant's land to support the wall on the strip of land conveyed by the Longshores to the widow and heirs of James Frisbee, under whom plaintiff claims.

2. ADJOINING  
LANDOWNERS:  
excavations:  
encroach-  
ments on ad-  
joining soil:  
buildings:  
negligence.

But for such grant, defendant would have the right to excavate as deeply as she pleased, and up to the line, provided that so doing did not interfere with the lateral support of the soil of the adjacent land of plaintiff. Incident to this adjoining land in its

natural condition is the right of support, and if, without being subjected to artificial pressure, as of this brick wall, the soil sunk away in consequence of the removal of the support, as by this excavation, then the defendant must have

been liable for the damages caused to the soil of such adjoining land. This is not because of any want of care, but for that thereby the adjoining owner's right of property is invaded. *Jamison v. Myrtle Lodge*, 158 Iowa 264.

3. PROPERTY:  
ownership and  
incidents: in-  
terference  
with right of  
property:  
negligence.

The lateral support to which an adjoining owner is entitled, however, is to the earth or soil in its natural state only, and not to buildings or other improvements which may be placed thereon. If the earth sinks away or falls, in consequence of the increased pressure of a wall or other artificial weight, when, but for such wall or weight, this would not have happened, there can be no recovery; for one so improving his land is bound so to do as not to interfere with his neighbor's right to the full enjoyment of his premises. In other words, the improvement should have been set back far enough so that the increased requirement for support would have been afforded by his own land. Thus far, the law is too well settled to call for the citation of authority. In harmony with the principle last stated is the further holding by the weight of American authority that, even though the land would have sunk away without the increased pressure of building or other structure, there can be no recovery for injury resulting to the building or structure. *Gilmore v. Driscoll*, 122 Mass. 199 (23 Am. R. 312); Jones on Easements, Sec. 620.

The withdrawal of lateral support may be in such a manner, however, as to create a liability beyond injury to the land. The law requires of every man that he shall so use his own property as not unnecessarily to injure that of his neighbor, and therefore if, in making the excavation,

which he has a right to do, he does it in a negligent manner, he will be liable for the full consequence of such negligence, not only for the injury to the soil itself, but to the improvement or superstructure thereon.

There is another rule, however, sometimes denominated as an exception to those alluded to, and it is this:

"If, by grant, express or implied, the owner of the adjoining land has acquired a right of lateral support for his buildings in addition to that given him by law for his soil, the liability of the disturber by excavation is absolute in respect to the buildings as well as the soil, and no inquiry arises as to whether the work was done negligently or unskilfully." *Walker v. Strosnider*, (W. Va.) 21 Am. & Eng. Ann. Cas. 1, 3.

There was no express grant, and it is conceded that the right to lateral support may not be acquired in this country by prescription. See *Sullivan v. Zeiner*, (Cal.) 20 L. R. A. 730, and note.

4. EASEMENTS:  
creation, etc.:  
prescription:  
buildings:  
lateral support.

The theory of plaintiff is that, inasmuch as the title to the strip conveyed to his grantors and the remainder of Lot 10 was in a common owner, the Longshores, and the strip was first conveyed, the deed to the strip on the west side of Lot 10 included by implication all that was necessary to the full enjoyment of said strip with the wall thereon, and therefore carried an easement in the portion of the lot retained for the lateral support of said wall.

In England, recovery for injury to the building is awarded where its weight has not contributed to the loss of lateral support, and this rule obtains in Virginia. *Stearns v. City of Richmond*, 88 Va. 992 (14 S. E. 847). The point is merely suggested, and without intending to express an opinion thereon. Manifestly, the right to support of land and the right to support of buildings stand upon distinct footings, as to the mode of acquiring them, the former being

in the nature of a right to property, and the latter must be founded on grant, express or implied, or, as held in England, founded on prescription. See *Dalton v. Angus*, 6 L. R. App. Cas. 740. When acquired, however, the character of the rights is the same. *Bonomi v. Backhouse*, 1 E., B. & E. 622, 655.

The case of *Dalton v. Angus*, supra, was given great consideration before the House of Lords and Privy Council of England, and, though there was disagreement there, as in the courts below, as to whether one might acquire a prescriptive right to lateral support, there was none as to such right under the circumstances disclosed in the case at bar. In the course of his opinion, the Lord Chancellor clearly expressed his view of the law on the subject:

"Land which affords support to land is affected by the superincumbent or lateral weight, as by an easement or servitude; the owner is restricted in the use of his own property, in precisely the same way as when he has granted a right of support to buildings. The right, therefore, in my opinion, is properly called an easement, as it was by Lord Campbell in *Humphries v. Brogden*, 12 Q. B. 742; though when the land is in its natural state the easement is natural and not conventional. The same distinction exists as to rights in respect of running water: the easement of the riparian landowner is natural; that of the mill-owner on the stream, so far as it exceeds that of an ordinary riparian proprietor, is conventional, i. e., it must be established by prescription or grant.

"If at the time of the severance of the land from that of the adjoining proprietor it was not in its original state, but had buildings standing on it up to the dividing line, or if it were conveyed expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary, there would then be an implied grant of such support as the actual state or the



contemplated use of the land would require, and the artificial would be inseparable from, and (as between the parties to the contract) would be a mere enlargement of, the natural. If a building is divided into floors or 'flats,' separately owned (an illustration which occurs in many of the authorities), the owner of each upper floor or 'flat' is entitled, upon the same principle, to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself. *Caledonian Railway Company v. Sprot*, 2 Macq. 449.

"I think it clear that any such right of support to a building, or part of a building, is an easement; and I agree with Lindley, J., and Bowen, J., that it is both scientifically and practically inaccurate to describe it as one of a merely negative kind. What is support? The force of gravity causes the superincumbent land, or building, to press downward upon what is below it, whether artificial or natural; and it has also a tendency to thrust outwards, laterally, any loose or yielding substance, such as earth or clay, until it meets with adequate resistance. Using the language of the law of easements, I say that, in the case alike of vertical and of lateral support, both to land and to buildings, the dominant tenement imposes upon the servient a positive and a constant burden, the sustenance of which, by the servient tenement, is necessary for the safety and stability of the dominant. It is true that the benefit to the dominant tenement arises; not from its own pressure upon the servient tenement, but from the power of the servient tenement to resist that pressure, and from its actual sustenance of the burden so imposed. But the burden and its sustenance are reciprocal, and inseparable from each other, and it can make no difference whether the dominant tenement is said to impose, or the servient to sustain, the weight."

Lord Blackburn puts like conclusions on different grounds:

"It is, I think, conclusively settled by the decision in this House in *Backhouse v. Bonomi*, 9 H. L. Cas. 503, that the owner of land has a right to support from the adjoining soil; not a right to have the adjoining soil remain in its natural state (which right, if it existed, would be infringed as soon as any excavation was made in it), but a right to have the benefit of support, which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support. This right is, I think, more properly described as a right of property, which the owner of the adjoining land is bound to respect, than as an easement, or a servitude *ne facias*, putting a restriction on the mode in which the neighbor is to use his land; but whether it is to be called by one name or the other is, I think, more a question as to words than as to things. And this is a right which, in the case of land, is given as of common right; it is not necessary either in pleading to allege, or in evidence to prove, any special origin for it; the burthen, both in pleading and in proof, is on those who deny its existence in the particular case. No doubt the right is suspended, or rather, perhaps, cannot be infringed, whilst the adjoining properties are in the hands of the same owner. He may dig pits on his own land, and suffer his own adjoining land to fall into those pits just as he pleases. When he severs the ownership and conveys a part of the land to another, he gives the person to whom it is conveyed (unless the contrary is expressed) not a right to complain of what has been already done, but a right to have the support in future. It is, I think, now settled that the conveyance may be on such terms as to prevent any such right arising (see *Rowbotham v. Wilson*, 8 H. L. C. 348; *Smith v. Darby*, L. R. 7 Q. B. 716; *Eadon v. Jeffcock*, L. R. 7 Ex. 379; *Aspden v. Seddon*, L. R. 10 Ch. 394). But the

burthen both of pleading and proving such a case lies on those setting it up. And I think that the decision of this House in *Backhouse v. Bonomi*, 9 H. L. C. 503, also conclusively settles this, that, though the right of support to a building is not of common right and must be acquired, yet, when it is acquired, the right of the owner of the building to support for it, is precisely the same as that of the owner of land to support for it. Both Lord Cranworth and Lord Wensleydale say that this right also is more properly to be called a right of property, to be respected by the owner of the adjoining land, than a negative easement or servitude *ne facias*."

See also opinion of judges in 4 Queen's Bench Div. 162, 3 L. R. Q. B. Div. 85.

The law as thus stated has been uniformly recognized by the courts of this country. *Lampman v. Milks*, 21 N. Y. 505; *Fremont, E. & M. V. R. Co. v. Gayton*, 67 Neb. 263; *Liquid Carbonic Co. v. Wallace*, 219 Pa. St. 457; *City of Quincy v. Jones*, 76 Ill. 231 (20 Am. R. 243); *Tunstall v. Christian*, 80 Va. 1 (56 Am. R. 581); *Gilmore v. Driscoll*, 122 Mass. 199 (23 Am. R. 312); 14 Cyc. 1166; Jones on Easements, Sec. 605; Gale on Easements (9th Ed.), p. 372. Citation of decisions and text books laying down this rule might be extended indefinitely. Indeed, though appellant contends to the contrary and cites numerous decisions, in none is to be found an expression in derogation to the rule as stated. It was applied in *Aspden v. Seddon*, L. R. 10 Ch. App. 394, affirming a decision of Sir G. Jessel's, Master of the Rolls; *Geible v. Smith*, 146 Pa. St. 276; *Stevenson v. Wallace*, 27 Gratt. (Va.) 77. In the last case, the court declared that:

The "right to support exists in respect of land only, and not in respect of buildings; but the former right remains, though houses are built. *Brown v. Robbins*, 4 Hurl. & Nor. R. 186 (28 L. J. Exch. 250); *Stroyan v. Knowles*,

6 Hurl. & Nor. R. 454 (30 L. J. Exch. 102). But a right to support for buildings may be acquired; and when so acquired it is an easement—which is defined to be ‘a privilege without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person; by reason whereof the latter is obliged to suffer, or refrain from doing something on his own tenement for the advantage of the former.’ Goddard on Easements, p. 2. An easement for support may be acquired in different modes, but all are reducible to one by grant, which may be express, implied or presumed. When the owner of land acquires the easement of support, it would seem that his natural right of support in respect of the soil is enlarged, so as to embrace the buildings which he may erect on his land, and invests him with the same right of support in respect of his buildings that he has *ex jure naturae* in respect of the soil. \* \* \* The grant is *implied*, in the absence of express stipulations, in every case where the owner of adjoining houses, or of houses and land, severs the property by sale; for, in every such case, rights to support are granted by implication by the vendors and purchasers respectively, for the preservation of the buildings belonging to each other. Goddard on Easements, p. 154, and cases cited. Rights of support in such cases are mutually granted and reserved between original owner and first grantee; and the second grantee succeeds to owner’s preserved rights.”

We have no difficulty in reaching the conclusion that an easement for the support of the wall passed to plaintiff’s grantors, unless, as suggested by appellant’s counsel, this was obviated by the circumstance that defendant’s grantor acquired title to Lot 10, less the strip, before the deed conveying the strip to plaintiff’s grantors was filed for record, and therefore

5. EASEMENTS:  
creation, etc.:  
severance of  
owner-  
ship of domin-  
ant and  
servient es-  
tates: implied  
grants: notice.

without notice. This is mentioned in the brief, but cannot well be said to have been fully argued.

6. EASEMENTS: creation, etc.: The point may be disposed of, however, by rights as against purchaser of servient estates. observing that, in a case like this, as indicated in the excerpt from *Stevenson v. Wallace*, supra, if the servient estate is first

conveyed, the reservation of an easement is to be implied. The rule is well established that an easement in land conveyed is never to be implied in favor of that retained by the grantor unless the burden thereof is apparent, continuous and necessary. This is on the theory that a grantor cannot derogate from his own grant, and, as a rule, he can retain an easement in the land absolutely conveyed only by express reservation. Jones on Easements, Sec. 136; *Burns v. Gallagher*, 62 Md. 462; *Warren v. Blake*, 54 Me. 276; *Carbrey v. Willis*, 7 Allen (Mass.) 364 (83 Am. Dec. 688).

Cases may be found declaring that an easement may not be reserved by implication, but the consensus of opinion seems to be that none is so reserved unless it is actually annexed to the grantor's estate at the time of the grant; is open, visible, and continuous, and necessary to the enjoyment of the estate which the grantor retains. Jones on Easements, Sec. 141.

There is some confusion in the cases, as pointed out in *Wells v. Garbutt*, 132 N. Y. 430 (30 N. E. 978), in consequence of overlooking the distinction between the implication of a grant and that of a reservation; and it should be borne in mind that, though a grantor may not derogate against his own grant, a grantee may take the language of the deed most strongly in his favor. The existence of the wall on the strip of land could not well have escaped the observation of defendant's grantor, and attention to the strip was directed by the exception in the deed. The wall was not only actually attached to be strip retained, but was open and plainly visible. To be continuous, an easement must be such

as may be enjoyed without the intervention of any act on the part of anyone, and noncontinuous' is where there must be such intervention. Jones on Easements, Sec. 143. The rule is recognized in *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564, 572, that:

"The continuous and the noncontinuous may be granted and annexed to the same estate. Upon the unity of title, they would both cease to exist as easements. Upon the severance of the estate, the continuous would revert and pass by the conveyance, but the noncontinuous would not revert or pass but by a new creation. This distinction, and this result, is recognized in the earlier and later cases upon the subject."

It was observed in *Larsen v. Peterson*, 53 N. J. Eq. 88 (30 Atl. 1094), that:

"Mr. Gale, in the later editions of his book—Secs. 50, 52 (4th Eng. Ed. 1868, pp. 87-89)—comes to the conclusion that the test of continuousness is that there should be an alteration in the quality—or 'disposition' of—the tenement, which is intended to be, and is, in its nature, permanent, and gives the tenement peculiar qualities, and results in making one part dependent, in a measure, upon the other. It is not of the essence of this test, as applied to a water-course, that the water should flow of itself continuously, but the test is that the artificial apparatus by which its flow is produced is of a permanent nature. It is with a view of bringing out this quality of permanence that the learned author contrasts this class of easements with a right of way, 'the enjoyment of which depends upon an actual interference of man at each time of enjoyment.' Now, what is meant by that sentence is that the burthen of the easement in the case of a right of way is not felt by the servient tenement except at the moment of each enjoyment of it. A permanent structure upon, or alteration of, the servient tenement is not a necessary element of such an easement.

And by the expression 'interference of man at each time of enjoyment,' is meant no more than an interference with the servient tenement by an entry upon it, as illustrated not only by ordinary rights of way, but also by rights of way with a right to take something from the servient tenement, as in *Polden v. Bastard*, 4 Best & S. 258, L. R. 1 Q. B. 156."

It is said, in Section 143 of Jones on Easements, that:

"The test of continuousness is that there is an alteration or arrangement of a tenement which makes one part of it dependent in some measure upon another. This alteration or arrangement must be intended to be permanent in its nature."

Enough has been said to indicate that the easement for the support of the wall is continuous; for such a structure is regarded as permanent, and no act of interference with the servient estate is essential to its enjoyment.

Such easement would also seem to be of strict necessity, —that is, reasonably necessary to the support of the wall. Pitney, V. C., after an exhaustive view of the authorities in *Tooth v. Bryce*, 50 N. J. Eq. 589 (25 Atl. 182), expressed the opinion that the necessity must be absolute; and authorities are not wanting employing this language. On the other hand, Lord Campbell declared in *Ewart v. Cochrane*, 7 Jur. (N. S.) 925, that:

"When I said it was necessary, I do not mean that it was so essentially necessary that the property could have no value whatever without this easement; but I mean that it was necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant."

And in *Wells v. Garbutt*, *supra*, it is said that:

"While absolute physical necessity need not be shown, as in the case of landlocked premises, or the support of a

wall, there must be a reasonable necessity, as distinguished from mere convenience."

In a sense, no easement or quasi easement can well be absolutely necessary to any possible enjoyment of property. The most that can be required is that it be, in addition to being apparent and continuous, essential to use and enjoyment of the premises as permanently improved at the time of the conveyance of the servient estate. And this appears to be what is meant by the term "strict necessity," in defining easements reserved by implication. *Warren v. Blake*, 54 Me. 276 (89 Am. Dec. 748); *Carbrey v. Willis*, 7 Allen (Mass.) 364 (83 Am. Dec. 688); *Kelly v. Dunning*, (N. J.) 10 Atl. 276; Jones on Easements, Sec. 154; *Burns v. Gallagher*, 62 Md. 462; *Dunklee v. Wilton Railroad Co.*, 24 N. H. 489. The term "necessity" is to be understood as meaning that there could be no other reasonable mode of enjoying the dominant tenement without the easement.

There are many decisions recognizing an implied reservation as the converse of an implied grant. *Elliott v. Rhett*, 5 Rich. Law (S. C.) 405 (57 Am. Dec. 750); *Seibert v. Lev an*, 8 Pa. St. 383 (49 Am. Dec. 525); *Seymour v. Lewis*, 2 Beas. (N. J. Eq.) 439 (78 Am. Dec. 108); *Outerbridge v. Phelps*, 58 How. Prac. (N. Y.) 77; *John Hancock Mut. Life Ins. Co. v. Patterson*, (Ind.) 2 N. E. 188. Some of these cases seem to have missed the distinction always to be observed in ascertaining whether there is an implied grant of an easement, and whether there is an implied reservation. Where the conveyance of the so-called servient estate is complete and absolute on its face, its very terms exclude all other interest therein, and there can be no derogation of the title thus passed, save when the estate retained is permanently so improved as that to deprive it of an easement in that conveyed would render impossible its full use and enjoyment in that condition. Here, the easement of support was strictly necessary to the use of the strip of land



as permanently improved. The wall was annexed to the realty, and so located that the portion of Lot 10 conveyed to defendant's grantor was entirely essential to the beneficial use and enjoyment of the land retained by the grantor. The issue as to notice, then, was immaterial; for, if there had been no conveyance to the Frisbee heirs, the easement must have been retained by implied reservation by the grantors.

There was no error, and the judgment is—*Affirmed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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STATE OF IOWA, Appellee, v. ROSE BURLEY, Appellant.

**CRIMINAL LAW: Appeal and Error—Assignment of Error—Fail-**

- 1 **ure to Argue—Effect.** Errors specified and points made in rule manner may not be considered as abandoned because the same are not elaborated by argument *in extenso*.

**INDICTMENT AND INFORMATION: Requisites and Sufficiency—**

- 2 **Improper Designation of Offense.** It is quite immaterial what name is given in the indictment to the offense charged. The facts alleged are the all-important consideration.

**PROSTITUTION, HOUSE OF: Evidence—Possession and Use of In-**

- 3 **toxicating Liquors.** The possession and use of intoxicating liquors is a recognized badge of a house of ill fame, and evidence of such possession and use is material and relevant on a charge of keeping such house.

**CRIMINAL LAW: Trial—Reception of Evidence—Incompetent Evi-**

- 4 **dence—Promise to Show Competency.** Testimony incompetent in itself may properly be received under a promise to subsequently show its competency, especially when the jury is specifically and repeatedly told that the testimony in question is of no weight unless the defendant is shown to be responsible therefor.

**CRIMINAL LAW: Appeal and Error—Trial—Evidence— Motion to**

- 5 **Strike—Waiver.** One who consents that the court may reserve a ruling may not predicate error on the failure to subsequently rule, without a request therefor and proper entry of exceptions, in case of a refusal.

**APPEAL AND ERROR: Briefs—Preparation—Assignment of Errors Without Brief Point—Effect.** An assignment of error which forces the court to an examination of the abstract in order to determine its exact nature, with no separately stated brief point, raises no question upon which the court is bound to pass.

**CRIMINAL LAW: Appeal and Error—Briefs—Preparation—Waiving Defects.** Manifest guilt, in criminal causes, is ample reason for demanding a strict compliance with the rules governing the preparation of briefs and arguments.

**APPEAL AND ERROR: Harmless Error—Improper Exclusion on Cross-Examination.** Unduly limiting cross-examination as to matters bearing on the interest and credibility of the witness is harmless when it affirmatively appears that, had the desired testimony been received, the verdict would not and should not have been different than it was.

**CRIMINAL LAW: Appeal and Error—Assignment of Errors—Contradictory Assignments.** One who asserts that a certain question was one of *law* and not of *fact* may not predicate error on the failure of the court to submit it as a question of fact, even though his brief point so asserts.

**TRIAL: Instructions—Form, Requisites and Sufficiency—Lack of Clearness—Waiver.** The explicitness of instructions may not be questioned by one who asked no instructions and entered no exceptions to those given.

**NEW TRIAL: Proceedings to Procure—Misconduct of Jurors—Unverified Motions—Criminal Law.** Allegations, in a motion for new trial, of misconduct on the part of jurors, are without effect unless verified or otherwise supported by proof.

*Appeal from Polk District Court.*—CHARLES A. DUDLEY,  
Judge.

NOVEMBER 26, 1917.

HERE there was a conviction on an indictment charging the crime of keeping a house of prostitution, and defendant appeals.—*Affirmed.*

*F. T. Van Liew*, for appellant.

*H. M. Havner*, Attorney General, *F. C. Davidson*, As

sistant Attorney General, and Ward C. Henry, County Attorney, for appellee.

SALINGER, J.—I. It is not, as the State seems to contend, an abandonment of errors specified and points made in rule manner because these were not elaborated by the argument *in extenso*. Such argument is desirable, but optional.

II. The indictment charges that defendant is guilty "of the crime of keeping a house of prostitution," committed as follows: That defendant, on or about the 1st day of December, 1916, in said county and state, and on divers other times between the said 1st day of December, 1916, and the time of finding the indictment. "did wilfully, unlawfully and feloniously keep and maintain a house resorted to by divers persons \* \* \* for the purpose of prostitution and lewdness, and in which house acts of prostitution and lewdness were committed." It is urged the court erred in overruling the defendant's motion for new trial, because this indictment charged the "keeping of a house of prostitution," and that the statute provides no punishment for doing that. The vital thing in an indictment is that it have "a statement of the facts constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." Code Section 5280. Giving the wrong name to the offense is not material. The facts stated determine for what defendant is to be tried. *State v. Davis*, 41 Iowa 311; *State v. Wyatt*, 76 Iowa 328; *State v. Smith*, 148 Iowa 640; *State v. McIntire*, 59 Iowa 264. If the offense charged has no name given to it by statute, the giving it a name in the indictment which is repugnant to the facts alleged as constituting the offense.

1. CRIMINAL  
LAW: appeal  
and error:  
assignment of  
error: failure  
to argue: ef-  
fect.

2. INDICTMENT  
AND INFORMA-  
TION: requi-  
sites and suffi-  
ciency: im-  
proper design-  
ation of of-  
fense.

will be regarded as surplusage. *State v. Shaw*, 35 Iowa 575. The contention is without merit.

III. As to the claim that there is no evidence that defendant committed any crime in Polk County within the statute of limitations. It is not well made, whether construed to mean that venue was not proved or that there is a failure to show that acts done where the venue is laid were done so recently as not to be within the bar of the statute. We shall not elaborate, beyond saying that the abstract of appellee shows there was direct testimony that, if anything prohibited occurred, it was in Polk County, Iowa, and an abundance of testimony from which the jury could find that the time of doing did not invoke the statute.

IV. A witness was asked what the fact was as to whether or not defendant would, when men came up there, serve intoxicating liquors to them. Upon objection that this was incompetent, immaterial, and had no bearing upon the offense charged, the trial judge said: "That is merely an incident to what was going on, and she is not on trial for that, of course. Answer." An exception was saved. The answer was: "There was drinks there. Defendant would go away and get it; she would not always serve it; others did. It was served in glasses that belonged to her." In argument, defendant says that evidence of other crimes, such as the handling of intoxicating liquors, is not competent under the indictment herein. That is so, broadly stated; and, as seen, the trial court so declared before the jury. He did not elaborate upon it by limiting the effect of such testimony in the charge, and he was not asked to, and the charge was not excepted to.

The question, then, is whether testimony that one charged with maintaining a house of ill fame supplied the patrons with intoxicating liquor is receivable for no purpose. On that question, *State v. Shaw*, 125 Iowa 422, cited by the

State, gives us no light; and *State v. Steen*, 125 Iowa 307, and *State v. Burns*, 145 Iowa 588, have no bearing on any question on this appeal. But if it had never been decided, it would yet be true that, upon this charge or any other, all things are receivable if they tend to establish or refute the accusation on trial; and this though what is received tends to show what in itself constitutes a crime. The test is not what act is being offered, but whether the offer is material and relevant. Suppose it were a crime to threaten the life of prosecutor. If defendant, tried for shooting prosecutor, asserted that he was friendly to prosecutor, as an argument that it was unlikely he had shot at him, would it be claimed that the threat was inadmissible because defendant was not on trial for the crime involved in such threat? In *State v. Gardner*, 174 Iowa 748, we held that, on such accusation as this, all the circumstances developed in the evidence, such as the going and coming of people to the house, were to be considered. This was not an excluding specification, but an illustration. In *State v. Gill*, 150 Iowa 210, at 213, we deal with the sufficiency of the evidence to sustain the verdict. We set out as one item that one witness thought, from the appearance of men going to and from the house, through both back and front doors, that most of them had been drinking, and another testified that one of them was drunk on leaving, and hold that this, with many other things set out, sustained the verdict. If, then, we are to sustain appellant, we must hold that, in spite of these indications in our decisions, it is, as matter of law, immaterial and irrelevant to show, in proof of a charge of maintaining a house of ill fame, that the owner furnished liquor to visitors. So to hold is to throw away common knowledge that liquor getting and drinking is a badge of the bawdy-house. We are not minded to do this.

4. CRIMINAL  
LAW: trial:  
reception of  
evidence: in-  
competent evi-  
dence: prom-  
ise to show  
competency.

V. The court, despite objection that it was not material and not binding on defendant, received the following testimony by an alleged inmate:

She was accosted that morning on the public highway. "They didn't say anything about testifying in this case; they called me a snitcher; they said they would get me if I came over here,—they would keep me from coming. This was just one man; he grabbed me by the shoulder. I never saw this man up to Rose Burley's house that I know of. I saw him in the middle of Mulberry, between Sixth and Seventh, this morning; saw him down on Walnut some place,—don't know just where it was,—couldn't say for sure. He said nothing to me at that time. Don't remember of ever seeing him before. Q. Now what is the fact, Miss Page, as to whether or not any threats have been made against you if you came to this court to testify in this case? A. Why, there was never any threats,—only once it was said that, if I testified, I should go the same as if they convicted her; that they would convict me the same."

Through all of this, the court stated repeatedly that it was of no weight unless it should be made to appear that defendant was responsible for what was said and done. At the close of the testimony of the witness, defendant moved to strike all the evidence relating to an alleged attack on the day of the trial, on the grounds that it is incompetent, irrelevant and immaterial, and has no bearing upon the issue in this case, and is not involved or connected with defendant in any way. Counsel for the State answered that this testimony shows "they" told her they were going to get her if she came over here to testify today. Counsel for defense answered that it was not binding on defendant. And the court said:

"I will hold that motion in reserve. I don't know what

the further proof may be, but we will see what may happen in the future. It will have to be brought home to the knowledge of the defendant."

Defendant consented that the ruling might be reserved.

Now, it was not error to receive this testimony. The State could not prove all of any branch of its case by any one question and answer. It was bound to make this connection if it was to retain what it had put in, but the court had the power to say what the mere order should be. It did no more than exercise that power by ruling that the State might show first what was done, and later, that defendant was responsible. It made clear to all that the first should not count unless the last was proved. If error there was, it does not lie in receiving, but in failing to exclude in terms by making the ruling which was reserved. The reservation having been upon consent, there is no reversible error in failing to rule finally, because such final ruling was not asked, nor failure to make it excepted to.

VI. The witness Page was asked, on cross-examination, "Now, you have been promised immunity and protection if you would testify in this case?" She was not permitted to answer, on the objection of the State that this is "incompetent, irrelevant and immaterial to any issue in the case, not proper cross-examination—she is not on trial here," and though counsel for defendant stated, what was quite manifest, that the purpose was to show the interest and bias of the witness. We think we should not pass upon the ruling. Its sole presentation is by a statement in the "Errors relied on for reversal" that the court erred in sustaining the objection of the State to the question of the defendant "at page 12, line 20, of the abstract, for the reason that the question was material to

5. CRIMINAL  
LAW: appeal  
and error:  
trial: evi-  
dence: motion  
to strike:  
waiver.

6. APPEAL AND  
ERROR: briefs:  
preparation:  
assignment of  
errors with-  
out brief  
point: effect.

show the interest of the witness, and to test her credibility." The rule provides that the "Errors relied upon for reversal" shall be followed, "under a separate heading of each error relied on," by "separately numbered propositions or points, stated concisely and without argument or elaboration, \* \* \* No alleged error or point not contained in this statement of points shall be [deemed] raised," etc. The presentation here is faulty: First, because what the complaint is can be told only by going to the abstract; second, the point is not made in appellant's statement of points. We affirmed for violation of the rule in *Campbell v. Davis*, 180 Iowa 314. We have the power to waive the rule, but are not obliged to use it. Those who fail to observe it take their chances. While we have waived it in aid of liberty

7. CRIMINAL  
LAW: appeal  
and error:  
briefs: prep-  
aration:  
waiving de-  
fects.

(*State v. Walters*, 178 Iowa 1108), this case does not move us to do so. The proof of guilt is so clear that waiver would be in aid of crime rather than of protecting against the chance of an undue deprivation of liberty.

8. APPEAL AND  
ERROR: harm-  
less error:  
improper ex-  
clusion on  
cross-examin-  
ation.

VII. The witness Ridsen, who claims to have gone to the place of the defendant under his employment as state agent, and to do detective work, on cross-examination said that he gathered his evidence on the 20th of December. He was then asked whether this was not just four days before his principal, the attorney general, went out of office; whether this evidence was not gathered for the purpose of reappointment—of witness' being continued in his office; whether this was not the first case of the kind he had ever brought in the city of Des Moines. To all of these, objections were sustained, in effect, that same was incompetent, irrelevant, immaterial, and improper cross-examination. It is now urged there was error in this, "for the reason that he was an employed decoy, and defendant was entitled to a wide latitude in cross-examination to test



the credibility of the witness, and of his interest." We incline to think the witness should have been permitted to answer. But we cannot reverse for this exclusion, because we are abidingly satisfied that, if it had been answered that this evidence was gathered four days before the attorney general went out of office, and as an aid to reappointment, and that this was the first case of the kind ever instituted by the witness in Des Moines, yet, upon the whole record, the verdict would not and should not have been other than it was. In other words, it appears affirmatively that the error was without prejudice.

VIII. It is said the court erred in sustaining objections of the State to the cross-examination of Risdén, "for the reason that said Risdén was an employed decoy, and the defendant was entitled to a wide latitude in his cross-examination to test his credibility and show his interest."

At the close of the testimony of the witness Page, defendant moved to strike all her testimony, because "it appears she is being offered as an accomplice, and there is no corroboration of any of her testimony." This was overruled, and it is said in the points relied on for reversal that this was error. It is said in the errors relied upon for reversal that the court erred in failing to instruct the jury that the testimony of Page, "a self-confessed accomplice," should be corroborated, and if not so corroborated, it should be not considered.

In the brief points it is said that the testimony of decoys should be corroborated, and the court should instruct thereon, and that the testimony of Page and of Streeter and Risdén, who are decoys employed by the State, is not corroborated; that the court erred in failing to instruct the jury that the testimony of Risdén and Streeter should be corroborated or else ignored, "for the reason they were the State's decoys," and erred in failing to instruct upon

the law relative to accomplices, decoys, and the corroboration of their testimony.

9. CRIMINAL  
LAW: appeal  
and error:  
assignment of  
errors: con-  
tradictory as-  
signments.

In effect, the contentions of the appellant divide into the proposition that Page, Streeter and Riden were accomplices, which is equivalent to claiming that this is so as matter of law, and that the court erred in failing to instruct upon the law relative to accomplices and the corroboration of their testimony. Taking these up in their inverse order, we are not prepared to say that, where the instructions given are not excepted to, and there is no request for an instruction, that failing to charge upon these matters is reversible error. See *State v. Mahoney*, 122 Iowa 168. Be that as it may, the controversy between the State and the defendant here resolves into a claim by the defendant that the persons named were accomplices and the assertion of the State that they were not.

The State says the test is whether these witnesses could, upon the evidence, have been indicted for the offense for which the defendant was indicted, wherefore it appears, as matter of law, that they were not accomplices, because they could not have been so indicted. This contention suggests many interesting questions. It brings up for consideration whether, under a statute which makes all who aid in any degree chargeable as principal, it can be well said that, as matter of law, these witnesses could not have been indicted for keeping this house of prostitution—whether they could not thus have been indicted merely because they helped in some step in keeping it. On the other hand, it involves dealing with the well settled proposition that, ordinarily at least, whether a witness is or is not an accomplice is a jury question, even if it be the test whether they might be indicted for what the alleged principal is. All these questions we leave expressly undecided, because in this case we should. Its settlement is outside of the issues tendered. If the de-

defendant were complaining that the court refused to let the jury say whether these witnesses were or were not accomplices, and the State responded that the refusal was not error because they were not accomplices, as matter of law, a different question would be presented, and the matters which we leave undecided would have to be passed upon. The trouble is that both parties contend the question is one of law. And the defendant is not complaining because a question of fact was not submitted, or was decided by the judge, but that corroboration, or the necessity therefor, should have been submitted, because, as matter of law, the witnesses were accomplices. To put it in fewer words, the essence of the defendant's complaint is that the court erred in failing to hold, as matter of law, that these witnesses were accomplices. Let it be conceded that whether they were or not was a jury question. One who asserts that it was not a fact question cannot maintain it was error not to submit it to the jury as a question of fact—and this though the brief points present such a contention.

IX. It is also complained the court did not make clear to the jury what resorting to such a place means, in the legal acceptance of the term; did not make clear by instructions just what the term "inmate" means, in legal significance. That may be so, but the answer has already been made. No instructions were asked, and none of those given were excepted to.

X. In the motion for new trial, one ground is the alleged misconduct of the jury, in that they communicated to the outside, so that the county attorney, assistant and others knew how the jury stood when they had been out for twenty-four hours. That motion asserts that at least three of the jurors became sick, and used their

10. TRIAL: instructions: form, requisites and sufficiency: lack of clearness: waiver.

11. NEW TRIAL: proceedings to procure: misconduct of jurors: unverified motions: criminal law.

sickness, pain and suffering as an argument upon those voting for acquittal to vote for conviction, in order to get release; that the court indicated he would keep them together for a second night, and, after obtaining their evening meal, they promptly brought in a verdict of guilty; that counsel for defendant was advised by a juror that the jurors finally said they had been in the jury room for thirty-two hours, and they did not care what happened; that the length of time the jury was kept together tired and sickened them, so that they were not able to give fair and due consideration to defendant's case.

We are not called upon to say whether, if all this were proved, it would avoid the verdict. The motion is not verified, and has no evidence to support its assertions. Those assertions are not proof.

We find no reversible error. Wherefore the judgment below must be—*Affirmed*.

GAYNOR, C. J. LADD and EVANS, JJ., concur.

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UNITED STATES TRUST COMPANY, Appellant, v. INCORPORATED  
TOWN OF GUTHRIE CENTER, Appellee.

**CONTRACTS: Construction and Operation—Sale Depending on**  
1 **Opinion of Attorney.** The actual rendition by an attorney of an *honest* but *erroneous* opinion that a bond issue is illegal, furnished complete protection to a prospective purchaser in his refusal to buy, under his contract to purchase provided the bonds be legal "*to the satisfaction of our counsel*."

**CONTRACTS: Construction and Operation—Entire or Severable**  
2 **Contracts—Non-Severable Consideration—Effect.** An indivisible consideration—one incapable of being apportioned among different things contracted for—stamps the contract as indivisible. So held where the contract was for the purchase of *two* sets of bonds of materially different amounts, with a deposit of earnest money in a lump sum of \$1,000.

**APPEAL AND ERROR: Reservation of Grounds—New Arguments**  
3 **on Appeal.** One who has properly presented and reserved a

point in the trial court is not limited, on appeal, to the same arguments presented by him to the trial court.

*Appeal from Guthrie District Court.*—W. H. FAHEY,  
Judge.

NOVEMBER 26, 1917.

SUIT to have restored a deposit made as an evidence of good faith in a contract to buy bonds issued by the appellee. The trial court found for the defendant. Plaintiff appeals.—*Reversed.*

*Morsman & Maxwell* and *Milligan & Moore*, for appellant.

*Brown & Batscholet* and *Weeks & Vincent*, for appellee.

SALINGER, J.—I. The agreement which  
1. CONTRACTS: construction and operation: sale depending on opinion of attorney. is the basis of the controversy is signed by the appellant, and offers par and accrued interest, if any, for \$10,000, more or less, of 6 per cent sewer disposal plant bonds of appellee, being dated as soon as practicable after July 1, 1914, due 10 years from date, and in \$500 denominations; \$500 of said bonds to be optional annually from 4 to 9 years from their dates, inclusive; balance due in 10 years from date; and for \$30,000, more or less, of 6 per cent sewer bonds. The contract provides that:

"Prior to delivery of bonds to us, you are to furnish us full certified copy of records of all proceedings had preliminary to and authorizing the issuance of said bonds necessary to satisfactorily evidence their legality to our counsel."

There is the further statement that there is given over therewith a check for \$1,000, "to be held by you as a guaranty of good faith, said check to be returned to us forthwith in case said bonds are not legal to the satisfaction of our counsel, without expense to us."

There is a controversy over whether the amount of  
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money that could be lawfully raised by taxation, within the legal and constitutional limitations of the laws and the Constitution of the state of Iowa, by the defendant during the life of the proposed bonds, would or would not be sufficient to pay the bonds and the interest thereon. Attorneys for plaintiff advised it that, in their opinion, said \$10,000 issue was not valid.

The theory of the defendant is that this opinion is reviewable, and that it was rightly disregarded because the issue is in fact legal. The trial court proceeded as it would have if no contract provision making the attorney's opinion a factor existed—treats that provision as redundant and surplusage. It may not so be dealt with. *Haney-Campbell Co. v. Preston C. Assn.*, 119 Iowa 188, at 192, 193. And see *Butler v. Tucker*, 24 Wend. (N. Y.) 447; *Barton v. Hermann*, 11 Abb. Prac. N. S. (N. Y.) 378; *Gray v. Central E. Co. of N. J.*, 11 Hun (N. Y.) 70; *Boyd v. Woodbury County*, 122 Iowa 455, 458. The point is as well stated by the Supreme Court of Nebraska in *Thurman v. City*, 90 N. W. 253, a bond bid case, as it is anywhere. It is there said that, where a party stipulates that his contract of purchase shall be subject to the opinion of his attorney as to the title to or legal status of the thing to be purchased, the plain purpose being to make his act dependent upon the personal opinion of his legal adviser, the sole requirement is that such legal adviser in fact pass upon the subject and give his honest opinion, and the merits of an honest opinion actually given are not subject to review—that his decision is conclusive, provided he really passes upon the question and reaches a conclusion honestly, whether his conclusion is right or wrong.

The question is not whether the buyer "ought to be," but whether, acting in good faith, he is, satisfied. *Inman Mfg. Co. v. American Cereal Co.*, 124 Iowa 737; *Singerly v.*

*Thayer*, 108 Pa. St. 291; *Lieberman v. Beckwith*, (Conn.) 65 Atl. 153; *Hollingsworth v. Colthurst*, (Kans.) 96 Pac. 851. Good faith is the sole limitation. *Inman Mfg. Co. v. American Cereal Co.*, 124 Iowa 737. So held in bond bid cases, on refusal because bonds were invalid, in opinion of buyer's attorney. *Sargent v. Sibley*, 6 Ohio Dec. 1219. So, unless the opinion is fraudulent, capricious and in bad faith. *City v. Rollins*, (Tex.) 127 S. W. 1166; *Michigan Stone & Supply Co. v. Harris*, 81 Fed. 928; *Webb v. Trustees*, (N. C.) 55 S. E. 719. In cases other than agreements to take bonds, it is held the buyer may refuse to take the goods that are to satisfy him, unless the refusal is a mere caprice (*Singerly v. Thayer*, 108 Pa. St. 291, *Manning v. School Dist.* [Wis.] 102 N. W. 356); or his dissatisfaction is feigned (*McCormick Harv. Mach. Co. v. Okerstrom*, 114 Iowa 260, at 264, 265); or he acts with a fraudulent motive (*Lieberman v. Beckwith*, [Conn.] 65 Atl. 153). Some cases hold the right to reject for failure to satisfy is absolute. *Wood Machine Co. v. Smith*, (Mich.) 15 N. W. 906. But we do not care to go that far. It must not be an unreasonable refusal, in a case where the title was good "beyond all dispute." *Vought v. Williams*, (N. Y.) 24 N. E. 195. It must be an honest refusal (*Hartford S. Mfg. Co. v. Brush*, 43 Vt. 528, *Daggett v. Johnson*, 49 Vt. 345); a good-faith refusal (*Stotts v. Miller*, 128 Iowa 633, *Inman Mfg. Co. v. American Cereal Co.*, 124 Iowa 737, *McCormick Harv. Mach. Co. v. Okerstrom*, 114 Iowa 260, *Haney-Campbell Co. v. Preston Cream Assn.*, 119 Iowa 188). Where an expressed ground for rejecting a certificate of health is frivolous, and it does not appear what the true ground of the rejection is, the rejection will not base a forfeiture. *Miesell v. Globe Mut. Life Ins. Co.*, 76 N. Y. 115. It must not be arbitrary. *O'Dea v. City*, (Minn.) 43 N. W. 97; *Stockton & V. R. Co. v. City of Stockton*, 51 Calif. 328; *Duplex S. B. Co. v. Garden*, 101 N. Y. 387; *Folliard v. Wallace*, 2 Johns. (N. Y.) 395.

It does not matter that a title rejected by the attorney is in fact perfect, if the rejection is in good faith. *Church v. Shanklin*, (Calif.) 30 Pac. 789; *Lieberman v. Beckwith*, (Conn.) 65 Atl. 153; *Hollingsworth v. Colthurst*, (Kans.) 96 Pac. 851; *Watts v. Holland*, (Va.) 11 S. E. 1015. It is immaterial that, after the bonds have been refused and sold to other parties, the state Supreme Court adjudges the bonds to be valid, as the purchaser then has no opportunity to accept them with the benefit of such adjudication. *City of Great Falls v. Theis*, 79 Fed. 943. In *Kihlberg v. United States*, 97 U. S. 398, a contract between the United States and A., for the transportation by him of stores between certain points, provided that the distance should be "ascertained and fixed by the chief quartermaster." The distance as ascertained and fixed by the chief quartermaster was less than by air line or by the usual and customary route. It was held that his action is, in the *absence of fraud, or such gross mistake as would necessarily imply bad faith*, or a failure to exercise an honest judgment, conclusive upon the parties.

1-a

It is not disputed that counsel, to whom the matter was submitted, gave it as their opinion that the \$10,000 bond issue was not legal. There is neither claim nor proof that the opinion is arbitrary and in bad faith, unless that is made out by the fact that counsel for appellee and the trial court differ from that opinion. Indeed, the only argument here is that the opinion is and was held to be an erroneous one, and therefore cannot control. Reliance is placed upon *Hoffman v. Colgan*, (Ky.) 74 S. W. 724. It does not rule this case. It turns wholly on the status of an opinion founded on a mistake of fact. In its essence, it is a rightful decision that, when it would presume fraud if the giver of the opinion knew what the true facts are, therefore it should rather be presumed that the opinion would have



been the opposite if the true facts had been known; wherefore, the opinion, due to an honest mistake of fact, does not govern. It makes a proper distinction between an opinion resting purely upon a mistake of fact and one which, in good faith, errs in applying the law to the existing facts. It does not attempt to overturn the well settled rule which exists where the mistake is an honest mistake of law. To overturn that rule would, in effect, nullify all agreements that bonds need not be taken unless counsel finds them to be valid.

*People v. Alameda County*, 45 Calif. 395, seems to us to have no applicability. It holds, on a motion for writ of mandamus on pleadings, that it shall be tried as a question of fact whether a petition alleged to have been presented to the board of supervisors was signed by as many as 1,355 persons who were, at the time of such signing, qualified electors of the county.

II. But it is said that the contract is divisible; that it was an offer to take not only the \$10,000 sewer disposal plant bonds issue, but also a \$30,000 issue of sewer bonds, and that no opinion hostile to the legality of said last issue was ever given. The tenability of this position depends entirely upon whether the contract here is a divisible one. Appellant makes some claim that the town in fact breached the contract by never making the \$10,000 issue. Appellee responds the court did not hold that "appellant violated its contract calling for an issue of \$10,000 bonds 'more or less' by its refusal to accept an issue over \$16,800 of bonds," but rightfully held that appellee refused to take the \$10,000 issue of bonds. This dispute needs no settling if the contract is not divisible; for, if it be indivisible, plaintiff prevails, even though the town stood ready to deliver the \$10,000 issue.

In *Pope v. Porter*, (N. Y.) 7 N. E. 304, at 306, the

2. CONTRACTS:  
construction  
and operation:  
entire or sev-  
erable con-  
tracts: non-  
severable con-  
sideration: ef-  
fect.

refusal to accept part performance is put on the ground of a rescission justified because there are not two independent contracts, one of which may be broken without peril to the other. The case involved the purchase of several lots of iron to be delivered at different times, having separate prices, but to be paid for by note "on arrival;" and it was held that failure to deliver the first lot excused a refusal to receive the second. Somewhat to like effect is *Walti v. Gaba*, (Calif.) 116 Pac. 963. A like holding is found in *Thompson v. Conover*, 30 N. J. L. 329, where one party agreed to sell to the other all the corn he had to sell, supposed to be in all about 600 bushels—the white at one price, the yellow at a lesser—and where, upon delivering the white and offering to deliver the yellow, the buyer refused to receive the latter.

In *Pacific Tim. Co. v. Iowa Windmill & Pump Co.*, 135 Iowa 308, there was an order for a car of lumber. We said that, where the consideration to be paid is entire, the contract must be so held, although the subject of the same consist of several distinct and independent items; that the simple fact that the dimensions of the timber were specified and the prices per thousand named would not make the contract a divisible one; that such an order contemplates and intends that each and all of its parts and the consideration shall be common to each other and interdependent; that the question is largely one of intention, and, where it reasonably appears from the language of the contract, or from its terms, that the parties intended a full and complete performance should be made with reference to the subject matter of the contract by one party in consideration of the obligation of the other, the contract is entire. In *Smith v. Lewis*, 40 Ind. 98, at 101, it is said that, wherever the failure as to a part would materially defeat the objects of the contract, and would have affected the sale had such failure been anticipated, the contract is entire.

The test seems to be whether the items are in their nature disconnected—whether the failure to obtain the whole would materially affect the objects of the purchase—whether the inducement to dealing at all was getting all. A controlling question is whether the consideration is divisible and can be apportioned. It is not controlling that separate prices are affixed to the items. In the last analysis, it becomes a question of intention. See 35 Cyc. 115-117. The contract under consideration, to be sure, does undertake to buy two sets of bonds, and whether or not the contract has been breached as to the taking of either issue depends, as to both issues, on whether a rejection is justified by an honest opinion of counsel against the legality of that issue. But while this is common to both issues, the deposit of the earnest money was in a lump sum, without any apportionment of any part thereof to be forfeited if one issue were accepted and the other unjustifiably refused. It does not seem persuasive that either party contemplated that a distinct contract was made as to each of the issues, or that anything was thought of except that the obligation to take any of the bonds depended upon whether both sets were legal. As said, there is no apportionment, and nothing in the contract indicates that the whole \$1,000 deposit was to be forfeited because part of the bonds were not taken.

2-a

3. APPEAL AND  
ERROR: reservation of  
grounds: new  
arguments on  
appeal.

Appellee says that no issue was raised in the trial court as to the contract's being divisible or indivisible, nor as to the legality or amount of the sewer bonds, and that the sole issue was as to the legality of the sewer disposal bonds. What we have said makes plain that this practice point is without merit. There is no

question here about failing to state below a ground for recovery. The claim that this contract is not divisible is merely an argument why the appellee had no right to appropriate a non-apportionable fund, on the theory that appellant had unjustifiably broken its contract. In other words, the plaintiff does not say that it should have its money back because it had an indivisible contract, and that defendant had failed to perform *in toto*, but meets an argument that part of the bonds had not met with an adverse opinion by pointing out that it suffices that a substantial part of the issue did encounter such opinion.

We conclude that plaintiff is entitled to recover as prayed, because the \$10,000 issue was invalid in the opinion of its attorney.—*Reversed.*

GAYNOR, C. J., LADD and EVANS, JJ., concur.

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K. W. WEAVER, Appellee, v. NATIONAL FIRE INSURANCE  
COMPANY, Appellant.

**EVIDENCE: Best and Secondary—Value—Absence of Markets.**

- 1 One who is required to prove the "market" value of a thing, when no market, in its usually accepted meaning, exists at the time and place in question, is not necessarily helpless. He may resort to the best obtainable evidence, even though it be but *circumstances as to value. The jury may find it necessary to do some approximating.*

**PRINCIPLE APPLIED:** Plaintiff, in order to recover under a policy of insurance, was required to prove the "*cash value*" of pop corn at Altoona, Iowa, on a certain date. No market existed at Altoona nor at any other near-by place except Des Moines, Iowa, where there was a market for such corn in small lots. Again, there was no "consumption" market, in its ordinary meaning, at *any* place until such corn had matured in crib for from *one* to *two* years. The corn in question had been picked in the fall and was destroyed in February following.

*Held* competent for plaintiff to show, as a circumstance bearing on value, that for several years he had marketed pop corn

at Des Moines in small quantities at from 3 to 3½ cents per pound, and that the remnant of the corn not destroyed by the fire in question was sold at said place 4 months after the fire at said prices.

**EVIDENCE:** Best and Secondary—Value—Absence of Market—Cost of Replacing Under Foreign Market. In the absence of a market for a thing at the time and locality in question, it is competent to show, in the light of an existing market at a foreign point, what it would cost to replace the article in question at the locality in question; but such testimony does not necessarily overcome other circumstances tending to show a higher value.

**EVIDENCE:** Weight and Sufficiency—Amount of Corn in Crib. Evidence reviewed, and held sufficient to support a verdict as to the quantity of corn in a crib.

*Appeal from Polk District Court.*—W. H. McHENRY, Judge.

NOVEMBER 26, 1917.

ACTION at law upon a fire insurance policy for recovery of the value of a crib of pop corn destroyed by fire. The only issue made upon the trial and presented here is the question of the the amount and value of the property so destroyed. The jury rendered special findings to the effect that the quantity was 78,400 pounds, and that the value thereof was 2¼ cents per pound. A judgment was entered accordingly, and the defendant appeals.—*Affirmed.*

*Sullivan & Sullivan*, for appellant.

*Read & Read*, for appellee.

EVANS, J.—I. The pop corn involved in this controversy was contained in a crib on the plaintiff's premises near Altoona. It was the product of about 24 acres of ground, raised in the year 1915. It was destroyed by fire on February 29, 1916.

Two points are presented for our consideration as grounds for reversal. The first challenges the competency of plaintiff's testimony as to market value, and contends

1. **EVIDENCE:**  
best and sec-  
ondary: value:  
absence of  
markets.

that there was no evidence of market value except that offered by the defendant, and that the verdict should be reduced accordingly. The policy sued on provided for the payment of the "cash value" of property destroyed by fire. Primarily, the question at issue at this point upon the trial was, What was the market value of this corn on February 29, 1916? The plaintiff had been engaged in raising pop corn and marketing the same for several years. His method of marketing the same had been to sell the same in small lots to grocers and other retail dealers in Des Moines. There was no market therefor at Altoona. There was no market for it in Des Moines except in small lots, as already indicated. That is to say, there was no wholesale market which would take the crop in lump. Manifestly, therefore, the plaintiff could not prove a market value on February 29, 1916, at Altoona, either by the use of market quotations or by the direct testimony of witnesses. This absence of a general market, however, would not necessarily reduce the plaintiff's corn to no value. It would still have a cash market value, and for the purpose of showing the same the plaintiff was entitled to introduce the best evidence of which such a case is capable. The difficulty of the situation was somewhat intensified by another fact, and that is that pop corn is not ready for the consumption market for a period of from 1 to 2 years after it is gathered. It is usually required to be kept in crib for a long period, in order that it may dry thoroughly before it becomes in a popping condition. The plaintiff's corn was not in a popping condition at the time of its destruction, and would not have been in such condition for some months thereafter. In the ordinary course, the plaintiff would have kept the corn in his crib until the popping condition was attained. The plaintiff therefore introduced, over the objection of the defendant, evidence showing in substance that for several years the market, such as it was in Des Moines, where he

had sold his pop corn from year to year, was uniformly from 3 to 3½ cents per pound. He further showed that such was the market in Des Moines in June, 1916, and that such was the price which he received for the remnant of his 1915 crop which had not been destroyed, and which amounted to about 100 bushels. All this evidence was objected to by the defendant as incompetent, and the point is now urged here. We think the evidence thus introduced was the best evidence which the nature of the case permitted. It was in the nature of circumstantial evidence. It did not prove that the plaintiff's pop corn, on February 29, 1916, was worth 3 cents a pound. But it did legitimately throw some light on the question of the actual value of the corn as it was on that date. Inasmuch as there were no daily markets and no market quotations, there was no way that the exact market value of that particular corn on that date could be stated by any witness. The best that any witness could do and the best that the jury could do would be to exercise its best judgment, in the light of all the circumstances, and approximate the market value of the plaintiff's corn on the date in question. The defendant doubtless would have been entitled to an instruction advising the jury of the purpose of such testimony and the limitations put upon it. No objections are urged to the instructions, nor is there any claim that any proper instruction on this subject was refused. We think, therefore, that, in the state of the record as it was when this evidence was introduced, the defendant's objections to it were properly overruled.

2. EVIDENCE:  
best and sec-  
ondary value:  
absence of  
market; cost  
of replacing  
under foreign  
market.

The defendant, however, has argued the question in the light of subsequent testimony of an expert witness in its own behalf. The defendant's witness Reuber was one of the few men engaged in the business of buying pop corn in large lots. He testi-

fied that he could have shipped corn from Odebolt, Iowa, to the plaintiff's crib, and replaced the corn on February 29, 1916, for a cent and a half per pound. He also testified that Odebolt made the market of the world on pop corn, because more pop corn is raised and marketed there than in all the rest of the world. Giving full effect to this testimony, yet, if the ruling of the court in receiving the evidence of the plaintiff was proper when made, it would not become erroneous by the subsequent introduction of this testimony by the defendant. The most that can be said for this testimony is that it was proper and admissible. It did not purport to be a market quotation for Altoona or for Polk County. It was merely a deduction from the best data which the witness had. The final responsibility of making deductions, however, was upon the jury, and it was not bound to accept the deduction of any witness, even though expert. The jury found the value to be  $2\frac{1}{4}$  cents per pound. It is urged by the defendant that it has the support of no testimony, and that it is a mere compromise or a splitting of the difference between conflicting testimony. There is a sense in which this is manifestly true, but it is such a compromise as is always present to a greater or less degree in the attainment of approximate justice by deduction from indirect evidence. We think, therefore, that the point here relied upon by appellant is not well taken.

II. It is next urged by defendant that the special finding of the jury as to the quantity of corn was excessive, and without support in the evidence. This quantity was ascertained by computation from the dimensions of the crib. Witnesses for the plaintiff presented computations showing the contents to have been the equivalent of more than 85,000 pounds, counting 70 pounds to the bushel. A witness for the defendant presented a computation showing a probable quantity of something more than 65,000

3. EVIDENCE:  
weight and  
sufficiency:  
amount of  
corn in crib.



pounds. The jury found the quantity to be 78,400 pounds. The difference between the witnesses was not in the computations of the dimensions nor of the cubic contents of a bushel. The defendant's witness made certain deductions because of husks on the corn, and because of the alleged fact that the 1915 corn was generally not of a high grade, it being assumed, therefore, that the plaintiff's corn would not meet the standard weight by several pounds per bushel. This witness, therefore, deducted 15 per cent for husks and 8 per cent for a supposed deficiency in weight, making a 23 per cent deduction. The basis of this reduction was a mere general estimate, and could have been more or less, according to the point of view of the witness. This estimated reduction was proper for the consideration of the jury, but it was not of that character which could be said to be binding on the jury. Here again was a case where approximation was the best that could be done. The result reached by the jury was justified by the evidence before it. We must hold, therefore, that this point is not well taken. The judgment below is therefore—*Affirmed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

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MAY MOIR, Appellee, v. GEORGE R. MOIR, Appellant.

**HUSBAND AND WIFE: Enticing and Alienating—Evidence—Dec-1, 7** larations of Alienated Spouse. Declarations of a husband (whose affections are alleged to have been alienated) to the plaintiff wife, to the effect (a) that defendant was making trouble between plaintiff and her husband, or (b) that defendant wanted the husband to leave plaintiff, are admissible on *one* issue only, to wit, the condition of the mind of the husband in consequence of any influence which it may be shown, by evidence *distinct from such declarations*, was actually exerted by the defendant.

**HUSBAND AND WIFE: Enticing and Alienating—Evidence—Dec-2, 7** larations of Alienated Spouse. Declarations of a nusband

(whose affections are alleged to have been alienated) to the plaintiff wife are competent to show his affection for his wife.

**HUSBAND AND WIFE: Enticing and Alienating—Right of Parent**  
3 **to Advise Child—Malice.** No parent may be rendered liable for exercising his *natural* right to advise with his child concerning the child's domestic affairs, without proof *by the one seeking to recover* that the parent acted maliciously.

**HUSBAND AND WIFE: Enticing and Alienating—Evidence—Dec-**  
4 **larations of Alienated Spouse—Hearsay.** Declarations of a husband to his wife (who is seeking to recover of the husband's father for alienation of affections) concerning transactions with the father, are hearsay and wholly inadmissible when they have no probative force (a) on the issue as to the husband's state of mind, (b) on the issue of affection between the husband and wife, or (c) on the issue of wrongdoing on the part of the defendant. So held as to declarations of the husband that his father reluctantly gave him money to defray the expenses of the wife in sickness.

**HUSBAND AND WIFE: Enticing and Alienating—Evidence—Dec-**  
5 **larations of Alienated Spouse.** Declarations of the husband, whose affections are alleged to have been alienated, concerning his opinion as to what the members of defendant's family other than defendant had said or done, are wholly inadmissible.

**HUSBAND AND WIFE: Enticing and Alienating—Evidence—Dec-**  
6, 9 **larations of Alienated Spouse.** Declarations of the husband, whose affections are alleged to have been alienated, tending to show what effect the intermeddling of defendant's relatives had on him (defendant) are wholly inadmissible.

**HUSBAND AND WIFE: Enticing and Alienating—Evidence—Dec-**  
1, 2, 7 **larations of Alienated Spouse.**

**HUSBAND AND WIFE: Enticing and Alienating—Evidence—Ad-**  
8 **missibility.** Evidence in an action for alienation of affections that an attorney promised the one whose affections are alleged to have been alienated to write to the defendant and ask him to desist from his efforts to separate plaintiff and her husband, is hearsay.

**HUSBAND AND WIFE: Enticing and Alienating—Evidence—Dec-**  
6, 9 **larations of Alienated Spouse.**

*Appeal from Sioux District Court.*—WILLIAM HUTCHINSON,  
Judge.

NOVEMBER 28, 1917.

ACTION for damages consequent on the alleged alienation of the affections of plaintiff's husband by his father resulted in a judgment against defendant for \$18,000. The defendant appeals.—*Reversed.*

Geo. T. Hatley, for appellant.

Van Oosterhout & Kolyn and T. E. Diamond, for appellee.

LADD, J.—I. The plaintiff was married to William Moir, June 10, 1914. He left her December 7, 1915. She had been married before, and had two children by her first husband, Claude Hoeg. Prior to her marriage to William, she had been engaged as his housekeeper from about the middle of February of that year, and was divorced in March. In September, 1914, he adopted her children. They lived on a farm rented from defendant, who resided about three miles distant. The defendant and his wife appear to have raised nine children, of whom William is the third. He had not been healthy, and intellectually appears to be subnormal. According to plaintiff's testimony, she and William had lived happily together, though William tells a different story. In passing on the sufficiency of the evidence to sustain the verdict, however, deductions from the evidence most favorable to the plaintiff must be accepted.

It appears without controversy that William became involved in debt, and in November, 1914, his father paid these debts, and then or thereafter took a mortgage on all his property, signed by him and plaintiff, to secure the payment of these and what William owed defendant and his

1. HUSBAND AND  
WIFE: enticing  
and alien-  
ating: evi-  
dence: dec-  
larations of  
alienated  
spouse.

mother for borrowed money and rent, and subsequently furnished William money, on which, in connection with the proceeds of eggs sold and the income from cows, he supported his family. Of course, evidence of William's complaints in substance that his father was not advancing as much money as he would like, or of the restraints on him in handling his property, owing to the mortgage, could have no bearing on the issues, as defendant was not shown to have failed to furnish the amount agreed upon, nor to have done more in relation to the property than insist that the mortgagor should not sell mortgaged property. If, as William declared, defendant grudgingly handed over that with which to pay the nurse attending plaintiff when operated

2. HUSBAND AND WIFE: enticing and alienating: evidence: declarations of alienated spouse.

on, he violated no duty to either, as he was under no legal duty to pay the expense incurred. The testimony of these declarations, and that his father was making trouble between him and plaintiff, or that he wished William to leave her, and the like, together with evidence of sentiments expressed by William in relation to plaintiff, tended to prove the state of his affections toward her and the condition of his mind in consequence of any influence exerted thereon. But such evidence could not be considered as tending to prove that defendant or anyone else had actually exerted any such influence or had interfered in any manner in his domestic affairs. As to these issues, such declarations were mere hearsay. *Scxton v. Scxton*, 129 Iowa 487; *Hardwick v. Hardwick*, 130 Iowa 230; *Miller v. Miller*, 154 Iowa 344.

3. HUSBAND AND WIFE: enticing and alienating: right of parent to advise child: malice.

The circumstance that a child is married does not sever the parents' relations with him. He may lawfully and is likely always to talk over his affairs, and especially his troubles, even those relating to

his domestic affairs, with them, and the law recognizes the right of parents to counsel their children, even after marriage, and concerning the most delicate relations of life. *Heisler v. Heisler*, 151 Iowa 503, 505; *Miller v. Miller*, 154 Iowa 344; *Busenbark v. Busenbark*, 150 Iowa 7; *Pooley v. Dutton*, 165 Iowa 745. For this reason, more proof is required to sustain such an action against a parent than against a stranger. Even though a father's advice be unsound or foolish, if it be given in good faith, he is exonerated. Moreover, good faith is to be presumed, and malice must in all cases be proven directly, or the circumstances shown to be such that malice may be inferred. *Heisler v. Heisler*, supra; *Geromini v. Brunelle*, 214 Mass. 492 (46 L. R. A. [N. S.] 465, and all cases collected in note).

The burden of proof, then, was on plaintiff to show not only that defendant, by his counsel or conduct, persuaded William to leave his wife, but that in so doing he was actuated by malicious motives. Appellant contends that the evidence was insufficient to carry these issues to the jury.

Upon a separate examination of the record, the members of the court are unable to agree whether there was any evidence from which the inference might properly be drawn that defendant had persuaded his son to abandon plaintiff, or that, if he so did, he was actuated by malice therein, and, as there must be a reversal on other grounds, we have concluded not to review the evidence or pass at this time upon its sufficiency to carry these issues to the jury.

II. Plaintiff underwent an operation,

4. HUSBAND AND WIFE: enticing and alienating: evidence: declarations of alienated spouse: hearsay.

on September 10, 1915, at Le Mars, and she testified that her husband visited her every day. She was then asked to relate to the jury what he had said to her, and, over objection, answered:

"Will told me that he had asked for money to pay  
VOL. 181 I.A.—64

the nurse that had been waiting upon me, and he said his father furnished the money very grudgingly.”

Motion to strike this out was overruled. The objection to the question should have been sustained, and, as the answer had no tendency either to show the affection or want thereof for plaintiff, or improper conduct on the part of the defendant, the same ruling should have been made on the motion. The defendant was under no obligation to pay the bill, and, if he did so reluctantly, this was no proof of hostility toward plaintiff, or of any design to interfere with her marital relations.

### III. Plaintiff testified that defend-

5. HUSBAND AND WIFE: enticing and alienating: evidence: declarations of alienated spouse.

ant's wife came to see her one evening in company with her son, Carl; that she (defendant's wife) told her that the story was going around that she was killing William.

She was then asked what William afterward said to her about the visit. Over objection, she answered:

“Well, he said the story that his mother had heard, there was absolutely no truth in it, and he bet his mother had never heard such a story; that it had been hashed up at home to make trouble between us.”

A motion to strike was overruled. Manifestly, the ruling was erroneous. Defendant was not responsible for what his wife did, nor what might have been hashed up at home, unless he participated therein. See *Heisler v. Heisler*, supra.

### IV. Again, plaintiff related that her

6. HUSBAND AND WIFE: enticing and alienating: evidence: declarations of alienated spouse.

husband's cousin from Minnesota and his brother and brother-in-law came to the place one evening; that, after they left, her husband stated how he felt, and also what they wanted him to do.

“Q. Tell the jury what Will said to you in that connection.”

Objection as incompetent, irrelevant and immaterial, and calling for hearsay testimony, was overruled. The ruling was erroneous; for surely the defendant could not be held responsible for what a nephew or son or son-in-law may have said, or for the influence what they said may have had on her husband. The witness answered:

"After they went away, Will seemed to feel very bad, and said that his folks wanted him to leave me right then and there, and go with his cousin, Rufus, that night, on one of the Minnesota farms that his father owned, and said that he felt very bad; that his folks were trying to make trouble between us."

The reference to his folks evidently was directed to the three young men who visited him, and the answer but emphasizes the prejudicial character of the ruling.

7. HUSBAND AND WIFE: entic-  
ing and alien-  
ating: evi-  
dence: dec-  
larations of  
alienated  
spouse.

V. The plaintiff and her husband passed the night following the visit last above mentioned at Ireton. She was asked:

"You may go on and state what was said there by Will and by Mr. Bailey and by Mrs. Bailey and you there in the presence of each other, as to how Will felt and what he intended to do, and so on."

An objection might well have been sustained to this question because of calling for evidence that would be improper, but the witness answered pertinently to the issues, and therefore the ruling was not prejudicial.

"Will seemed to feel very bad, and when we got there, seemed to be nervous and excited, and he told my brother-in-law and my sister that his father was insisting on him leaving, and that his folks all had it in for me, and that, if he could have a team and could save the household furniture, and take me and the children and move off the place and let his father have the rest, and he also said that he believed he had the meanest father in the world; that his father was doing all he could to separate him and I."

Such evidence is admissible as tending to show the husband's attachment for plaintiff and the influence of what ever may have been said or done by defendant on the declarant's mind. *Sexton v. Sexton*, 129 Iowa 487; *Hardwick v. Hardwick*, 130 Iowa 230; *Miller v. Miller*, 154 Iowa 344; *White v. White*, 140 Wis. 538 (122 N. W. 1051).

VI. The next morning, plaintiff and her husband drove to Orange City to consult Attorney Hatley, and she was asked what Will said to Mr. Hatley, and, over objection, answered:

"He told Mr. Hatley that his folks were making trouble between them and trying their best to separate us, and he said his father had a mortgage on everything that he had, and he wouldn't give him any money, and he said he thought lots of his family and he liked to treat them right, but he said no man could treat his family right, he said, and get along without any money at all. He also asked Mr. Hatley his advice as to what he should do, and Mr. Hatley agreed to write a letter to father Moir, telling him to desist from separating us, and Mr. Hatley agreed to and I think he did write a letter to father Moir."

The question was entirely too general, and the answer included much that was not admissible. That defendant held a mortgage on everything was true, but he was under no obligation to give William money save as he undertook so to do, and it was not a matter of his concern that William might not have sufficient money to care for plaintiff. What Hatley may have advised was entirely hearsay, as was his promise to write a letter.

VII. Cornie Milder testified that he had a conversation with William in October, 1915, and was asked:

8. HUSBAND AND WIFE: entic- ing and alien- ating: evi- dence: ad- missibility.

"Will you state to the jury what that conversation was and how it seemed to af-

9. HUSBAND AND WIFE: entic- ing and alien- ating: evi- dence: de- clarations of alienated spouse.



fect him; that is, as to whether he felt bad or not?"

The question was objected to as incompetent, irrelevant and immaterial, and as hearsay and as not binding on defendant. The objection was overruled, and the witness answered:

"Well, he said his mother had been down the night before, and they had some trouble, and she called May all kinds of names. He said he didn't say anything, but just let them fight it out, May and his mother; and then he said his mother wanted him to leave May, and he said he wouldn't do that; he said he would sooner quit the farm than leave May. 'Well,' he says, 'we always get along all right, but the old folks didn't seem to like her.'"

A motion to strike the answer was overruled, and, over another objection, the witness was permitted to say that William had "felt bad about that the whole day when he helped us thresh that day. That is what he told me." These rulings were erroneous for that conspiracy between defendant and his wife was neither charged nor proven, and defendant was not responsible for what his wife may have said or done. Because of the errors pointed out, the judgment is—*Reversed*.

GAYNOR, C. J., EVANS and SALINGER, JJ., concur.

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T. A. ROSSING et al., Appellants, v. STATE BANK OF BODE et al., Appellees.

**CORPORATIONS: Members and Stockholders—Meetings—Voting**

- 1 **by Proxy.** Voting by *proxy* is apparently (?) authorized by articles of incorporation which provide for dissolution upon a vote "of stockholders *representing* a three-fourths majority of all stock then issued."

**CORPORATIONS: Members and Stockholders—Meetings—Usage as**

- 2 **Justifying Voting by Proxy.** Usage may justify the voting of corporate stock by proxy.

and the formation of the defendant State Savings Bank of Bode, asserting that all these things should be held fraudulent as to plaintiffs, and praying, among other things, that plaintiffs should be given such interest in the new bank as they owned in the old. They claim further that the directorate of the old bank wrongfully allowed defendant Hanson commissions on the making of farm loans, which should have been received by the old bank, of which Hanson was cashier. The district court dismissed the petition of the plaintiffs, and they appeal.—*Affirmed.*

*O. T. Gullixson and E. A. & W. H. Morling*, for appellants.

*Kenyon, Kelleher, O'Connor & Price and F. M. Miles*, for appellees.

SALINGER, J.—I. The plaintiffs seek re-

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| <p>1. CORPORATIONS :<br/>members and<br/>stockholders :<br/>meetings :<br/>voting by<br/>proxy.</p> | <p>lief on the allegation, in substance, that the dissolution of the old and the formation of the new bank should be set aside because both acts were a fraudulent scheme on part of those defendants who control both banks to transfer the assets and good will of the old bank to the new, and to exclude plaintiffs from sharing in the new to the extent of the value of their shares in the old. If the corporation was dissolved, and the new bank has stockholders not in court, how is such relief possible?</p> |
|---|---|

Undoubtedly, a court of equity may set aside a sale where one who controls buyer and seller so sells the property of one to the other as that a fraud is worked upon minority shareholders. Such relief has often been given. *Manufacturers' Sav. Bank v. O'Reilly*, (Mo.) 10 S. W. 865; *Abbott v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578, 588; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27, 64; 3 Cook on Corporations (7th Ed.), 2113. In *Mason v. Pewabic Min. Co.*, 10 Sup. Ct. Rep. 224, that being still

possible, the prayer granted was that the minority may have the property publicly sold. But all that can give no standing to a prayer which asks impossible relief. It will be remembered that the "setting aside" which the plaintiffs pray is in effect a demand that the court decree the old bank is not dissolved; that this is so because the new bank *is* the old bank; and that the plaintiffs, therefore, shall have such share in the new bank as equals the one they had in the old bank. If the State Bank of Bode *is* dead, no court can give it life. Aside from complaint of things that were done in winding up its affairs *after* dissolution, there is no challenge of the legality of the dissolution itself, beyond an allegation that plaintiffs have neither knowledge nor information sufficient to form a belief "whether the said proceedings for dissolution were in form conformable to the articles of incorporation and with the law of the state of Iowa." The only attack made by the evidence is that voting by proxy was not authorized formally, and that without such votes the dissolution and winding up by sale was ordered by less votes than the articles of incorporation require. It is doubtful whether an allegation that plaintiffs do not know whether the "proceedings for dissolution" conformed to the articles and to the laws of the state raises whether proxy voting was authorized. But grant it does, and the fact remains that this objection is either untenable, waived, or both. The statute provides that a corporation may be dissolved "in accordance with the provisions of its articles." Code, Section 1617. The articles here provide for a dissolution upon a vote "of the stockholders *representing* a three-fourths majority of all stock then issued," which would seem to recognize a vote by representation,—i. e., by proxy; and the vote on dissolution was declared to be, and treated as, valid. The votes were counted, and it was found, in accordance with the practice of the corporation, that 295 shares were repre-

sented, and declared by the president that the resolution was adopted. All this was unchallenged. The declaration was preliminary to proceeding with the business of the meeting. Those who now assert illegality voted proxies. The bank record reciting all this voting and action on the vote was received in evidence without objection. Though

voting by proxy were not formally provided for, it must still be recognized now, because according to usage, and of having been dealt with as valid. See *Graebner v. Post*, (Wis.) 96 N. W. 783; *Pendleton v. Harris-*

*Emery Co.*, 124 Iowa 361; *Jones v. Bonanza Min. & Mill. Co.*, (Utah) 91 Pac. 273. The practice was not only permissible because of usage, but this particular voting was permitted and not objected to, and so made now unobjectionable.

It is a principle of corporation law that the legality of an election will not be inquired into upon the ground that illegal votes were cast, unless those votes were challenged at the election at the time when they were cast. 2 Cook on Corporations (7th Ed.), 1827. All irregularities in a corporate election, the legality thereof, as well as the legal qualifications of the officers elected, are settled by the election as against a collateral attack. *Jones v. Bonanza Min. & Mill. Co.*, (Utah) 91 Pac. 273. Though a proxy cannot vote when the owner of the stock is present and votes, yet the alternative proxy may vote the stock even though the principal proxy is present, no one objecting. 2 Cook on Corporations (7th Ed.), 1785. The ordinary proxy, being intended to be for an election merely, does not enable the proxy to vote to dissolve the corporation, or to sell the entire corporate business and property, or to vote upon other important business, unless the proxy itself is general, or in special terms gives

2. CORPORATIONS :  
members and  
stockholders :  
meetings :  
usage as justifying  
voting by proxy.

3. CORPORATIONS :  
members and  
stockholders :  
meetings :  
proxies : necessity  
for prompt objection.

the power to vote on such questions. But where the stockholder does not promptly object, he may be bound. *Graebner v. Post*, (Wis.) 96 N. W. 783, 784. The validity of a corporate election is not affected by the fact that an alternative in proxies voted the stock when the principal attorney was present, where none of the shareholders who executed the proxies complained of, and all of them subsequently formally ratified, the action of the alternative. *Commonwealth v. Roydhouse*, (Pa.) 82 Atl. 74. A stockholder is bound by the action of his proxy at a stockholders' meeting, unless he exercises the most active diligence in repudiating the same, where he knows or should have known what was done at the meeting. *Synnott v. Cumberland Bldg. Loan Assn.*, 117 Fed. 379. Neither *McKee v. Home Savings & Trust Co.*, 122 Iowa 731, nor *Stewart v. Pierce*, 116 Iowa 733, hold anything that is material on this point. The first decides merely that, in a situation where what was done can be undone by the courts, and the statute says that one may vote by proxy but that no person shall vote more than 10 per cent. of the outstanding shares at the time of the election, one who votes more than that number of shares cannot by such vote carry a proposition, and that this applies to more than voting for the election of bank officers. The other is that, where the court finds that a stockholder owns one half the stock of a corporation, the other stockholders may properly be enjoined from voting more than one half thereof.

1-a

4. CORPORATIONS :      The majority has power to order dissolution and the sale of the assets upon members and stockholders : such vote as was here had. It had power dissolution : even to sell it to itself. The courts will sale of assets.      closely scrutinize the fairness of such a sale, but that does not affect the original power to make it. One corporation

may lawfully sell its assets to another corporation composed in greater part of the majority stockholders of the selling company. *Munford v. Ecuador Development Co.*, 111 Fed. 639, 643. The mere fact that directors sell property of their corporation to a new corporation of which they are directors and stockholders will not make the sale absolutely void. *Manufacturers' Sav. Bank v. O'Reilly*, (Mo.) 10 S. W. 865. And so though the sellers control both corporations. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *Olsen v. Homestead Land & Imp. Co.*, (Texas) 28 S. W. 944; *Smith v. Stone*, (Wyo.) 128 Pac. 612. Where a sale is made from one corporation to another, and the directors of one are largely interested in the stock of the other, or the same person or persons own a majority of the stock of both corporations, such sale is not void nor constructively fraudulent, but will be avoided by actual fraud, or if an undue advantage is taken or unconscionable bargain made. 3 Cook on Corporations (7th Ed.), 2113. And see *Beidenkopf v. Des Moines Life Ins. Co.*, 160 Iowa 629, 649. As said in *Plimpton v. Bigelow*, 93 N. Y. 592:

"The right which a shareholder in a corporation has by reason of his ownership of shares, is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately, on its dissolution, in the assets remaining after payment of its debts."

In *Price v. Holcomb*, 89 Iowa 123, speaking to a claim that, under the rule governing a purchase of trust property by the trustee, the holder of the majority of stock cannot buy the property of the corporation, we said that such stockholder's relation was not that "of agent or trustee, but a joint owner," and, while "an agent or trustee, is charged with the interests of his principal or *cestui que trust*, and cannot have any interest adverse thereto. Not so, however, as to a stockholder. He has his own interests to protect,

and is not charged with the care of the interests of the other stockholders. They act for themselves."

See *Windmuller v. Standard Distilling & Distributing Co.*, 114 Fed. 491.

We do not go into the question for

5. CORPORATIONS: what the sale will be avoided, because, as  
dissolution: the majority had the power to dissolve and  
fraud in sub- wind up and sell to anyone, including it-  
sequent sale self, no fraud in the subsequent sale can af-  
of assets: ef-  
fect. fect that original power. When the requisite vote ordered  
dissolution, the corporation became, *ipso facto*, dissolved.  
no matter what the motive that induced the vote. No ac-  
tionable wrong can arise from doing by lawful means what  
there is lawful right to do.

In *Watkins v. National Bank*, (Kan.)

6. CORPORATIONS: 32 Pac. 914, it is said that a national bank  
dissolution: may go into liquidation and be closed by a  
voluntary dis- vote of its shareholders owning two thirds  
solution: rea- of its stock; and this right may be exer-  
sonableness: cised although it may be contrary to the wishes, and against  
banks and the interest, of the owners of the minority of the stock.  
banking. It is held in *Windmuller v. Standard Distilling & Distrib-  
uting Co.*, 114 Fed. 491, that a stockholder may, in stock-  
holders' meeting, vote on any measure, even though he has  
a personal interest therein separate from, or adverse to;  
that of other stockholders, and may vote for a dissolution,  
even though he is influenced to that course by a wish to ter-  
minate a contract beneficial to the corporation, but oner-  
ous to himself; and in *Green v. Bennett*, (Texas) 110 S. W.  
108, that shareholders owning two thirds of its stock may  
vote to liquidate the bank, though they are the directors  
and the executive officers thereof; since they, as directors  
and officers, owe no duty to dissenting minority stock-  
holders to continue the bank, where they do not desire so  
to do. Appellants cite *Beidenkopf v. Des Moines Life Ins.*

Co., 160 Iowa 629, 641, presumably because it has some language that a dissolution is justified where it is ordered without fraud, upon reasonable grounds, and is for the best interests of all concerned. If that were its decision,—and it is not,—we are not prepared to say the power to dissolve was arbitrarily exercised. Had we the question whether the dissolution was justified, many things indicate there was a preconceived plan to have a majority of the stockholders buy the assets on dissolution, and to open the new bank, which is a defendant. While this is so, it cannot be said that entertaining and carrying out such a plan was necessarily even a moral wrong, and, as such, unjustified. It is plain there was great friction between those who are ranged on opposing sides in this suit. Plaintiff Captain Rossing expressed himself to the effect that defendant Hanson couldn't be believed on anything, which seems to have been after the captain had become angered because he was retired from the directorate. Some of the plaintiffs promoted the organization of a national bank as a rival, and when the other faction acted to bring about dissolution, this rival had already proved quite injurious, which we think is undeniable, notwithstanding there is strained evidence attempting to show that the creation of such a rival is really a benefit to the old institution. We find good reasons, too, for not renewing the charter of a bank capitalized at \$30,000, and for organizing a new bank with less capital and with these contending factions eliminated. Plaintiff Gullison admits it would not have been "good business" to renew the charter, in view of the existence of the new national bank. But the *Beidenkopf* case does not *decide* that the required vote can dissolve only if its action is reasonable. It does say that, if certain conditions exist, the courts will not interfere for a dissenting minority. It does not say there will be such interference where those conditions do not exist. *Price v. Holcomb*, 89 Iowa 123, is of



like effect in statement. What the *Beidenkopf* case decides, and we now approve, is this:

(a) By change in statute, a dissolution need no longer have unanimous support, but it suffices if it have such vote as is stipulated in the articles of incorporation.

(b) Every stockholder impliedly agrees, in becoming a member, that the management and control of the corporate business and interest shall be vested in the majority, and that *Platner v. Kirby*, 138 Iowa 259, at 265, is supported by precedent in saying that "in this state we have recognized the right of a majority to determine whether the corporation shall be continued, or shall be wound up."

(c) Such majority has a discretionary power in the matter of dissolving.

(d) While an article of incorporation majority may dissolve because the corporation is insolvent, it may do so though the corporation is not insolvent—which is as well the holding of *Green v. Bennett*, (Texas) 110 S. W. 108.

(e) Such majority may wind up if, in its judgment, there is reason to believe that, at some time in the future, the business may not prove satisfactory, and that, when the acts of the majority are impugned by the minority, the courts will hold that the policy and wisdom of the act is a matter of business, and not judicial judgment, and will not set the judgment of the court against it.

(f) There is no implied contract to remain in business, and the courts will do nothing which is in effect ordering specific performance of such claimed implied agreement. Nor is the fact that the required vote ordered dissolution, all. The charter would have expired by limitation on March 1st. The dissolution was ordered in October preceding. Section 1618-a, Supplement to the Code, 1913, provides that to continue the corporate existence of a state bank necessitates an affirmative vote of two thirds

7. CORPORATIONS:  
dissolution:  
finality.

of the shareholders at a stockholders' meeting held for that purpose, and called upon a notice signed by at least two of the officers of the bank, and by a majority of the directors. Unless its existence is continued in manner fixed by law, the corporate life expires, *ipso facto* and without any direct action, at the time fixed by charter for expiration. 10 Cyc. 1271. It is made plain that no such vote could be had for renewal. Between the time at which dissolution was ordered and March 1st, nothing was left of the charter except the power and duty to liquidate. *Muscatine Western R. Co. v. Horton*, 38 Iowa 33, at 45; *Stewart v. Pierce*, 116 Iowa 733, 749, 750. If it could be claimed that the vote to dissolve left more than this, the old bank is now dead, because the charter is dead. We have no power to do the impossible. We can no more decree that bank into life than we can add to the term of a tenant, when we find after the claimed term has expired that he should not have been dispossessed. And plaintiffs sue

8. CORPORATIONS: members and stockholders: right to assets of undissolved corporation. as individual shareholders, and their pleadings are framed to obtain only such relief as could be given if the State Bank of Bode is a dissolved corporation. They have no right to maintain suit as individuals, unless the corporation is no longer existing. If the corporation is existing, it and not its stockholders must sue. *Troutman v. Carnival Co.*, 142 Iowa 140, 145; *De La Vergne Refrigerator Mach. Co. v. German Savings Institution*, 20 Sup. Ct. Rep. 20; *Judy v. Beckwith*, 137 Iowa 24; *Morrow v. Gould*, 145 Iowa 1, 4. This is certainly so unless the corporation refuses to sue or demand. *Kennedy v. Citizens' Nat. Bank*, 128 Iowa 561; *Smith v. Stone*, (Wyo.) 128 Pac. 613; and *Dillon v. Lee*, 110 Iowa 156. In the last, it is said this requirement and rule is not changed because, in a suit by members of a corporation by its treasurer, the defendants were among those in control of the corporation when such profit was

made, and that, if the corporation was in existence at the time the action arose, the fact that it was dissolved at the time the suit was brought did not relieve plaintiffs from showing demand and refusal of the corporation to bring the suit. Plaintiff might as well ask that a court of equity decree a disintegrated corpse shall be dealt with as being quick.

Just as impossible is the relief asked as to the new bank. To be sure, the plaintiffs speak of a "pretended" new bank; but they also say—and it is the fact—that the new bank "is now doing business as a state savings bank and conducting business as such at Bode, Iowa," on authority from the state. And it is manifest that, no matter what complaints plaintiffs may justly make of the dissolution of the old and the organization of the new bank, we cannot, since other shareholders in the new bank are not made parties, give to plaintiffs an interest in the new bank without taking from the shares of those over whom we have no jurisdiction. As said in *Leurey v. Bank*, (La.) 58 So. 1022, the amount of the capital stock of a corporation being fixed by its charter and divided into aliquot parts, it is no more possible to add parts in excess of the number which constitutes the whole than it would be to add another to the two halves which constitute any whole thing.

The prayer which asks the impression of a trust, the removal of the defendants as trustees, and the like, asks what is not impossible, but it does ask what the law will not give. As has been seen, the relation between stockholders who disagree as to what shall be done is not a trust relation. On such division of opinion they assume an adversative relation, at least in such sense as that those who prevail because they are in the majority, may not, therefore, be held to have violated a

9. CORPORATIONS:  
dissolution:  
rights of  
minority stock-  
holders.

10. CORPORATIONS:  
members and stock-  
holders: ma-  
jority order-  
ing dissolu-  
tion: nonex-  
istence of  
trust relation.

trust. If this be not so, the assertion of a trust would always be available to have the courts nullify any action of the majority which remained unsatisfactory to the minority.

11. **CORPORATIONS: dissolution: rights of minority stockholders.** We do not see what relief the plaintiffs can base upon the fact that Captain Rossing claims he voted to dissolve and to have the assets sold because it was his understanding that he and others should have as much of a share in the new bank as they had in the one to be dissolved. If there were no other difficulty, it is an insuperable one that the "understanding" of the witness is all there is, and that there is no evidence of any agreement to do what the captain understood or believed was going to be done, even if that were possible. The utmost his testimony comes to is that he voted in the understanding that all done was merely a form of reorganization for the purpose of renewing the charter and reducing the stock, and that he voted, "expecting to get stock." Be that as it may, it is, to say the least, extremely doubtful whether the result would have been changed if those who claim to have voted aye with said understanding had voted no. We cannot grant relief based on treating the dissolved bank as going. We cannot thrust the plaintiffs into the new bank at the expense of parties not before us. We should not impress a trust upon the new bank nor deal with its officers as trustees for plaintiff. The old bank is dissolved, and the plaintiffs have no interest in the new one. This much must stand, be the consequences what they may, and whatever may or may not be the remedy available to plaintiffs.

1-b

12. **EQUITY: decree: praying impossible relief: general prayer.** But that one seeks relief which cannot or should not be granted does not work to deny him any relief to which the petition and its prayer for general relief entitle him. For instance, while *Green v. Bennett*,

(Texas) 110 S. W. 108, refused to give the complainant a proportionate share of the stock of the new bank, it held that dissenting minority stockholders had a remedy against the liquidating committee for injuries resulting from the failure of the committee to properly dispose of the assets of the bank.

That impossible relief is sought is, as said, no bar to possible relief. Indeed, it may fairly be held that, even where possible and impossible relief is sought in the alternative, the possible is not an alternative at all, but is all that is sought and expected. But, of course, even possible relief may not be due. In this case plaintiff alleges all he does as a reason why all done should be nullified—the equivalent of asking a rescission. The only specific prayer for a money judgment is for the sum got by Hanson for farm loan commission, which it is claimed he was improperly allowed to divert from his employer, the bank. There is not a suggestion in pleading that damages are sought for conversion of either property or good will of the old bank. Rescission and restoration by setting aside is the object. The brief points make no claim for damages, or complaint that the stock of plaintiff is worth more than defendants offer. It is doubtful, to say the least, whether appellant may, in argument, mend holds and change from the claim that the sale is a nullity to one that damages are due because the purchase price is too small. See *Pollitz v. Wabash R. Co.*, (N. Y.) 167 Fed. 145; *Smith v. Stone*, (Wyo.) 128 Pac. 612; *Farmers' Milling Co. v. Mill Owners Mut. Fire Ins. Co.*, 127 Iowa 314, 318; *Donley v. Porter*, 119 Iowa 542, 545; *Hawes v. Swanzey*, 123 Iowa 51; *Schilling Bros. v. Bosch-Ryan Grain Co.*, 145 Iowa 750, 758; *Yoder v. Kalona Sav. Bank*, 142 Iowa 219; *Home Sav. Bank v. Morris*, 141 Iowa 560; *Wright v. Lieth*, 146 Iowa 290; *Criley v. Cassel*, 144 Iowa 685; *Farmers & Merchants Bank v. Wood Bros. & Co.*, 143 Iowa 635. But, as both parties

have seen fit to litigate the question of damages, we shall proceed as though the pleadings tendered the issue tried out.

II. Some claim is made that the sale

13. CORPORATIONS: dissolution: sale of assets: non-necessity for public sale.

was not public; that no opportunity for general bidding was given; and that, were it not for the conduct of defendants, more than was could have been realized from the

sale. The plaintiffs knew the sale was ordered. Most of them voted for the order. While they claim defendants designed that no one else should bid, plaintiffs admit they could have bid, and that they were neither willing nor able to. They admit, in effect, that no amount of publicity and no public sale would have produced a buyer, except in the plaintiffs or the defendants. When a public sale would get no more than was got, private sale is not a fatal objection. One stockholder may buy all the property at a public sale thereof. *Price v. Holcomb*, 89 Iowa 123. If the price be fair and adequate, there is no overreaching, all that is ordered and done is public, and the minority have full opportunity to bid and buy, it is not material that the sale was not at public vendue. *Linsley v. Strang*, 149 Iowa 690, 691; *Roberts v. Herzog*, (Minu.) 124 N. W. 997; *Kessler & Co. v. Ensley Co.*, (Ala.) 141 Fed. 130; *Pewabic Min. Co. v. Mason*, 12 Sup. Ct. Rep. 887; *Baker v. Seattle-Tacoma Power Co.*, (Wash.) 112 Pac. 647; *Buell v. Buckingham & Co.*, 16 Iowa 284; *Clark v. American Coal Co.*, 86 Iowa 436; *Taylor v. Lovett*, 87 Iowa 177, 178. It is said in *Phillips v. Steam Engine Co.*, (R. I.) 45 L. R. A. 560, that a sale fair to all concerned will not be set aside for the purpose of ordering an auction sale. All that is held by *Hart v. Mt. Pleasant Park Stock Co.*, 97 Iowa 353, cited by appellants, is that one who is an agent of an association, and also stockholder in a company, can base no rights upon a clause in a contract between the two which he inserted without authority, and which was repudiated as soon as

discovered. The plaintiffs neither wanted to keep their shares in the old nor take part in the new bank. It is admitted over and again that the complaint is of the price offered for their stock. If that be a fair price, plaintiffs have not been injured by failure to have public vendue. There would have been no suit, were defendants willing to pay plaintiffs \$2 a share instead of a round \$1.20. There is practically no dispute but that defendants are offering enough, so far as the value of the tangible assets sold are concerned. There is a claim that there was bad and slow paper, and that more than value was paid for the bills receivable. We do not think the attack on this paper is to be taken seriously. On the other hand, plaintiffs complain that the bank building and the fixtures were unjustifiably dealt with as being worth \$3,000 and \$1,000, respectively, when in fact worth \$4,000 and \$1,250. We think the lower value the correct one. Complaint that improvements were made and wrongfully charged to real estate, we think is trifling.

So it all narrows to whether more than book value should be allowed. In *Green v. Bennett*, (Texas) 110 S. W. 108, the owners of two thirds of the stock of a solvent national bank, who were also its directors and executive officers, voted to liquidate the bank, and organized a new bank, and apportioned the stock thereof among themselves, to the exclusion of minority stockholders of the old bank. They elected themselves directors and officers of the new bank; and, through a liquidating committee composed of themselves, they transferred the assets of the old bank to the new. It is held that the transaction is not void, but is subject to the closest scrutiny on the part of a court of equity, and subject to be set aside on its being shown that it was not conducted with the utmost fairness, to the end that full value and the best price obtainable may

14. CORPORATIONS:  
dissolution:  
sale of assets:  
"good will"  
as element of  
value.

be realized; and that, since the minority stockholders had only the right to demand that the assets of the old bank be disposed of so that the full value thereof should be received for distribution among shareholders, they could not complain of the transaction, in the absence of a showing that the sales were not for full value, and on as favorable terms as could be obtained.

## 2-a

The great question is whether those who dissolved the corporation and wound it up and bought its tangible assets should be dealt with as if they had continued the old bank, had bought its good will, and not paid for it. The crux is whether defendants are in that position, and, if so, what is the value of this "good will." We are of opinion they are not in that position. If the bank was dissolved, it ceased to be a going concern, and no good will was left. Appellants concede that this is the holding of *Green v. Bennett*, (Texas) 110 S. W. 108. Our leading case on the subject, *Millsbaugh Laundry v. First Nat. Bank of Sioux City*, 120 Iowa 1, so holds when the business was ended by an authorized foreclosure: that the one who forecloses and thereby destroys the business has done no wrong, and cannot be guilty of a conversion of the good will, because the exercise of his rights worked that there was no good will to convert. While selling the property of a party on foreclosure is not ordering a dissolution and a sale of the property in carrying out the dissolution, the two acts invoke the same rule: that, when a business is closed out, there is no good will left. The witnesses in this trial finally agreed, in substance, that the fact that the concern is no longer going will at least greatly reduce the value of the good will. We think it a fair view of the whole of the evidence that it would be of no value. It is held in *Bell v. Ellis*, 33 Cal. 620, *Farwell v. Huling*, (Ill.) 23 N. E. 438,



and *Rice v. Angell*, (Texas) 11 S. W. 338, that it impairs the value of good will that the business is not profitable. It must follow that, if the business is defunct, its "good will" has no value. If the property necessary to carry on the business is all sold, and a theretofore existing partnership has been in fact dissolved, there is nothing left of good will, and no good will to be converted (*Lobeck v. Lee*, [Neb.] 55 N. W. 650, which seems to have been approved in *Bradbury v. Wells*, 138 Iowa 673, at 680).

If there be in fact a dissolution, it does not matter that surviving partners, in the absence of a restrictive agreement on their part, carry on the same line of business as was transacted by the firm, and at the same place, and they may do so without accounting for the value of such of the good will of said firm as thereby accrued to them. *Lobeck v. Lee*, (Neb.) 55 N. W. 650. This was held in *Musselman & Clarkson's Appeal*, 62 Pa. St. 81, where, after a banking firm had dissolved and appointed a partner to liquidate, he, immediately following the dissolution, commenced banking in the firm's house on his own account, and under the firm name, while at the same time settling the firm business at that place. It is said that, if he had sold the good will, he would have been obliged to have accounted for the value received; but, in the absence of such sale or agreement on his part to pay for it, and his not selling it as such, he was under no liability to pay for good will; that this is so because—

"There was no relinquishment of business by the partners. Their business expired by its own limitation. They had no *exclusive* right in the business that existed for a moment after the firm dissolved \* \* \* ; and these are the criteria of property in good will under the English rule. *Kennedy v. Lee*, 3 Meriv. 441; Coll. on Part. 156; Story on Part., § 99."

The court adds that though, in its opinion, the rule has

been made more extensive by usage in Pennsylvania, "how can there be a good will of a business in favor of the members of a firm, where the firm has ceased by its own limitation, and no exclusive right to follow the business in that place belongs to them?" This is approved in *Lobeck v. Lee*, (Neb.) 55 N. W. 650, 654.

As some of the authorities put it, the good will arising from the sale of the property exists only in cases where such sale is compellable by some of the members of the partnership or the association; that, therefore, on the death of one partner, the good will is not stock upon which the executor of that partner can compel a division, because he cannot compel a sale of the whole premises. *Bradbury v. Wells*, 138 Iowa 673, at 680, citing with approval Collyer on Partnership, Section 162.

In *Slack v. Suddoth*, (Tenn.) 52 S. W. 182, a firm of dentists dissolved partnership, and complainant notified defendant that the partnership was dissolved. But before giving this notice, or perhaps on the day after, he rented another office in the same building, and near the head of the stairway where the old offices were. On the next day after the dissolution, he advertised in the papers that the partnership was dissolved and he was located for practice in an adjoining room in the same building, and put his sign up at his office door. The other partner remained in charge of the old office, and used such of the furniture and instruments as he needed or wished. Complainant thereupon filed a bill to wind up the partnership, asked that a receiver be appointed to take charge of the lease and property and sell the same, and that he be allowed to start the bidding at \$2,000. Relief was denied upon the ground that here is a case where in no forced sale or transfer can be made of a good will, and that good will implies something gained by consent.

## 2-b

The very definitions of "good will" demonstrate that it belongs to none but a going concern which continues the business sold to it,—that "stays at the old stand,"—a business handled as something other than "a closing-up transaction." *Ott v. Boring*, (Wis.) 121 N. W. 126. It is an element in the transfer "of a well-established business." *In re Graesser's Estate*, (Pa.) 79 Atl. 242. The most frequent definition of good will is that old customers will continue to be customers. *Halverson v. Walker*, (Utah) 112 Pac. 804; *Brown v. Benzinger*, (Md.) 84 Atl. 79.

Other cases on the rule of the prospect of the customers' going back are *Vonderbank v. Schmidt*, (La.) 10 So. 616; *Bergamini v. Bastian*, 35 La. Ann. 60; *Succession of Journe*, 21 La. Ann. 391; *Chittenden v. Witbeck*, (Mich.) 15 N. W. 526. *Cruttwell v. Lye*, 17 Ves. 335, says it is "the probability that the old customers will resort to the old place." *Williams v. Farrand*, (Mich.) 50 N. W. 446; *Meyers v. Kalamazoo Buggy Co.*, (Mich.) 19 N. W. 961 (20 N. W. 545). The Master of the Rolls, in *Wedderburn v. Wedderburn*, 22 Beav. 84, at 104, says: "It seems to be that species of connection in trade which induces customers to deal with a particular firm." It is said in *England v. Downs*, 6 Beav. 269, at 276, "It is the chance or probability that custom will be had at a certain place of business in consequence of the way in which that business has been previously carried on." Story on Partnership, Sec. 90, speaks of an advantage or benefit acquired "by establishment \* \* \* in consequence of the general public patronage and encouragement which it receives from custom or habitual customers." It is said in *Williams v. Farrand*, (Mich.) 50 N. W. 446, that a retiring partner, in the absence of stipulation, and in addition to his interest in the tangible effects, parts simply with "the advantages that an established business possesses over a new enterprise. The old business is an assured suc-

cess, the new an experiment. The old business is a going business, and produces its accustomed profits on the day after the transfer. \* \* \* The continuing partner gets these advantages. \* \* \* He [the selling partner] sells only so much of the custom as will continue in spite of his retirement and activity."

It is said in *Cottrell v. Babcock Printing-Press Mfg. Co.*, (Conn.) 6 Atl. 791, at 797:

"By purchasing the good will merely, Cottrell secured the right to conduct the old business at the old stand, with the probability in his favor that the old customers would continue to go there."

In *Austen v. Boys*, 4 Jur. (N. S.) 719, 721, it was said:

"Where a trade is established in a particular place, the good will of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. \* \* \* It seems to have been intended to describe that interest which the retiring partner would have had if he had remained in the partnership, and which, by his retirement before its termination, he was willing to relinquish to the continuing partner."

In *Angier v. Webber*, 14 Allen (Mass.) 211, this is said:

"These facts show that the defendants have done acts which tend directly to deprive the plaintiff of the benefit of the reputation of the old firm, to take away from him the patronage which appertained to it, and to draw away the business of its habitual customers to which he had acquired a right by the purchase of the good will."

How can there be customers continuing to deal with a closed-out establishment? As said by Mr. Justice Ladd in *Millspough Laundry v. First Nat. Bank of Sioux City*, 120 Iowa 1, if, by lawful conversion, the business is at an end, and the property disposed of, there cannot be left for appropriation that probability that customers might con-

tinue their patronage which is the element covered by some of the definitions.

2-c

Much of the law which treats good will as a thing of tangible value rests upon the holding that he who buys good will gets the benefit of eliminating a rival in the business bought; that the seller is bound not to impair the continued success of the business whose good will he transferred. See *Smith v. Gibbs*, 44 N. H. 335, 346; *Labouchere v. Dawson*, L. R. 13 Eq. 322; *Cottrell v. Babcock Printing-Press Co.*, (Conn.) 6 Atl. 791; *Churton v. Douglas*, Johns. Eng. Ch. 174; *Dwight v. Hamilton*, 113 Mass. 175; *Munsey v. Butterfield*, 133 Mass. 492; *French v. Parker*, (R. I.) 14 Atl. 870, at 873; *Rice v. Angell*, (Texas) 11 S. W. 338; *Brown v. Benzinger*, (Md.) 84 Atl. 79; *Howard v. Taylor*, (Ala.) 8 So. 36; *Knoedler v. Boussod*, 47 Fed. 465; *Meyers v. Kalamazoo Buggy Co.*, (Mich.) 19 N. W. 961 (20 N. W. 545); *Williams v. Farrand*, (Mich.) 50 N. W. 446, 451.

The fact that it is so often made the test of value that good will means that having established a happy reputation would make it probable old customers and new ones will resort to the business that has been sold, and that the breach consists of impairing that probability and absorbing those same customers in a rival business established, is an irresistible argument for the proposition that, when the authorities define what good will is, and what its value is, they have reference to a going business that has been transferred, and the owner of which complains of interference therewith, either while the business is still going, or because its going qualities have been destroyed or impaired by the one who sold the going business. See *Smith v. Gibbs*, 44 N. H. 335, 343, 345; *Jackson v. Byrnes*, (Tenn.) 54 S. W. 984; *Nelson v. Hiatt*, (Neb.) 56 N. W. 1029, 1032; *Howard v. Taylor*, (Ala.) 8 So. 36; *Bradbury v. Wells*, 138 Iowa 673.

It is quite difficult to appreciate rivalry in or an im-

pairment of the business of a dissolved and wound-up bank. If there be a remedy, it is for doing what destroyed good will. No matter how wrong it was to destroy, there can be no recovery on the theory that the good will still exists and has been converted. No matter why a thing has ceased to be, no non-existent thing can be the subject of conversion.

#### 2-d

The four cases most relied on by plaintiffs, *Knapp v. Reed*, (Neb.) 130 N. W. 430, at 434, *Inman v. Inkster*, (Neb.) 134 N. W. 265, *Lindemann v. Rusk*, (Wis.) 104 N. W. 119, and *Moore v. Rawson*, (Mass.) 70 N. E. 64 (§5 N. E. 586), are not applicable. All have a central holding which, though differing as to circumstances and detail, is the same in all; and that is: If one partner or one managing stockholder in effect oust the other, seize the corporation or partnership business or property, and carry on the business as his own, he is to be dealt with as liable to account, among other things, for a conversion of the good will.

III. The case could well be disposed of on the ground that the plaintiffs have estopped themselves by laches and acquiescence. But we have determined that, in view of the nature of the law questions presented on this appeal, the decision thereof should not rest upon that ground. See *Cowell v. City Water Supply Co.*, 130 Iowa 672; *Watkins v. National Bank of Lawrence*, (Kan.) 32 Pac. 914; *Beidenkopf v. Ins. Co.*, 160 Iowa 629, 649; *Baker v. Seattle-Tacoma Power Co.*, (Wash.) 112 Pac. 647; *Smith v. Stone*, (Wyo.) 128 Pac. 612; *Kessler v. Ensley*, (Ala.) 141 Fed. 130; *Jones v. Bonanza Min. & Mill. Co.*, (Utah) 91 Pac. 273.

IV. Plaintiffs charge that the board of directors of the old bank wrongfully allowed Hanson farm loan commissions in from \$1,000 to \$1,200, which commissions belonged to the bank. It is responded that the allow-

15. BANKS AND  
BANKING:  
officers, etc.:  
powers: com-  
pensation of  
employees:  
ratification.

ance was rightful. It appears an allowance for clerk hire was made Hanson, and that he waived it in consideration of being allowed to keep what he could make out of farm commissions. Captain Rossing was then president, and was advised of this, did not disapprove of it, but failed to call a meeting so that formal authority for this arrangement might be given. But the arrangement was consummated, and later the board ratified what was done. There was no fraud, and no abuse of the discretion that the governing body had in the matter; and we agree with the trial court that plaintiffs are not entitled to recover anything on that account. See *Clark v. American Coal Co.*, 86 Iowa 436.

The decree is—*Affirmed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

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T. P. SCOTT, Appellee, v. MELVIN C. SIMONS, Appellant.

**FRAUD: Liability for Fraud—Knowledge of Fraud—Consumma-**  
1 **tion of Contract—Effect.** Consummation of an executory contract by a party thereto, with full knowledge that a fraud has been perpetrated upon him in the execution of the contract, works a complete waiver of the fraud and all damages flowing therefrom.

**FRAUD: Actions—Waiver—Accepting Deed with Knowledge of**  
2 **Fraud—Ratification.** One who, with full knowledge that he has been fraudulently induced to execute a contract, accepts a deed in compliance with the contract, thereby ratifies and confirms the original fraud-induced contract and waives all claim for damages by reason of the fraud.

**PRINCIPAL AND AGENT: The Relation—Termination—Brokers.**  
3 The relation of principal and agent is terminated *ipso facto* by the voluntary and mutual initiation by the parties of negotiations under which the agent proposes to buy and the principal proposes to sell the subject matter of the agency.

*Appeal from Osceola District Court.*— W. D. BOIES, Judge.

NOVEMBER 28, 1917.

ACTION to recover a balance alleged to be due plaintiff on the exchange of land. The opinion states the facts.—*Affirmed.*

*B. Radcliffe and Molyneux & Maher*, for appellant.

*T. M. Zink*, for appellee.

GAYNOR, C. J.—I. Plaintiff brings this action in equity to recover a balance unpaid upon a written contract for the sale of certain land in Osceola County, and to impress upon and enforce against the land a vendor's lien for the unpaid balance. The facts out of which the controversy arises are substantially as follows:

1. FRAUD: Liability for fraud: knowledge of fraud: consummation of contract: effect.

The defendant was the owner of all of Section 14 in Township 1, Range 21 East, in the county of Stanley, state of South Dakota. In the month of June, 1914, he placed this land in the hands of the plaintiff, as agent, to sell or trade it for him at a valuation fixed at \$11,000, the plaintiff to receive a commission therefor of 50 cents an acre, or about \$320. On or about July following, the plaintiff called on the defendant in respect to said Dakota land, and said to him that there were some parties from the east on a visit who had a half section of land north of Hartley, in the county of Osceola, Iowa; that the land was part of an estate, and the parties were anxious to close it up, and that they would take the Dakota land in exchange; that they were asking \$135 an acre, but he thought it could be got for \$125 an acre. At this time, the commission was fixed that should be paid in the event that an exchange was consummated. The next day, plaintiff and defendant went to Osceola County and examined this land. Nothing was said further about the trade, plaintiff, however, affirming at all times that this land was worth \$125 an acre. On the way



home from this visit to the land, the plaintiff said to the defendant:

"When I got home last night, the people who owned this land were waiting for me. They had to leave on an early train. I thought surely you folks would take this land, and so I bought it and will turn it over to you for just what I paid. I thought it was a good deal, and you surely would take it."

Defendant told him he didn't know whether he would take it or not. Defendant's father, who accompanied them, remarked: "If this is such a good deal, and the land is worth the money, why don't you keep it yourself?" And plaintiff said: "Well, there is a limit to what a man can own, and I am up to the limit. I am carrying all I can handle." He said the parties would take the Dakota land at the price of \$11,000, the price at which it was listed. "We talked the matter over until we came to the town of Marcus. I then told him; 'If that is the way, I would take the land as he had represented.' " A contract was drawn, when they reached Marcus, as follows:

"This agreement, made this 22nd day of July, A. D. 1914, between T. P. Scott, of the county of Plymouth and state of Iowa, of the first part, and Melvin C. Simons, of the county of Cherokee and state of Iowa, of the second part, witnesseth, that in consideration of the stipulations herein contained and payments to be made as hereafter specified, the first party hereby agrees to sell unto the second party the following real estate, situated in the county of Osceola and state of Iowa and described as follows: The North Half ( $N\frac{1}{2}$ ) of Section Twenty-four (24), in Township Ninety-eight North of Range Forty (40) West of the Fifth P. M., containing, according to the government survey thereof, three hundred twenty acres, less three and  $\frac{77}{100}$ ths acres for school ground and road, for the sum of thirty-nine thousand five hundred dollars, on which the second

party has paid the sum of one thousand dollars, the receipt whereof is hereby acknowledged. The remaining principal shall be paid to the party of the first part at the time and in the manner following: Ninety-five hundred dollars payable cash, March 1, 1915. Assumes a mortgage of eighteen thousand dollars, dated March 1, 1915, due on March 1, 1920, with interest at 6 per cent per annum, with optional payments on any interest-paying date. For the balance, \$11,000, the second party delivers to the party of the first part, on the first day of March, 1915, a warranty deed to the following real estate: All of Section Fourteen (14), in Township One (1) South, Range Twenty-one (21) East, Black Hills Meridian, in the county of Stanley, state of South Dakota. It is agreed that, if the party of the first part cannot furnish perfect title to the above described real estate, then in that case he shall refund the \$1,000 to the party of the second part. The second party hereby further agrees and obligates himself, his heirs and assigns, that all improvements placed upon said premises shall remain thereon, and shall not be removed or destroyed, until final payment of said premises, and further that he will punctually pay said sums of money above specified, as it becomes due, and that he will regularly and seasonably pay all such taxes and assessments as may be lawfully imposed upon said premises, each party to pay the taxes for the year 1914. In case the said second party, his legal representatives or assigns, shall pay the several sums aforesaid, punctually and at the several times above limited, and strictly and literally perform all and singular of his agreements and stipulations aforesaid after their true tenor and intent, then the first party will make unto the second party, his heirs or assigns, upon request and surrender of this agreement, a deed conveying said premises in fee simple, with ordinary covenants of warranty, and subject to all taxes and assessments and to all liens and incumbrances created or imposed on said

premises by said second party or his assigns subsequent to the date hereof. First party agrees to furnish abstract showing a good and sufficient title, subject to the above named incumbrance and to legally establish highways. But in case the said second party shall fail to make the payments aforesaid, or any of them, punctually and upon the strict terms and times above limited, and likewise to perform and complete all and each of his agreements and stipulations aforesaid, strictly and literally without any failure or default, the times of the payments as above specified being the essence of this agreement, then the first party, at his option, shall have the right to declare this agreement null and void, and all rights and interest hereby created, or now existing, in favor of said second party, or derived under this agreement, shall utterly cease and determine, and the premises hereby contracted shall revert to and invest in said first party (without any declaration or forfeiture or act of re-entry, or without any other act by said first party to be performed, and without any right of said second party for reclamation or compensation for money paid or improvements made) as absolutely, fully and perfectly as if this contract had never been made. Witness our hands the day and year first above written."

Defendant testified:

"At the time I signed this contract, the plaintiff told me he had paid \$125 an acre for the Osceola County land. He said he was turning it over to me for just what it cost him. He represented to me at the time that the parties in the east who owned the Osceola County land would take my Dakota land. I didn't know what plaintiff paid for the land other than as he stated it to me. I believed then that he had paid \$125 an acre for it. The next conversation I had with the plaintiff, Mr. Scott, after the written contract was signed, was on the 1st of March, at the time the deeds were exchanged. We had exchanged abstracts prior to that,

and they were found all right. At the March meeting, I delivered to him my deed to the Dakota land, and he delivered to me his deed to his Osceola County land. After the deeds were exchanged, the plaintiff said, 'I guess that is all now; it is all done but the passing of the money.' "

Thereupon the defendant informed the plaintiff that he knew that plaintiff had paid only \$80 an acre for the land, and said to plaintiff that he would settle only on that basis for the Osceola land. Defendant refused to return plaintiff's deed, though requested to do so. There was nothing said about returning the \$1,000, nor was it demanded. It appears that the defendant had learned as early, at least, as January, that plaintiff paid only \$80 an acre, but no mention was made of this fact until after the deeds were delivered and the exchange consummated.

Defendant testified:

"When I exchanged those deeds in March, 1915, I had no other reason for not paying the balance of the money to Mr. Scott than that he told me he had paid \$125 an acre for the Osceola County land, when in fact he had paid only \$80 an acre. I made no objection to consummating the contract until after the deeds were passed. I received the deed to the Osceola County land, and he accepted my deed to the Dakota land. I had been told by the former owners of the Osceola County land, the persons from whom Mr. Scott bought it, that Mr. Scott had in fact paid only \$80 an acre. I knew from whom he had bought the land, and what he had paid for the land at least as early as January, 1915."

With this knowledge, defendant consummated the contract, the consummation of which he now says worked a fraud upon him. Assuming the facts to be as herein set out, it is apparent that, upon discovering the fraud, defendant could have retired from performance. It was open to him to perform the contract or rescind it. It is a rule, to which

there is no exception, that the defrauded party may rescind an executory contract and retire from the performance and put the contract at an end; or, if the contract is executed, he may retain what he has received and sue for and recover damages on account of the fraud. This is elementary. The general rule in case of fraud and deceit is that the party defrauded has two remedies: First, he may rescind the contract by restoring what he has received under it, or offering to restore it; or he may affirm the contract, retain whatever he has received under the contract, and resort to an action for damages for the fraud practiced upon him. One induced to enter into a contract through fraud has the right, upon discovering the fraud, to rescind, though the contract be executed, by restoring or tendering back what he has received under the contract; or he may, at his election, retain what he has received under the contract, and sue and recover whatever damages he has sustained on account of the fraud. Where, however, the contract is executory, and the party alleged to be defrauded discovers the fraud that worked injury before he is called upon to perform and before he has suffered any damage, and refuses to exercise his right to retire from the contract unhurt, and proceeds to its consummation to his injury, he thereby waives any right to recover for the self-inflicted injury. The injury from the fraud arises only out of the consummation. He cannot be heard to say:

"I knew all the facts before I proceeded to the fulfillment of the contract, and knew that to fulfill it would be to work an injury. I am injured just as I knew I would be. Now pay me for my hurt."

The fraudulent representations, in and of themselves, work no injury. It is the consummation of the contract induced by the fraud that works the injury, and, where the person knows of the fraud before the contract is consummated, and has a right, under the law, to retire from the

contract without injury to himself, he cannot be heard to say:

"I knew the contract was not binding upon me because of the fraud, and I knew I could retire from it without injury to me, yet I elected to go on and perform the contract, and I am hurt. I hold you for all damages sustained by the consummation of the contract on my part."

In other words, he cannot be permitted to say:

"I knew that your representations were false. I was not deceived by them at the time the contract was consummated. No injury could have been worked on me had I retired, as I had a right to do, from the consummation of the contract. All the injury I have sustained results from this consummation, yet I will hold you liable for this injury."

Would the fact situation be any different had the plaintiff said to the defendant, before the deeds were exchanged:

"I lied to you when I said I bought that land for \$125 an acre. I paid only \$80 an acre. Do you desire to proceed to the fulfillment of the contract as written, or do you wish to retire from the contract?" And if the defendant had said: "I will proceed with the contract as written," and the deeds were then exchanged, would the defendant have known more, or would his rights be other or different had the plaintiff so informed him before the deeds were exchanged? Plaintiff evidently formed in his mind a purpose not to perform the contract as written, as soon as he learned of the misstatement of the plaintiff touching the amount paid for the land; yet, with that purpose uncommunicated, he proceeded to the consummation of the contract as written, and only insisted upon what he now claims to be his right after he had received from the plaintiff all that the contract called upon the plaintiff to give. A different situation might exist had the defendant notified the plaintiff that he would not perform the contract as written, and would

not pay the price stipulated in the contract, but would insist upon the price which he claimed that the plaintiff's statements bound the plaintiff to accept, in lieu of what was written in the contract, and plaintiff had then exchanged deeds. A different situation would arise if, before the consummation of the contract, he had demanded his \$1,000 back, and the plaintiff had refused to pay it, or had refused to recognize his right to retire from the contract. Defendant had paid \$1,000 at the time the contract was entered into. The record shows that the plaintiff is perfectly solvent, and good for the amount paid; that the defendant did not know to the contrary, and made no inquiry to determine that fact. We think that, under the record herein disclosed, he waived his right now to insist upon damages, if any, that flowed only from the consummated contract under the circumstances disclosed here.

2. FRAUD: ac-                    Thus far we have discussed the case on  
tions: waiver:                the theory that the only basis for recovery  
accepting deed                on the part of the defendant on his counter-  
with knowl-                    claim rests on the theory that the contract  
edge of                        was induced by fraud, and that the fraud  
fraud: ratifi-  
cation.                        consisted in misrepresenting the amount which plaintiff  
had actually paid for the land. Further, the deed from  
plaintiff to defendant recited:

"We, T. P. Scott and Dora Scott, his wife, \* \* \* in consideration of the sum of twenty-four thousand four hundred three and 75-100 dollars, and the sum of fifteen thousand dollars, represented by the two mortgages hereinafter described, and assumed by the grantee herein (being the amount stipulated to be paid in the original contract), in hand paid by N. C. Simons, \* \* \* do hereby sell and convey," etc.

When he received the deed therefor, there was a new contract made between the parties, by which the defendant ratified the amount stated in the original contract as the

consideration, and, by accepting the deed, assumed and agreed to pay the same, notwithstanding his knowledge of the fraud upon which he now relies. We think plaintiff, therefore, with knowledge of the fraud upon which he now relies, ratified the original contract, and reaffirmed his purpose to pay the consideration stipulated in the original contract, and thereby waived the claim which he now asserts, to have the land at a smaller sum than was therein stipulated. Further than that, by such ratification and reaffirmance of his purpose to pay the price stipulated in the original contract, he induced the plaintiff to accept the Dakota land at a valuation of \$11,000, when, in truth and in fact, as this record discloses, this Dakota land did not exceed in value \$4,000.

As sustaining the doctrines herein announced, see *Hartford Life Ins. Co. v. Hanlon*, (Ky.) 104 S. W. 729; *Simon v. Goodyear Metallic Rubber Shoe Co.*, 44 C. C. A. 612 (52 L. R. A. 745). In that case, the action was for fraud and deceit in the procurement of a contract for the sale of rubber waste, and to recover damages sustained by plaintiff in the execution of the contract. It appears that the representations which induced the contract, on the procuring of which the fraud was predicated, were either promissory in character or true in fact; second, that the contract was largely executory when the plaintiff acquired full knowledge of the fraud which induced the contract, and with such knowledge proceeded to execute it according to its terms. The court said:

"The fact that the defendant insisted upon performance, and that the plaintiff intended to perform and then sue to recover the loss growing out of performance, cannot alter the principle. The plaintiff was under no legal compulsion to go on. What he subsequently did was in execution of the contract. The deliberate execution of it was an adoption of it with knowledge of the deceit, and in contradiction



of his purpose to sue for deceit practiced in its procurement. He cannot save his right to sue for the fraud by notice that he will do so if he perform, and exact performance with full knowledge of the facts which rendered performance non-obligatory. Neither can the action be saved, after such voluntary performance, to the extent of the damage sustained by partial performance before full knowledge of the deceit. His duty was 'to stop short or go on with it,' to use the expression of Judge Bronson in *Railroad Co. v. Row*, 24 Wend. 74. The execution of the contract, so far as it was executory after full knowledge of the fraud, is equivalent to an adoption of the contract with knowledge of all the facts. A subsequent promise, with full knowledge of the facts, is certainly equivalent to an original promise made under similar circumstances; and no one acting with full knowledge can justly say that he has been deceived by false representations," (citing authority).

In *Selway v. Fogg*, 5 Mees. & W. 83, 85, Baron Parke, speaking for the court, said:

"I also think that, upon discovering the fraud (unless he meant to proceed according to the terms of the contract), the plaintiff should immediately have declared off, and sought compensation for the by-gone time in an action for deceit; not doing this, but continuing the work as he has done, he is bound by the express terms of the contract, and if he fail to recover on that, he cannot recover at all."

See also *Vernol v. Vernol*, 63 N. Y. 45. In this case, the plaintiff made and entered into a written agreement with one Robinson, by which Robinson agreed to convey to the plaintiff a certain house and lot for the price of \$5,250. Subsequent to the making of said written agreement, the plaintiff represented to the defendant that he bought said property of Robinson for \$6,000, and that defendant could have it for what he paid Robinson for it; that plaintiff would not make a cent on it. The defendant verbally agreed

with the plaintiff that he would take said property and pay therefor the price aforesaid, \$6,000, the defendant then believing that plaintiff had paid Robinson \$6,000. After making this agreement with plaintiff, the defendant learned that plaintiff had paid Robinson only \$5,250 for the house. With plaintiff's consent, Robinson conveyed the premises to the defendant, who paid therefor the sum of \$5,250. The action is brought by the plaintiff to recover the difference between \$5,250 and \$6,000. The court said:

"Assuming that the contract between the plaintiff and the defendant was originally a valid one, when the defendant ascertained that the price which the plaintiff was to pay had been misrepresented, he was exonerated from any obligation to fulfill his contract, and would have been fully justified in repudiating the same. The false representations made would have been an ample excuse for his nonperformance. While such was the case, the defendant could not avail himself of these false representations to excuse the payment of the price agreed upon [\$6,000] if he took the conveyance, and as he chose to carry the contract into execution, he was bound to pay the plaintiff the balance of the consideration money. If the contract had been in writing, and the plaintiff had brought an action to compel a specific performance upon defendant's refusal to fulfill, the false representations would have been a complete defense. But after the defendant had taken the deed, it would not rest with him to refuse to perform by paying the price agreed upon. He could not reap the fruits of the bargain by taking the property, thus fulfilling in part, and then repudiate the performance of the obligation to pay into which he had entered. Such a course would, under the contract, be advantageous only to one of the contracting parties, and cannot lawfully be upheld. It is to be presumed that the deed was delivered to the defendant in accordance with the agreement proved, and, although the judge did not find the fact

specifically, the findings show that such must have been the case. No other agreement was found to have been proven, and it is fairly to be inferred from the facts that the contract proved was fulfilled by the conveyance to the defendant. No other legitimate conclusion can be arrived at, and such being the case, it was not necessary to prove a promise to pay the plaintiff the amount claimed when the deed was delivered. The promise to pay was comprehended in the agreement, and it may be inferred from the very fact that the deed was accepted by the defendant."

See also *Tuttle v. Stovall*, 134 Ga. 325 (67 S. E. 806, 20 Am. & Eng. Ann. Cas. 168). In this case it is said:

"It cannot be said that merely affirming the contract by the defrauded party will necessarily deprive him of the right to sue for damages for the fraud inducing him to make the contract, as the right to affirm the contract and the right to sue for damages for the fraud co-exist. While the defrauded party may affirm the contract and sue for damages for the fraud, this right of affirmance, with a saving of the right to sue for damages, has its limitations, in that the defrauded party, in order to preserve his right to sue for damages for the fraud, must do no act in affirming the contract, or otherwise, which waives the fraud. If the defrauded party, with knowledge of the fraud, does any act in ratifying or affirming the contract which shows his intention to abide by the contract as made with the fraud in it, and thus waives the fraud, he cannot afterwards set up the fraud and recover damages therefor."

II. It is claimed, however, that the plaintiff was the defendant's agent at the time of the consummation of this contract, and therefore he cannot reap any benefit to himself through the consummation of the contract.

The record shows that whatever agency there was between the plaintiff and the defendant related to the sale

3. PRINCIPAL AND  
AGENT: the  
relation: termi-  
nation: brokers.

or trading of the Dakota land. Plaintiff was not authorized to buy the Osceola County land for the defendant. He was not his agent for that purpose. He was in no way authorized by the defendant to purchase the land for him; nor was the defendant in any way bound to take the land off the plaintiff's hands after he purchased it. No agreement had been made, before the purchase, to take this Osceola County land off the plaintiff's hands. In the purchase of the Osceola County land, the defendant was not consulted, nor did any contractual relationship between the plaintiff and the defendant grow out of its purchase. Upon the purchase of the Osceola County land, the plaintiff became the absolute owner of it, independent of any relationship existing between him and the defendant. The defendant was informed of his purchase before the written contract was made, knew that he was dealing with plaintiff, as owner of this land, before the written contract of exchange was made. We have this situation, then: Plaintiff, at one time, was the agent of the defendant for the sale or exchange of the Dakota land. Thereafter, plaintiff purchased some land on his own account, and offered to exchange it with the defendant for the Dakota land; offered to exchange it on the basis of \$125 an acre for the Osceola County land, and \$11,000 for the Dakota land. The defendant then knew that he was dealing with the plaintiff at arm's length; that plaintiff was no longer acting for him in the transaction, but for himself. Each had land to exchange. They exchanged lands with each other, plaintiff acting for himself, defendant acting for himself. The relationship of agency is contractual. Out of that contractual relationship grow duties and obligations on the part of the agent. The agency must exist and continue during the transaction in order that these duties and obligations may exist. When they undertook to deal with each other, each for himself, one exchanging his land for the property of the other, the

relationship of agency ceased, and the duties and obligations of agency disappeared. It is true that, though they dealt at arm's length, neither had a right to fraudulently impose anything upon the other. But, under such circumstances, the same duty to protect does not exist as exists on the part of the agent. It is not believable that defendant, at the time of the consummation of this contract, thought that plaintiff was acting as his agent. Further than that, even if he thought him his agent, he discovered the fraud that he now claims justifies him in seeking damages, before the deal was consummated out of which the damage arose. When the plaintiff said to the defendant, "I am the owner of this Osceola County land; I will trade it to you for your Dakota land," thereafter he ceased to act for the defendant in procuring a sale or in trading his Dakota land, and in no sense could he be understood as acting as the agent of the defendant, either in making the proposition or in consummating the deal growing out of it. We think that, from that time on, no relationship of principal and agent existed between them. Plaintiff was trading his lands for lands owned by the defendant, and the relationship became antagonistic, and not confidential or fiduciary. Each then knew the relationship of the other to the subject matter, and each knew that the other was acting for himself. After this deal was consummated, could the plaintiff for a moment be heard to say that he was entitled to a commission as for the sale of this Dakota land, and if he had sued the plaintiff therefor, would he have any standing in court upon such a claim? We think not.

III. It seems to be claimed by the defendant, however, that the plaintiff cannot recover of the defendant anything in excess of \$80 an acre for this Osceola County land, and that, figuring the land at \$80 an acre, there is nothing due the plaintiff. This contention is based upon the fact that the plaintiff had purchased it for \$80 an acre, and had

said that he would let defendant have it for the same amount that he had paid, asserting that he had paid \$125 an acre. The defendant entered into the written contract in which he stipulated that he would pay \$125 an acre for this Osceola County land, upon plaintiff's taking in part payment this Dakota land. We may assume that defendant thought at that time that plaintiff had paid \$125 an acre. He discovered his error, however, before he made his deed. He did not insist then upon plaintiff's selling him the land at that sum, but took a deed from the plaintiff in which he reaffirms his contract to pay \$125 an acre. This was a new contract, made after he had full knowledge of the fact that plaintiff had not paid \$125 an acre. It was a ratification of the original written contract to pay \$125, notwithstanding the fact that he had discovered that plaintiff had not paid that much for the land.

The court found for the plaintiff, and upon the whole record we think the court was right, and the judgment is therefore—*Affirmed*.

LADD, EVANS and SALINGER, JJ., concur.

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ADAMS SEED COMPANY, Appellant, v. CHICAGO GREAT WESTERN RAILROAD COMPANY et al., Appellees.

**CARRIERS:** Interstate Commerce—Carmack Amendment—Initial

- 1 **Carrier's Liability.** An initial carrier is not liable, under the Carmack Amendment to the Interstate Commerce Act, for any default of the delivering carrier occurring after it has ceased to be a *carrier*, and while it is acting as a *warehouseman*. (See Act June 29, 1906, 34 Stat. at L. 595, Part 1, Ch. 3591.)

**PRINCIPLE APPLIED:** Plaintiff, in 1909, shipped from McIntire, Iowa, to itself at Philadelphia, Pennsylvania, a quantity of wool. The initial carrier delivered the shipment to a connecting carrier, which, in turn, delivered the shipment to a second connecting carrier, which carried the wool to Philadelphia.

There was no loss or delay in the shipment. Plaintiff had no place of business in Philadelphia. When the wool arrived at Philadelphia, the delivering carrier sought to notify plaintiff of the arrival by mailing a postal card notification to plaintiff at "Philadelphia, Pa., General Delivery." Plaintiff never received the card. Several days later, the delivering carrier turned the goods over to a storage company to be held for plaintiff. Some four years later, the wool was sold for the freight and accumulated charges thereon. Later, plaintiff brought action against the *initial* carrier, on the claim that the *delivering* carrier was guilty of a conversion of the wool at Philadelphia.

*Held*, the matter and things of which plaintiff complained were done by the delivering carrier *not as a carrier* but as a *warehouseman*, and the *initial* carrier was not liable.

**CARRIERS: Carrier as Warehouseman—Goods Awaiting Delivery.**

- 2 Principle recognized that the liability of a common carrier, *as such*, terminates when the goods have reached their destination and are ready for delivery to the consignee.

**CARRIERS: Interstate Commerce—Carmack Amendment—Liability of Connecting Carrier.**

- 3 A *connecting* carrier is, under the Carmack Amendment to the Interstate Commerce Act, only liable for its *own* wrong.

**CARRIERS: Carriage of Goods—Unauthorized Diversion of Shipment—Ratification.**

- 4 An unauthorized diversion of a shipment from its proper point of destination is irrevocably ratified by the act of the shipper (a) in making claim to the *delivering* carrier for loss and damage, *less the freight*, and (b) in instituting an action against the *initial*, *connecting* and *delivering* carriers for such loss and damage.

**PRINCIPLE APPLIED:** Plaintiff shipped wool from McIntire, Iowa, to himself at St. Louis. The wool was carried to Des Moines by the *initial* carrier, and turned over to a *connecting* carrier, who, in turn, transported the shipment to St. Louis. Without authority from the plaintiff, the wool was re-consigned to plaintiff at Philadelphia, at which point plaintiff had no place of business. A second *connecting* carrier carried the wool to Philadelphia. At the time of its arrival at Philadelphia, no loss or delay had occurred. Upon its arrival at the latter place, the *delivering* carrier was unable to locate the plaintiff, and the wool was placed in storage. Later, plaintiff learned that his shipment was in Philadelphia, and thereupon claimed that the *delivering* carrier was guilty of a conversion of the wool, and made claim to such latter carrier for the value

of the wool, *less the freight to Philadelphia*. The wool was later sold for the charges thereon. Plaintiff brought action against the initial, the connecting, and the *delivering* carrier, on the theory that there had been a conversion (a) at Philadelphia, by the *delivering* carrier, and (b) at St. Louis, by the first *connecting* carrier, and that the *initial* carrier was liable for both wrongs.

*Held*: 1. Conceding, arguendo, a conversion at Philadelphia, the initial carrier was not liable therefor, because such conversion was an act done by the delivering carrier *not as carrier* but as warehouseman.

2. Plaintiff would not be heard to say that there had been a conversion at St. Louis, because he had irrevocably ratified the reconsignment to Philadelphia.

*Appeal from Howard District Court.*—A. N. HOBSON, Judge.

DECEMBER 10, 1917.

ACTION to recover for loss of goods shipped over defendants' roads. The opinion states the facts. Judgment in the court below for the defendants. Plaintiff appeals.—*Affirmed*.

*John McCook*, for appellant.

*Carr, Carr & Evans, Reed & Pergler, M. H. Boutelle, E. A. Church, Miller & Wallingford, and Roy E. Curray*, for appellees.

GAYNOR, C. J.—This action is brought to recover the value of certain wool delivered to the Chicago Great Western Railroad Company for shipment, and claimed to have been lost or destroyed. The plaintiff makes all the companies over whose lines the shipment passed parties defendant, and asks judgment against each and all of them. The defendants are railway companies engaged in interstate commerce. The plaintiff is a co-partnership doing business under the name of The Adams Seed Company, at Decorah in this state.

1. CARRIERS: interstate commerce: Carmack Amendment: initial carrier's liability.



The plaintiff alleges, in the first count of its petition, and in an amendment thereto, that, in the month of May, 1909, it delivered the wool in controversy to the Chicago Great Western Railroad Company at McIntire; that it was shipped from McIntire to the city of Philadelphia by the several defendants named herein, and that it was received by said companies for shipment as aforesaid; that, after its delivery to the Great Western Railroad Company, it was transported by said defendants, each in turn, until it reached its destination at Philadelphia. The allegation of the pleading is that each of said defendants, as common carriers, received said merchandise and took possession thereof for shipment in due course of transportation, and that said shipment was consigned by the plaintiff to itself; that defendants carried said wool to its destination at Philadelphia, but failed to deliver the same to the plaintiff (the consignee), and failed to notify the plaintiff of its arrival at its destination; that the defendants have appropriated the same to themselves, or have retained the same, or have delivered it to some person unauthorized, or have lost or wasted it in some manner unknown to the plaintiff.

Plaintiff further alleges, in an amendment to its petition, that the shipment was delivered as above, and was carried by the Chicago Great Western, the initial carrier, to Des Moines, and there delivered by it to the Wabash Railway Company, and carried by it to some point unknown to the plaintiff, and delivered to the other defendant, the Philadelphia & Reading Railway Company; that the last named company carried the goods to Philadelphia. The plaintiff further alleges that, upon the arrival of the wool in question at Philadelphia, the same was taken possession of by the defendant the Philadelphia & Reading Company and there converted to the use of said company, to the loss and damage of the plaintiff in the sum claimed; that the wool arrived at Philadelphia about June, 1909; that none

of the defendants herein, over whose lines the goods were shipped, notified the plaintiff of the arrival of said goods in Philadelphia.

In the second count of its petition, the plaintiff makes all the allegations of the first count a part of the second count, and alleges that the wool in question was delivered to the Chicago Great Western Company, to be carried by it to St. Louis; that both the Chicago Great Western and the Wabash were initial carriers; that they wholly failed to deliver the wool to the plaintiff at St. Louis or elsewhere, or to notify the plaintiff, so that it could obtain the same; that they negligently and without authority from the plaintiff caused said wool to be reshipped from St. Louis to Philadelphia; that neither of said companies had authority to do so, and had no authority to deliver it to the Philadelphia & Reading Company or to cause the wool to be moved over the lines of said company; that the Philadelphia & Reading Company had no authority from the plaintiff to move said wool, and that plaintiff had no knowledge that it exercised such authority; that all of said companies, defendants, acted jointly, and all were negligent in failing to notify plaintiff of the movements of the wool, and in failing to deliver the same to the plaintiff, and in failing to notify the plaintiff where it was, so that plaintiff could obtain possession.

In the third count, plaintiff makes all the preceding allegations a part of this count, and alleges that none of the defendants had any authority to move the wool from St. Louis to Philadelphia, and that, in moving it, they acted negligently and without authority, and all were negligent in respect to the matters hereinbefore referred to.

In the fourth count of plaintiff's petition, plaintiff alleges that, upon the arrival of the wool in Philadelphia, it was taken possession of by the defendant the Philadelphia & Reading Railway Company, and converted to its own use; that, after the shipment reached St. Louis, the plain-

tiff did not thereafter direct its movements, but that the wool was moved under the direction of the defendants the Chicago Great Western Railroad Company or the Wabash Railroad, or both; that the Philadelphia & Reading Company was especially negligent in failing to advise plaintiff of the arrival of the wool, and in failing to deliver the same to the plaintiff and failing to notify the plaintiff of the arrival of the wool and in failing to give plaintiff an opportunity to get possession of it; that all the defendants had knowledge that plaintiff was the consignee, and of plaintiff's home address.

The defendants filed separate answers.

The Chicago Great Western Railroad Company, answering, admits: That, on or about the 29th day of May, 1909, at the station of McIntire on its line of road, it received a consignment of wool from the plaintiff, consigned to the plaintiff at St. Louis, Missouri; that it carried said wool on its line to the city of Des Moines, and there delivered it to the Wabash Railway Company, its codefendant; that the Wabash Company carried it to St. Louis; that, after it had delivered the wool to the Wabash, this defendant received instructions from the plaintiff, or one of its agents, to reconsign the wool to Philadelphia; that it immediately issued instructions by telegram to the Wabash Company to reconsign the wool to Philadelphia; that said wool was thereupon reconsigned and carried by the Wabash Railway Company and other carriers to Philadelphia; that, immediately upon the arrival of the wool in Philadelphia, there was a notice mailed to the Adams Seed Company, addressed to General Delivery, Philadelphia, Pennsylvania, of the receipt of said goods; and that, after the expiration of four days from the date of the mailing of the notice, the Philadelphia & Reading Company moved and stored said wool in a public licensed warehouse in Philadelphia, where the same remained, without being claimed

by the plaintiff or anyone for it, until October, 1913, when the same was sold by said warehouse company to the account of plaintiff; that, at the time the said Philadelphia & Reading Railway Company delivered the wool to the warehouse, the liability of the railway company as a common carrier had ceased, and it was holding the same as warehouseman, and that, if there was any conversion by the Philadelphia & Reading Company in the delivering of said goods to the warehouse, it was while said company was acting as a warehouseman, and not as a common carrier; that plaintiff, at the time, had no office or agency in Philadelphia, and had not, previous to the arrival of the goods, advised any of the defendants of the manner or means in which it could be notified in said city of the arrival of said wool; that, upon the arrival of said goods in Philadelphia, they were unclaimed by the plaintiff or anyone for it, and for this reason were placed in storage. This defendant further alleges that, on or about September 4, 1912, and before the time the wool was sold by the storage company, the plaintiff made a claim against the Philadelphia & Reading Company on account of the loss of said wool, and subsequently brought suit against that defendant, jointly with the other defendants, alleging joint liability on account of the alleged loss; that, by making said claim and instituting said suit against the Philadelphia & Reading Company, seeking to recover damages on account of the alleged loss at Philadelphia, plaintiff ratified the reconsignment from St. Louis, and by said claim and suit has elected to treat the shipment as one entire shipment from McIntire to Philadelphia, and therefore is estopped from claiming anything against this defendant on account of the alleged wrongful reconsignment; and says that the wool was consigned to the Adams Seed Company at Philadelphia, but no street number was given.

The Wabash Railway Company makes practically the same answer as the other.

The answer of the Philadelphia & Reading Company we need not set out, for the reason that, at the conclusion of all the testimony, the plaintiff dismissed its claim as to the Philadelphia & Reading Company.

Thereupon, on motion of the other defendants, the court directed a verdict for them, and, a verdict being returned in accordance with the direction of the court, plaintiff's petition was dismissed, and plaintiff appeals.

There is practically no dispute in the evidence on any material fact. It will be noted from a reading of the several counts of plaintiff's petition that it seems to base its right to recover upon two separate and distinct grounds: one, as for a conversion by the Philadelphia & Reading Company, at Philadelphia; the other, as for a conversion by the other defendants, at St. Louis.

In the original petition, the plaintiff says that the wool in question was shipped by the several defendants from McIntire to Philadelphia, and that it was received by the defendants for shipment to Philadelphia. The language used is rather obscure, but, considering the original petition in all its fullness, it is apparent that it was the intention of the plaintiff in said petition to charge as for a conversion at Philadelphia, on the theory that the wool was consigned to itself at Philadelphia and received by the Philadelphia & Reading Company on such consignment as a common carrier. Plaintiff says that all the defendants are common carriers; that they received and had possession of said wool as common carriers; that it was consigned to the plaintiff; that it was carried to its destination at Philadelphia; that the companies failed to deliver it to the plaintiff as consignee at Philadelphia and failed to notify plaintiff of its receipt at its destination at Philadelphia; and alleges that the conversion took place at Philadelphia and that the con-

version was made by the Philadelphia & Reading Company; and they seek to recover of the Philadelphia & Reading Company as for a conversion at Philadelphia.

In other counts of the petition, the allegation is made that, when the plaintiff placed the goods in charge of the initial carrier, it consigned them to itself at St. Louis; that there was no authority on the part of the initial carrier or the Wabash Company to reconsign it; that, by the reconsignment, there was a conversion at St. Louis, because it was a disposition of the property not authorized by the plaintiff, and in violation of the duty which these defendants owed to the plaintiff.

At the conclusion of the testimony, and after the plaintiff had dismissed its claim against the Philadelphia & Reading Company, the remaining companies moved the court to require the plaintiff to elect upon which state of facts it would rely as for a conversion. There seems to have been no election made, and thereupon, the motion to direct a verdict was sustained.

The record shows that the plaintiffs were called as witnesses in their own behalf, and the substance of their testimony is to the effect that the wool was shipped to the Adams Company, as consignee, at St. Louis, without direction as to whom notice should be given to of its arrival there; that they had no office at St. Louis at the time, and had no one to represent the consignee on the arrival of the goods. One of the plaintiffs testified:

"When I delivered the wool to the agent of the initial carrier, I told him I wanted to sell either at St. Louis or Philadelphia, whichever market was the best. We had no agent at St. Louis or at Philadelphia at the time, and no Philadelphia address; had shipped to Philadelphia before then. We had an arrangement with the Pennsylvania road over which we shipped all our wool to Philadelphia that, as soon as any shipment from us arrived there, it should

be turned over to the C. J. Webb & Company, and our wool was shipped to our own address. I said nothing to the agent, if I did reconsign the wool, that I wanted it to go over the Pennsylvania. We got notice in March, 1912, I think, from the Reading Railway Company. I gave no orders for its disposition; did not go and look at the wool. It was my best judgment not to. I never gave the agent at McIntyre orders to reconsign the wool at Philadelphia."

The other member of the plaintiff firm testified:

"Neither myself nor the Adams Seed Company, following the date of its delivery at McIntire, advised or instructed the agent at McIntire to reconsign the wool."

It appears, however, from correspondence between the Reading people and the plaintiff, which occurred about September, 1912, that the plaintiffs expressed no surprise when they found their goods in the possession of the Reading Company at Philadelphia, but sent the following letter:

"We enclose you herewith our claim \* \* \* for shipment of wool made by us from McIntire, Iowa, May 29, 1909, consigned to our order at St. Louis, Missouri, and subsequently reconsigned to our order at Philadelphia, at which place it arrived June 20, 1909. \* \* \* We base our claim on failure on the part of the delivering carrier to promptly notify us of the inability to deliver shipment, \* \* \* so that disposition could have been made, thus preventing loss to us. We have allowed the freight on shipment, but do not believe that we should pay storage charges, as, if we had been given proper advice at the time, there would have been none. \* \* \* (Signed) Adams Seed Company."

With this letter was enclosed an account against the Philadelphia & Reading Company in favor of the Adams Seed Company for the loss of the wool.

This amount not being paid, the plaintiff brought the action against the Philadelphia & Reading Company, and

joined as defendants the other companies over whose lines the wool had passed, and in its original petition based its right to recover against the Philadelphia & Reading Company and the other carriers on the ground that the wool was received by the Philadelphia & Reading Company as a common carrier, and therefore it had failed to discharge its duty as a common carrier, and out of this the loss arose. In the original petition, the liability of the other companies seems to have been predicated on the thought that they were initial and connecting carriers, and were liable for the loss of the goods at Philadelphia because of their previous relationship to the shipment as carriers. This theory of the case never seems to have been abandoned, although, in subsequent pleadings, there seems to be a claim of a conversion at St. Louis by the other companies than the Philadelphia & Reading Company. But, however that may be, it is apparent through all the pleadings, both the original and the amendment, and in every count, that the plaintiff was seeking to recover of the Philadelphia & Reading Company and the other companies as for a conversion at Philadelphia, and the right to recover on this state of facts was never definitely abandoned by the plaintiff in any of the pleadings filed.

The first question that presents itself for consideration, therefore, is: Was there a reconsignment by the plaintiff of this wool to Philadelphia, such as authorized the companies to transport it to Philadelphia through the ordinary avenues of transportation? If there was, and upon arrival at Philadelphia the wool was lost to the plaintiff through the negligence of the Philadelphia & Reading Company, the question arises: Did the loss occur while it was in the possession of the Philadelphia & Reading Company as a carrier, or was there negligence of the Philadelphia & Reading Company at Philadelphia, as a common carrier of the goods, for which the other defendants would be liable?



- It will be noticed that these companies are charged with the negligence of the Philadelphia & Reading Company only on the theory that they were initial and connecting carriers in the transportation of these goods. If the goods arrived over these connecting lines in safety, and were delivered in proper condition to the Philadelphia & Reading Company, and the Philadelphia & Reading Company received them as delivering carrier and transported them in safety to Philadelphia and held them there for a reasonable time for delivery to the consignee, after which time its liability ceased as a carrier and it became charged with duties to the consignee as a warehouse only, then no negligence of the Philadelphia & Reading Company, after it had ceased to be a carrier and became warehouseman, could be charged to these other defendants, for the reason that the Philadelphia & Reading Company thereafter ceased to sustain any relationship to the other carriers upon which liability could be predicated for its negligence. If the goods shipped over the lines of these other defendants reached the lines of the Philadelphia & Reading Company in proper condition, and were transported by the Philadelphia & Reading Company to the place of destination in safety, and were there held by the Philadelphia & Reading Company, as carrier, for a reasonable time, for delivery to the consignee, then, while the goods remained in the possession of the Philadelphia & Reading Company as carrier, for any loss that occurred through the negligence of the Philadelphia & Reading Company as carrier the initial carrier would be liable, under the Carmack Amendment. But in no event could the connecting carrier, the Wabash, be liable for the negligence of the Philadelphia & Reading Company, even as carrier; for it did no wrong on which liability could be predicated. We are considering this case now on the
2. CARRIERS: carrier as warehouseman: goods awaiting delivery.
3. CARRIERS: interstate commerce: Carmack Amendment: liability of connecting carrier.

theory that there was a through shipment from McIntire to Philadelphia authorized by the plaintiff; that the Chicago Great Western was the initial carrier; that the Wabash was the connecting carrier, and the Philadelphia & Reading Company the delivering carrier. Under the Carmack Amendment, the initial carrier is liable for any loss or injury to the goods while in the possession of any of the carriers as carriers. The connecting carrier, however, is only liable for its own wrong. It is fundamental that the initial carrier is only liable for the negligence of the delivering carrier when the negligence occurs while the delivering carrier holds possession of the goods as carrier. Even the initial carrier is not liable for the negligence of the delivering carrier after the relationship to the goods as carrier has ceased.

In *Hicks v. Wabash R. Co.*, 131 Iowa 295, this court, speaking upon this question, said, in Division 2 of the opinion:

"But the defendant was, beyond question, a common carrier of goods as to plaintiff's trunk from New Conception to Shenandoah, for it undertook to transport the trunk for a reasonable compensation to be paid, and the only question on this branch of the case is whether its liability as common carrier had terminated and that of warehouseman had arisen before the destruction of the trunk by fire in defendant's station house; for it is conceded that the loss was one for which the defendant would be liable if it still held the trunk as common carrier, but would not be liable if the trunk was in its possession as warehouseman. The rule which has been consistently adopted by this court from the beginning is that the liability of the common carrier, as such, terminates when the goods have reached their destination and are ready for delivery to the consignee, and that thereafter the carrier is warehouseman only, even though the consignee has received no notice of the arrival of

the goods at their destination and has had no opportunity to take them away (citing authorities). The general weight of authority, no doubt, is that the carrier remains liable as carrier until the consignee has had a reasonable opportunity to take the goods."

It follows, therefore, that, upon the receipt of the goods at Philadelphia by the Philadelphia & Reading Company, this Philadelphia & Reading Company was required to hold the goods for delivery to the consignee for a reasonable time. During that time, the initial carrier, the Chicago Great Western, remained liable for any loss or injury to the goods while so in possession of the Philadelphia & Reading Company as delivering carrier. After a reasonable time, the relationship of the Philadelphia & Reading Company to the goods as common carrier ceased. It thereafter held the goods as warehouseman only, and for any loss or injury to the goods while it remained in the possession of the Philadelphia & Reading Company, the Philadelphia & Reading Company would not be liable as carrier, but only for negligence as warehouseman. Under the Carmack Act, the initial carrier is not liable for the negligence of the delivering carrier after its relationship as carrier has ceased, and its duty to the plaintiff and to the goods becomes that of warehouseman only. Or, in other words, if the transit was at an end, if the delivering carrier had ceased to have possession of the goods as carrier and held them in another capacity, as warehouseman, then the delivering carrier was responsible only for the care and diligence which the law attaches to that relation, and the loss occurring while held in that relation does not reach back and involve the initial carrier or any connecting carrier.

As supporting what we have said, see *Norway Plains Co. v. Boston & M. Co.*, 1 Gray (Mass.) 263 (61 Am. Dec. 423); *Gregg v. Illinois Cent. R. Co.*, (Ill.) 35 N. E. 343; and

*Kight v. Wrightsville & T. R. Co.*, (Ga.) 56 S. E. 363, in which it is held:

"When goods which have been received by a railroad company for transportation to a given station on its line of road and delivery there to the consignee of the same reach their destination and are there deposited by the company in its freight warehouse for safe-keeping until delivered to such consignee, the general rule is that the responsibility of the company as a common carrier ceases, and its liability as a warehouseman begins."

See also *Hogan Milling Co. v. Union Pac. R. Co.*, (Kans.) 139 Pac. 397. In this case it is held that it was not the purpose of the Carmack Amendment to make the initial carrier liable where the connecting carrier's liability as a carrier has ceased, and it was said:

"It was not the purpose of the amendment to extend the carriers' common law liability, except to provide that, until the transportation ended, the liability of an initial carrier should continue exactly the same as if it owned one line of railway from the point of shipment to the point of destination."

It was further said:

"The initial carrier, under the Carmack Amendment, is only made liable for loss, injury or damage resulting from some default in its common law duty as a common carrier, or some default of the same kind in a succeeding carrier. It does not make the initial carrier liable as a carrier for a loss or injury to goods occurring while held by the succeeding carrier as warehouseman."

In *Norfolk & W. R. Co. v. Stuart's Draft Milling Co.*, 63 S. E. 415, the Supreme Court of Virginia said that, if goods are not received by the consignee within a reasonable time after their arrival, the railroad company's liability as a common carrier ceases, and its liability thereafter is only as a warehouseman.

It was further held that, where a connecting carrier's liability as carrier for an interstate shipment had terminated, the initial carrier would not be liable for the value of the goods under the Carmack Amendment, for the reason that the liability of the initial carrier attaches only while the goods remain in its possession, or in the possession of its connecting carriers as such. See also *Model Mill Co. v. Carolina, C. & O. R. Co.*, (Tenn.) 188 S. W. 936.

It appears that, when this wool reached Philadelphia, over the Philadelphia & Reading line, the Philadelphia & Reading line sent notice to the consignee, addressed to it at Philadelphia, in care of general delivery; that it thereafter held the goods for a reasonable time, and then deposited them in a public warehouse for the use and benefit of the consignee; that the goods were never called for by the consignee; and that, in 1912, notice was sent to the consignor at Decorah of the fact that the goods were in storage, and that they would be sold for charges if the charges were not paid; that neither the consignee nor the consignor, the same person, made any claim to the goods, but preferred a bill against the Philadelphia & Reading Company for the value of the goods. A letter accompanying the bill and a statement of the account are hereinbefore set out.

It is apparent, then, that whatever loss occurred to the plaintiff by any act of the Philadelphia & Reading Company occurred after the Philadelphia & Reading Company had ceased to be a carrier and had become a warehouseman, and cannot be charged to preceding carriers. It follows, therefore, that no liability for any negligence of the Philadelphia & Reading Company, as warehouseman, could reach back and affect the initial carrier, the Chicago Great Western Railroad Company, under the Carmack Amendment. The Wabash Company could not, in any event, be

liable, because it did no wrong to the plaintiff or the goods, and was not the initial carrier, so as to be affected by the Carmack Amendment. So it is apparent that, for anything that happened in Philadelphia, after the Philadelphia & Reading Company had ceased to be carriers of the goods, these defendants now involved could not be made liable.

It is contended, however, on this hearing that, inasmuch as the plaintiff consigned to itself at St. Louis the goods delivered to the initial carrier, and the Chicago Great Western, the initial carrier, delivered

the goods to the Wabash to be transported to St. Louis only, the goods should have been delivered to the plaintiff at St. Louis; and that the reconsignment of the goods without authority from the plaintiff was a violation of the duty that these companies owed to the plaintiff, and effected a conversion of the goods at St. Louis for which both these companies are liable—the Wabash for having reconsigned them to Philadelphia, and the Great Western for having directed the consignment to Philadelphia.

The liability of these defendants on this theory cannot be considered, for the reason that whatever was done in the way of reconsigning these goods to the plaintiff at Philadelphia, after they reached St. Louis, was ratified by the plaintiff with full knowledge of all the facts upon which they now predicate the liability of these defendants. To hold the defendants as for a conversion at St. Louis is wholly inconsistent with the claim of a conversion at Philadelphia. In asserting a conversion at Philadelphia by the Philadelphia & Reading Company, the plaintiff affirms its ownership and right to possession of the goods at Philadelphia, and negatives a previous conversion of the same by these other defendants at St. Louis. It amounts to a waiver of any conversion at St. Louis, ratifies the act of those companies in transporting the goods to Philadelphia,

4. CARRIERS: carriage of goods: unauthorized diversion of shipment: ratification.

and seeks to hold the Philadelphia & Reading Company liable as for a conversion there on the theory that it was the delivering carrier of the goods in the process of transportation to Philadelphia. When it filed with the Philadelphia & Reading Company its claim hereinbefore set out, and offered to allow for freight on transportation, and sought to hold all companies as common carriers of the goods to Philadelphia, it ratified the act of the other companies in re-consigning the goods to Philadelphia, and waived its claim for damages as for a conversion at St. Louis.

There is some difficulty in understanding the plaintiff's theory or theories in this case. One theory seems to be that there was a conversion at Philadelphia by the Philadelphia & Reading Company as common carriers, for which the initial carrier, the Great Western, is liable under the Carmack Amendment. Even on this theory, the Wabash could not be liable, as connecting carrier. The second theory is that the shipment was made originally, and so far as authorized by the plaintiff, over the Great Western and the Wabash to St. Louis; that neither of these companies had any authority to reconsign or transport the goods beyond that point; that, when they did attempt to so do, their act was, in effect, a conversion of the property by both of these companies at St. Louis, for which each is liable. If the case stopped there, there might be some basis for holding these companies liable; but when the plaintiff proceeds further, and by its conduct ratifies the reconsignment of these goods from St. Louis to Philadelphia, the situation is the same as if originally the plaintiff had consigned the goods to itself at Philadelphia. If it ratified the reconsignment, all these companies became common carriers of the goods to Philadelphia, and the initial carrier, the Great Western, but not the connecting carrier, the Wabash, would be liable as for a conversion at Philadelphia, provided the conversion took place while the property was

held by the Philadelphia & Reading Company as common carrier; but in no event could the initial carrier be held for a conversion by the Philadelphia & Reading Company after its relation to the property as carrier ceased. If the act of these companies in reconsigning it is ratified by the plaintiff, the rights of the parties are the same as if originally authorized. It cannot ratify and repudiate at the same time. After ratification, the liabilities of the parties to each other must necessarily be the same as if the act ratified was originally authorized.

As sustaining the claim of these defendants that the plaintiff ratified the reconsignment to Philadelphia in bringing suit against the Philadelphia & Reading Railway Company as delivering carriers, and basing the liability of the Chicago Great Western on the allegation that it was initial carrier, and therefore liable for the acts of the Philadelphia & Reading Company as delivering carrier, see *Converse v. Boston & M. R. Co.*, 58 N. H. 521. In that case the plaintiffs contracted to furnish slate to one C. for a schoolhouse which C. was then erecting, to be "cash on delivery." The slate was ordered directed to themselves at F. Plaintiffs found the goods at the schoolhouse and workmen engaged in putting it on. C. was not there. They sued C. Soon after, C. called on the plaintiffs and gave them an order on the school district. The order was not accepted or paid. The plaintiffs were never paid. They commenced an action against C., afterwards dismissed the action, and brought an action against the railroad company as for a conversion. The court said:

"If the delivery was authorized, the plaintiffs have no claim against the defendants. If the delivery was unauthorized, and they subsequently ratified it, the ratification is equivalent to an authorized delivery, and is an effectual bar to the plaintiffs' recovery."

See also *Burritt Co. v. New York Cent. & H. R. R. Co.*,



135 N. Y. Supp. 557, There, a carrier received freight consigned by straight bill of lading to a consignee, and delivered the freight to a third person, pursuant to an unauthorized order. Before the delivery, the consignee had contracted to sell the freight to the third person, and when he learned of the delivery, he sent the third person an invoice dated before the delivery. Subsequently, and with knowledge of all the facts, the consignee paid the carrier the freight charges, and filed a mechanics' lien against the third person, and a claim for the value of the freight against him in the bankruptcy court. *Held* that the consignee ratified the unauthorized delivery, and could not maintain an action against the railroad company for the unauthorized delivery on the theory of conversion. See *Theusen v. Bryan*, 113 Iowa 496; *Renne v. Townsend*, 124 Iowa 332; *Kuhnes v. Cahill*, 128 Iowa 594.

So it follows that, the plaintiff having ratified the re-consignment to Philadelphia, and these companies having transported the wool over their lines to Philadelphia, without the occurrence of any negligence during transportation, and the goods having been received at Philadelphia over the Philadelphia & Reading lines in good condition, so far as this record shows, and the Philadelphia & Reading Company having held it a reasonable time as common carriers, and having given notice to the consignee at the place of destination, and the plaintiff having failed to call for said goods within a reasonable time, and the Philadelphia & Reading Company having stored the same for the use and benefit of the plaintiff, and the liability of the Philadelphia & Reading Company as carriers having ceased, no liability attaches to these defendants for any acts of the Philadelphia & Reading Company after said goods had passed out of its hands as carrier, and while it held the same, if it did so, as warehouseman.

We find no ground for reversing the action of the court. The cause is, therefore,—*Affirmed*.

WEAVER, PRESTON and STEVENS, JJ., concur.

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HARRY BAFF, Appellee, v. WALLER & WALLER et al., Appellants.

**JUDGES:** Powers, etc.—Proceedings at Chambers—Jurisdiction. A

- 1 district judge, sitting at chambers in one county, has no jurisdiction to set aside an order of the district court of another county. So held as to an order setting aside the dismissal of an action.

**APPEAL AND ERROR:** Review, Scope of—Void Presentation.

- 2 The appellate court will not review the merits of an application to set aside the dismissal of an action when said application has never been legally presented to the proper district court.

*Appeal from Floyd District Court.*—M. F. EDWARDS, Judge.

DECEMBER 10, 1917.

APPEAL from an order of the district judge, made at chambers in another county, vacating and setting aside a judgment dismissing a cause of action for want of prosecution.—*Annulled*.

*F. & F. M. Lingenfelder*, for appellant.

*J. H. Lloyd*, for appellee.

- STEVENS, J.—On November 18, 1915, plaintiff filed a petition in the above cause in the office of the clerk of the district court of Floyd County, signed by H. L. Lockwood, an attorney residing at Forest City, and Edwin S. McCrary, an attorney residing at Kansas City, Missouri. At the January, 1916, term of said court, counsel appeared for the defendant and filed motion to require plain-
1. JUDGES: powers, etc.: proceedings at chambers: jurisdiction.

tiff to give security for the costs, which motion was never called to its attention or passed upon by the court. At the March, 1916, term, H. L. Lockwood withdrew his appearance as attorney for plaintiff, and, upon the oral motion of counsel for defendant, said cause was by the court dismissed with prejudice, for want of prosecution.

It is claimed by counsel for appellee that, on June 19, 1916, he appeared at the office of the clerk of the district court of Floyd County, and tendered a cash cost bond in the sum of \$100, at which time he was informed by the clerk that said cause had been dismissed. On June 26, 1916, the attorneys for the respective parties submitted a motion on application of plaintiff, and the resistance and objections thereto of defendant, to Judge Edwards (who presided, when the judgment of dismissal was entered) at chambers at Parkersburg in Butler County. The record herein does not disclose whether said application and resistance and objections thereto were filed in the office of the clerk of the district court of Floyd County before or after the submission thereof to Judge Edwards, but same were filed before the adjournment of the March term of court. The record, however, does disclose that the hearing at Parkersburg before the district judge was upon 3 days' notice given by counsel for plaintiff to the defendant, upon the order of said district judge setting said application down for hearing at Parkersburg upon proof of service of such notice. Attached to plaintiff's application or motion for the reinstatement of said cause are several affidavits; and the objections or resistance of defendant thereto, which are numerous, were also supported by affidavits.

On August 5, 1916, the district judge caused his finding and order sustaining said motion to be filed in the office of the clerk of the district court of Floyd County, the material part of which is as follows:

"The plaintiff now by his counsel, J. H. Lloyd, files an  
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application to set aside such order and to have said cause reinstated upon the court docket. Defendants appear by their counsel, F. & F. M. Lingenfelder, and file herein their objections to the above-mentioned application to reinstate said cause. Upon notice, said cause is set down for hearing at chambers at Parkersburg, Iowa, June 26, 1916, and at said time and place counsel representing the parties appear, and a hearing is had on said motion and the objections filed thereto and the matter submitted to the court, and by agreement was taken under advisement by the court. \* \* \* It is therefore ordered that the entry of dismissal of said cause, as hereinabove set out, is annulled and set aside, and said cause reinstated on the court docket as prayed in the application of the plaintiff, all on condition that plaintiff at once file with the clerk a cost bond in the sum of \$100, with sureties to be approved by the clerk of said court, to all of which the defendants except."

The March, 1916, term of the district court of Floyd County did not finally adjourn until August 19th. This appeal was taken from the order of the district judge before the adjournment thereof. It is the contention of counsel for appellant that the order of the district judge vacating and setting aside said judgment of dismissal was without jurisdiction and void, and also that same should have been overruled on the merits.

Authority is conferred upon the court, by Section 243 of the Code, to amend or expunge any entry made during the term at which it is made, or before the same is signed by the judge. As above stated, the judgment of dismissal was entered by the district court, but the order vacating the same and reinstating the cause for trial was made by the district judge sitting in chambers at Parkersburg in Butler County.

It was held in *Whitlock v. Wade*, 117 Iowa 153, that the district judge did not, in vacation, and while sitting in

another county, possess the power to vacate, modify or suspend a judgment or order of the court, except by agreement of the parties or of counsel, under Section 319 of the Code. No such agreement is shown in this case. To the same effect see *Williams v. Dean*, 134 Iowa 216. It therefore follows that the order made by the district judge was without jurisdiction, and same must be annulled and set aside. We have, however, held—and this is conceded by counsel for appellant—that the district court has authority, after the term at which the judgment of dismissal was entered, upon notice, to vacate or annul a judgment of dismissal upon a sufficient showing therefor. *Owen v. Smith*, 155 Iowa 463; *Des Moines Union R. Co. v. District Court*, 170 Iowa 568; *Loos v. Callender Savings Bank*, 174 Iowa 577; *Williams v. Dean*, supra. Notice, however, may be waived by agreement or by the voluntary appearance of the adverse party thereto, and by answering to the merits. *Des Moines Union R. Co. v. District Court*, supra.

2. **APPEAL AND ERROR:** review, scope of: void presentation.      Counsel have argued upon this appeal the merits of plaintiff's application to set aside the judgment of dismissal, and for reinstatement; but, as the order of the district judge made herein was void for want of jurisdiction, and the application has not yet been passed upon by the district court upon the merits, we cannot pass thereon at this time. The order of the district judge vacating and setting aside the judgment of dismissal is annulled, and this cause is remanded for disposition by the court, the same as though no submission thereof had been had to the district judge at chambers, and no order entered therein.—*Annulled.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

JAMES A. FERGUSON et al., Appellants, v. JOHN M. FERGUSON et al., Appellees.

**CANCELLATION OF INSTRUMENTS: Grounds—Options—Incumbrances by Optionee.** A written recorded option to purchase real estate may not be canceled by reason of acts of dominion over the property by the optionee which in no wise lessen the estate of the optionor. So held where the optionee in possession mortgaged the property to one fully cognizant of the state of the title.

*Appeal from Floyd District Court.*—C. H. KELLEY, Judge.

DECEMBER 10, 1917.

ACTION to cancel an option to purchase an interest in land, executed by plaintiff James A. Ferguson to John M. Ferguson, and to cancel two mortgages executed by John M. Ferguson and wife to the defendant bank. Demurrers to the petition were sustained, and plaintiffs appeal.—*Affirmed.*

*Eggert & Eggert*, for appellants.

*J. A. Campbell*, for appellees.

PRESTON, J.—Plaintiffs are husband and wife, and defendants John M. and Ethel Ferguson are husband and wife. John and James are brothers. It is alleged that they are co-owners of 240 acres of land described in the petition, each owning an undivided half interest, subject to a life annuity to their mother, which was made a lien on the land; that, in June, 1910, defendants John M. and wife executed a mortgage to defendant bank, mortgaging the undivided one-half interest of John M. to secure the payment of \$5,000; that, in May, 1914, plaintiffs executed to defendant John M. an option to purchase their undivided half interest in said real estate; that thereupon, about

March 1, 1915, defendant John M. moved onto the land as renter of plaintiffs' undivided interest; that he so moved onto the land under the option before referred to, by which John agreed to pay his brother, as rent for plaintiffs' undivided interest, \$570 per annum, and pay the taxes and make all necessary repairs on the farm; that, about January 15, 1915, John and wife, without the knowledge or consent of plaintiffs, and without having purchased plaintiffs' undivided interest under the option, executed two mortgages on the common property to defendant bank; that plaintiffs lived in Dakota, and they discovered in the spring of 1915 that the mortgages had been executed and recorded; that thereupon, plaintiffs notified defendants in writing that the acts of John in mortgaging plaintiffs' property without any right were wrongful and illegal, and demanded that the option be annulled on account of the questionable means of obtaining and misusing same, and that the mortgages which included plaintiffs' half interest be cancelled, and gave them 15 days to comply. Copies of the option, mortgages and notice are attached to the petition and made part of it. Plaintiffs prayed that the two mortgages last executed be cancelled or annulled, as to the undivided half interest of plaintiffs, and that the option be cancelled and declared forfeited, and for general equitable relief. We have set out the petition fully, in order to show the grounds upon which plaintiffs asked relief. The option was executed May 27, 1914, and by it defendant was given the right to purchase plaintiffs' undivided interest for \$11,400, on or at any time before March 1, 1920, and defendant John was given the right to possession after March 1, 1915, upon payment of the \$570 annually. The option was duly acknowledged and recorded.

The defendants, John and wife and the bank, filed separate demurrers. The demurrer of John and wife is on the grounds: First, that plaintiffs are not entitled to the relief

demand; second, it does not appear from the petition that defendants or either of them failed in any way to carry out any of the provisions of the said option; third, it does not appear from the petition that plaintiffs are entitled to any relief; fourth, it does not appear that John M. is in default as to any of the terms of the option purchase; fifth, the option was properly recorded, and it does not appear from the petition that the interest of plaintiffs has been in any way jeopardized. The demurrer of the bank is on similar grounds as to some of the matters, and further, that the two mortgages last executed in no wise affect, and are not a lien on, the interest the plaintiffs have in the property; that the interest of plaintiffs in the property is not jeopardized because of said mortgages; and no facts are stated which entitle plaintiffs to a cancellation of said mortgages.

A number of propositions are argued at length by appellants which are not raised by the petition. The only claim set out in the petition for canceling the option from plaintiff to defendant John is the execution of the last two mortgages to the bank. It is not alleged in the petition that there was any fraud or inadequacy of consideration or any reason for setting aside the option other than as stated, the execution of the mortgage; nor is it alleged that defendant John has in any manner defaulted in the payment of taxes, or other things to be performed by him under the option. It is intimated by defendants that there has been an increase in the values of real estate since the execution of the option, and that this is the real reason for plaintiffs' desire to have it set aside.

It is true that the two mortgages cover all the land, but defendants John and wife could not mortgage plaintiffs' interest. The option was recorded, and this would be notice to the bank and the world of the rights of the parties, John and James. John could obtain no title by reason of the option until he had exercised his right of purchase and



completed the transaction. Indeed, one ground of the demurrer of the bank is, in part, that plaintiffs' interest is not jeopardized because of the mortgages, and counsel for the bank say in argument that the bank knew of the contract between the brothers, and knew that its mortgages covered only the interest of John M. We must determine the matter upon the allegations of the petition, and we think the court rightly held that no reason was shown for canceling the option or mortgages.

Appellants commence their argument in this way:

"This case being in equity, whose limits are endless and reach as far as those of the Golden Rule, you will pardon your friend when he, in his address, at times avoids the guide posts wisely erected within the realms of law, but sometimes necessarily avoided in the grander fields of equity. \* \* \* The district court upholds the defendants' arbitrary actions and, by upholding two demurrers filed by defendants, compelled plaintiffs to seek justice in the Supreme Court. This astounding decision staggered friend and foe alike, and would mean, if it were law, that the giving of any option to purchase real estate was co-extensive with the permission to sell or mortgage the same to Tom, Dick or Harry, thus opening an excellent field for fraud and its kindred vices. \* \* \* The very moment when the two mortgages were filed for record by the bank, the plaintiffs' title to the property therein described was lost to plaintiffs unless they paid the mortgages as stipulated therein, or gave valid reasons for not being obliged to pay, or show the mortgages are or were invalid. \* \* \* That the giving of the two mortgages impair, if they do not destroy, plaintiff's credit, and disgrace his father's memory, by reducing the freehold descended from a noble father to his sons, free from debt, but now soiled with the unerring proofs of extravagance, shiftlessness, and in this

case treachery, whether premeditated or not, we shall not now decide."

Appellants cite Code Section 5042, in regard to fraudulent conveyances and punishment therefor; but, as said, some of the matters argued are not covered by the petition. They also cite cases to the effect that the mortgagee obtains such an interest in real estate that he is a purchaser, within the meaning of the recording acts. They also cite cases that, where a deed is procured from one of inexperience for an inadequate consideration, and as the result of undue influence growing out of confidential relationship, it would be set aside as fraudulent, and claim that the evidence, under the cases cited, is sufficient to show fraud. Further, that a grantor who, through fraud, was induced to convey her land for an inadequate price, is not estopped from setting up the fraud against a subsequent purchaser who had knowledge of it and participated therein. Appellants also cite Section 3044 of the Code, in regard to the assignment of non-negotiable instruments. There is more in the argument of like character, but these matters are outside the case made in the petition.

Appellees say of appellants' argument:

"We have read with considerable pleasure and some amusement the argument of counsel for plaintiffs, in which we cannot but admire the easy style, flowing sentences and rounded periods. As a literary instrument, it is undoubtedly excellent; as a story of fiction, it undoubtedly would meet the approval of the magazine editors; but as a bare, dry argument of law, it perhaps is not up to the standard. A great many things are taken for granted in the arguments that nowhere appear in the abstract."

Without further discussion, it is our conclusion that the judgment of the district court, under the record, was right, and it is, therefore,—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

## IN RE ESTATE OF WILLIAM E. ENSIGN.

**DESCENT AND DISTRIBUTION: Surviving Spouse—Life Insurance.** Proceeds of life insurance, payable to the estate of an intestate, issueless deceased, belong wholly to the surviving wife, in the absence of an agreement or assignment thereof to the contrary. (Sections 1805, 3313, Code, 1897; Section 3379, Code Supplement, 1913.)

**DESCENT AND DISTRIBUTION: Surviving Spouse—Life Insurance—Estoppel.** The surviving wife of an intestate, issueless husband, is not estopped to claim the entire proceeds of the life insurance left by her husband, by the fact that as administratrix she repeatedly treated said proceeds as a part of the estate, when other distributees have not in any wise changed their position, and the wife has not secured any advantage thereby.

*Appeal from Cerro Gordo District Court.*—C. H. KELLEY, Judge.

DECEMBER 10, 1917.

THE surviving widow of deceased filed an application in the clerk's office praying an order authorizing herself as administratrix to distribute to herself the proceeds of certain life insurance on the life of her husband. The lower court overruled a demurrer to the resistance filed thereto by the only heir at law of deceased, and from a judgment thereon dismissing said application the widow appeals to this court.—*Reversed and remanded.*

*Frank W. Chambers and Blythe, Markley, Rule & Smith*, for appellant.

*Senneff, Bliss & Witwer*, for appellee.

STEVENS, J.—I. William E. Ensign

1. **DESCENT AND DISTRIBUTION:** died intestate October 29, 1915, leaving surviving him May Ensign, his widow, and Franc Adele Ensign, a sister, as his sole and
- surviving spouse: life insurance.

only heir at law. The estate, which consisted largely of real property, appears to have been valued at about \$100,000. At the time of his death, he held a policy for \$5,000 in the Northwestern Mutual Life Insurance Company, payable to his estate. The controversy in this case involves the distribution of the proceeds of this policy. May Ensign, his surviving widow, was appointed administratrix of her husband's estate. In due time, the administratrix filed an inventory of the estate, in which she listed the above policy of insurance as a part of the assets thereof. On November 8, 1915, she filed in the office of the clerk of the district court of Cerro Gordo County an application for waiver of appraisement of certain goods, and for other orders, and therein recited that the debts and expenses of administration would be approximately \$2,500, and again listed, among other assets of said estate, the said policy of insurance. On November 13, 1915, a stipulation was entered into between the surviving widow and the sister of her deceased husband, providing for a division of the real estate belonging to said estate. No mention appears to have been made in said stipulation of the insurance policy in question. On November 19, 1915, administratrix filed an application for a widow's allowance in the sum of \$2,000, in which she again referred to the life insurance policy as a part of said estate. Later, by agreement of parties, and on December 11, 1915, she was allowed by the court, in accordance with the stipulation previously filed, the sum of \$1,800 for her year's support. On December 21, 1916, the surviving widow filed in the district court of Cerro Gordo County, Iowa, an application for an order authorizing her, as administratrix, to pay to herself the proceeds of the life insurance policy. To this application Franc Adele Ensign filed resistance, reciting in full the inventory and other applications, reports and stipulations and orders of the court hereinbefore referred to, and averring that by reason thereof

applicant was estopped from having or claiming the proceeds of said insurance policy, and praying that the application therefor be denied. A demurrer to said resistance was filed by the applicant, which demurrer was overruled by the court; the applicant elected to stand on her demurrer; whereupon her application was dismissed. The appeal is from the ruling and judgment of the court upon the demurrer.

Two questions are argued by counsel upon this appeal, as follows: (a) Do the proceeds of life insurance made payable to the estate of deceased, in the absence of an agreement or assignment thereof to the contrary, inure to the separate use of the widow; or (b) if so, is the applicant in this case estopped to claim the same, by reason of the matters above set out and hereinafter more fully referred to?

The statutes applicable to the first question presented are as follows:

Section 1805, Code, 1897:

*"A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his [or her] creditors. [;and] The proceeds of an endowment policy payable to the assured on attaining a certain age shall be exempt from liability for any of his [or her] debts. Any benefit or indemnity paid under an accident policy shall be exempt to the assured, or in case of his death to the husband or wife and children of the assured, from his debts. The avails of all policies of life or accident insurance payable to the surviving widow shall be exempt from liability for all debts of such beneficiary contracted prior to the death of the assured, but the amount thus exempted shall not exceed five thousand dollars."*

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was estopped from having or claiming the proceeds of said insurance policy, and praying that the application therefor be denied. A demurrer to said resistance was filed by the applicant, which demurrer was overruled by the court; the applicant elected to stand on her demurrer; whereupon her application was dismissed. The applicant is bound by the ruling and judgment of the court upon the demurrer.

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## Section 3313, Code of 1897:

*"The avails of any life or accident insurance, or other sum of money made payable by any mutual aid or benevolent society upon the death or disability of a member thereof, are not subject to the debts of the deceased, except by special contract or arrangement, and [but] shall [in other respects,] be disposed of like other property left by the deceased.* When a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased, but if the deceased leaves a husband, wife, child or parent, it shall not be liable for the payment of debts. The words 'heirs,' or 'legal heirs' or other equivalent words used to designate the beneficiaries in any life insurance policy or certificate of membership in any mutual aid or benevolent association, where no contrary intention is expressed in such instrument, shall be construed to include the surviving husband or wife of the insured, and the share of such survivor in the proceeds of such policy or certificate made payable as aforesaid shall be the same as that provided by law for the distribution of the personal property of intestates."

## Section 3379, Supplement to the Code, 1913:

"If the intestate leaves no issue, the whole of the estate to the amount of seventy-five hundred dollars, after the payment of the debts and expenses of administration, and one half of all the estate in excess of said seventy-five hundred dollars shall go to the surviving spouse and the other one half of said excess shall go to the parents. If no spouse, the whole shall go to the parents."

The italicized portion of Section 1805, *supra*, constituted Section 1182 of the Code of 1873. The italicized portion of Section 3313, *supra*, indicates the provisions of Section 1330 of the Code of 1851, and Section 2372 of the Code of 1873.

This court, in *Rhode v. Bank*, 52 Iowa 375, construed



and harmonized Section 2372 of the Code of 1873, which is indicated by the italicized portion of Section 3313, *supra*, and Section 1182 of the Code of 1873, and held that the proceeds of an insurance policy payable to the insured, his executors, administrators or assigns, inured to the benefit of the widow, the court saying:

"The provision was manifestly designed to restrict the distribution of the avails of life insurance to the classes named. We do not infer this merely from the fact that the legislature must be presumed to have had some object. The language used indicates very clearly that the legislature had in view restriction in distribution. The provision is that the policy shall inure to the separate use of, etc. Now these words are not used to cut off creditors. They were cut off before. Separate use, therefore, does not mean a use separate from the creditors. The restriction, then, must have reference to those who might otherwise take as distributees. The provision of Section 2372 of the Code, that the avails of life insurance 'shall in other respects be disposed of like other property left by the deceased,' does not necessarily mean that it shall be distributed to the same class or classes of persons. The avails will, in some sense at least, be disposed of like other property left by the deceased, if distributed by the administrator to the persons entitled thereto under the law governing the distribution. It should be restricted to the classes named in Section 1182, if both or one exists; but if not, it should be distributed according to the general statute for the distribution of property. This construction gives each one of the sections in question a force of its own, and we think does violence to neither."

We have, therefore, to consider only the effect of certain changes in the statute since the decision in *Rhode v. Bank*, *supra*.

Section 1410 of the Code of 1851 was practically identical with Section 2455 of the Code of 1873 and Section 3379 of the Code of 1897, which was repealed by the thirty-fifth general assembly and Section 3379, Supplement to the Code, 1913, enacted in lieu thereof. The portion of Section 1805, *supra*, not italicized appears as a part thereof first in the Code of 1897, but the italicized portion of said section has, in substance, been a part of the statute since the Code of 1851. Section 3313 is substantially as it was at the time of the decision in *Rhode v. Bank*, *supra*, except the portion added thereto, which, so far as material to this controversy, is as follows:

"The words 'heirs' or 'legal heirs' or other equivalent words used to designate the beneficiaries in any life insurance policy or certificate of membership in any mutual aid or benevolent association, where no contrary intention is expressed in such instrument, shall be construed to include the surviving husband or wife of the insured, and the share of such survivor in the proceeds of such policy or certificate made payable as aforesaid shall be the same as that provided by law for the distribution of the personal property of intestates."

It is quite obvious that this addition to the statute was not designed to amend or change Section 1805, but makes the surviving husband or wife an heir to the proceeds of any policy of insurance upon the life of a deceased spouse which, by its terms, is payable to the heirs thereof. Prior to the enactment of this provision of said section, the husband or wife had no interest or share in the proceeds of a policy of life insurance by its terms made payable to the heirs of the insured. The language of the above section providing for the distribution thereof in the same manner as other personal property of intestates cannot be so extended as to include the proceeds of life insurance which, by the provisions of Section 1805, inure to the benefit of the surviving

husband or wife and the children, if any, thereof. The provision of Section 3313 relates only to the proceeds of a policy the beneficiaries of which are the heirs at law of the insured, while Section 1805 applies where the policy designates no particular beneficiary, but makes same payable to the executors, administrators or to the estate of deceased.

But it is contended by counsel for appellee that the designation in said policy of his estate as beneficiary was in effect "an agreement or assignment to the contrary," within the meaning of that term as used in Section 1805, Code, 1897. The thirty-fifth general assembly by specific provision repealed Section 3379 of the Code of 1897 and enacted the present section in lieu thereof. No reference was made in the act of the thirty-fifth general assembly to Section 1805, and if same, or any part thereof, was amended or repealed thereby, it was by implication only. Section 3379, as it appeared in the statute at the time this controversy arose, is substantially the same as Section 2455 of the Code of 1873.

No agreement can be implied, from the designation of his estate as beneficiary, that the proceeds of said insurance should be disposed of according to said Section 3379, and it is in no sense equivalent to an assignment. It is true that said fund became a part of the estate of deceased and was properly collected by the administratrix and must be distributed by her according to law. The only question is whether same is to be divided equally between the surviving widow and the sister of deceased, or whether the whole thereof shall, under Section 1805, inure to the benefit of the surviving widow. Repeals by implication are not favored. Besides, it is apparent that the legislature intended to repeal only Section 3379 as it appeared in the Code of 1897 and re-enact the same with the additional provision in favor of the surviving spouse, and had no reference, directly or in-

directly, to Section 1805. Unless said latter section has been repealed, we see no reason why the distribution of the proceeds of the policy in question should not be made in accordance therewith. The proceeds of a policy of life insurance which inure to the benefit of the surviving spouse are to be distributed by the administrator or executor according to the provisions of Section 1805, and other property of the estate according to the provisions of Section 3379, Supplement to the Code, 1913. By so construing same, full effect will be given to said sections according to their plain meaning and intent. None of the cases cited by counsel for appellee are in conflict with this holding.

It is our conclusion that appellant's demurrer should not have been overruled on this ground.

II. Upon the question of estoppel, it appears that the insurance policy was listed by administratrix, appellant herein, in the inventory of the assets of the estate of deceased, and referred to in her application for allowance, but no reference is made thereto in the stipulation between herself and appellee settling their respective interests in the real estate of deceased. The allowance in favor of appellant for her year's support was reasonably consistent with the value of the estate, and it is not to be inferred that same was fixed with any special reference to the item of insurance. If the same would otherwise inure to the benefit of appellant, appellee was in no wise prejudiced by any order made by the court, nor does it appear that the terms of the stipulation for settlement above referred to were arranged under the belief on the part of appellee that she was entitled to one half of the money in controversy. She was not, apparently, misled in any way by the failure of appellant to earlier indicate her intention to assert a claim to the whole thereof, nor does

2. DESCENT AND  
DISTRIBUTION:  
surviving  
spouse: life  
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she appear to have acted in bad faith in the matter.

We find no ground for an estoppel in the record. *Laub v. Trowbridge*, 71 Iowa 396; *School Twp. v. Stevens*, 158 Iowa 119; *Busby v. Busby*, 120 Iowa 536.

The demurrer to the resistance to appellant's application should have been sustained; and for the reasons above pointed out, this cause must be, and is, reversed and remanded for further proceedings in harmony with this opinion.—*Reversed and remanded.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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ISABELLA McCULLOUGH, Appellee, v. W. A. REYNOLDS, Appellee, et al., Appellants.

**PRINCIPAL AND AGENT: Powers of Agent—Evidence—Course of**

- 1 **Conduct.** *Possession* of an instrument is by no means the only evidence of authority to receive payment thereon. When a principal, by his habits and course of dealing, has held out an agent as having general authority to make loans for him and to receive payments on same, he may be bound by payments to the agent *although the securities are not in the possession of the latter.*

**PRINCIPAL AND AGENT: Powers of Agent—Payments to Agent**

- 2 **—Embezzlement, etc.—Effect.** If an agent has express or implied authority to receive payments on behalf of his principal, it is quite immaterial to the one making payment that the agent embezzled the money paid, or otherwise committed crime with reference thereto.

*Appeal from Linn District Court.*—JOHN T. MOFFIT, Judge.

DECEMBER 10, 1917.

SUIT in equity for the foreclosure of a mortgage. The defendant pleaded payment of the mortgage debt. Decree for plaintiff, and the defendants Prymek appeal.—*Reversed.*

*Joseph Mekota and C. F. Clark*, for appellants.

*Redmond & Stewart*, for appellee.

WEAVER, J.—It is not material in this statement to recite the facts attending the making of the mortgage in suit. It is sufficient that the mortgage debt was contracted in the name of the defendant Reynolds, and that, at the date of the mortgage, he held the title to the real estate in question. Afterward, the property was sold and conveyed to the defendant William Prymek, and in that transaction and in part consideration of said conveyance to him, he paid or attempted to pay the mortgage debt. In pursuance of that purpose, he went to a firm known as Miles & Son, who, he was informed and believed, were the authorized agents of the mortgagee, and paid to them the full amount of the debt, principal and interest, and said agents furnished to him an instrument purporting to be executed by the mortgagee, acknowledging full payment of the mortgage debt and discharging the mortgage lien. That this was done in good faith by Prymek, and in full faith that Miles & Son were authorized to receive such payment and that the release given him was a genuine instrument, there is no question. The mortgagee denies, however, that Miles & Son were authorized to act as plaintiff's agents in such matter or to receive payment of the debt, and alleges that she has never received any part of such payment or ratified the acts of her alleged agents in receiving it. She also denies the genuineness of the release furnished the appellant, and avers that it is a forgery.

This statement indicates with sufficient clearness the paramount question in the case: Was the appellant justified in making payment to Miles, or Miles & Son, as the agents of plaintiff to receive it? Or, stated otherwise, were Miles & Son the agents of the plaintiff to make this collection; and if not, had plaintiff, by her acts, words or conduct, so clothed them with apparent authority to represent her

that appellant, as a reasonably prudent man, was justified in making payment to them?

The testimony is very voluminous, and includes a large number of exhibits which cannot be here set out at large. Without quotation of the language of witnesses, save in a few instances, by way of illustration, we shall confine ourselves to a general statement of the ultimate facts as they appear to be established by the evidence as a whole.

J. M. Miles, who was the plaintiff's distant relative, had for many years conducted a loan agency business in Cedar Rapids. He died in December, 1911. A few years prior to his death, he associated with him in such agency his son, Matt J. Miles; and thereafter the business was conducted in the firm name of Miles & Son. After the death of the father, the son continued the business for some time. Plaintiff lived in Wisconsin, and, so far as shown, never visited Cedar Rapids at any time during the period hereinafter mentioned. She was one of a family of eight or more brothers and sisters, all of whom had money which they desired to invest in loans. Beginning in 1911 and continuing down to the summer of the year 1914, Miles and Miles & Son made many loans for the plaintiff, aggregating about \$30,000, and for the McCullough brothers and sisters, an aggregate of over \$200,000. Among the loans made for the plaintiff was the one to the defendant Reynolds, for \$2,200, secured by mortgage upon Cedar Rapids real estate. The note and mortgage representing this loan are the instruments sued upon in this action. The note bears date May 1, 1911, and is made payable 5 years after date, at the office of J. M. Miles & Son, with interest at 6 per cent, payable annually. It also reserves to the maker the right to pay \$10 or any multiple thereof upon the principal sum on interest pay days. The mortgage, in addition to the usual terms of such instruments, provides that, if the mortgagor should make any change in the ownership of the

property without giving written notice thereof to the mortgagee, it should constitute a default by the mortgagor in the terms of the contract, for which the mortgage might be at once foreclosed. When the appellant Prymek proposed to purchase the land, the abstract of title exhibited to him was submitted for examination to his counsel, who pointed out the necessity of removing the Reynolds mortgage. The attorney thus consulted was a resident of Cedar Rapids, and knew that Miles & Son had been doing a large business in loaning and collecting moneys for the McCulloughs. He told the appellant that the money was payable at the office of Miles & Son, and advised him to go there and pay off the lien and have a release made and shown in the abstract. Following this advice, the money was paid to Miles & Son, who delivered to the appellant a release of the mortgage, regular in form, purporting to be executed by the plaintiff and acknowledged before M. J. Miles, Notary Public. Appellant asked the alleged agents for the note which he had paid off, but was told that, the instrument having been given by Reynolds, he was the one entitled to receive it. Thereafter, no demand was made upon appellant or Reynolds by or for the plaintiff until May, 1914, when she caused written notice to be given that she still held the note unpaid, and that no one except herself or her counsel was authorized to collect it. Concerning the general course of business between plaintiff and Miles & Son, there is very little dispute. While the plaintiff swears broadly, "J. M. Miles & Son did not act as my agents in any capacity in connection with this loan, and they had no authority to collect interest," it is very evident, from her own testimony elsewhere, and from the overwhelming weight of the testimony, that J. M. Miles and Miles & Son had been, for at least twelve years, acting as her agents in some capacity with reference to each and every one of the numerous loans made by them on her account. It is also quite



evident that this agency was of a more intimate and informal character than usually exists between nonresident money lenders and the local agents through whom they do business. It was not the custom of the Miles agency to send plaintiff any formal applications from proposed borrowers for approval; the services of no appraisers were required by her; the abstracts of title were not forwarded to her for inspection; all notes, both principal and interest, were made payable at the Miles office; all payments of principal and interest on the entire list of loans were in fact made at that office; such payments were at times made before they were due, and plaintiff would afterward forward the proper receipts or the canceled securities for delivery to the makers; and, though plaintiff herself was never in Cedar Rapids, it was her uniform practice to sign the releases of mortgages prepared for her by Miles & Son and send them back for either J. M. or Matt J. Miles to attach his notarial certificate, to the effect that she had personally appeared before him and acknowledged the execution of the instrument. Perhaps no more satisfactory light can be thrown upon the manner and nature of these transactions than is furnished by the following extract from the plaintiff's cross-examination. Being interrogated by counsel for defendant, she testified:

"Q. And they collected all the interest, did they not—that is, J. M. Miles, or J. M. Miles & Son? A. Yes. Q. They collected all the principal, did they not, when it was due, or sometimes before it was due? A. Yes. Q. And they made renewals of these mortgages? That is, if the note and mortgage were not paid when due, would they make a renewal of it—extend the time? A. Yes. Q. And they did look after the insurance for you, did they not, on the property—see that the property was insured? A. Yes. Q. And they would look after the appraisement or the value of the property? That is, you would accept or

would take their judgment in that respect as to the value of the property on which the loans were made? A. Yes. Q. And would also rely on them to examine the title; that is, if the title was sufficient or clear, or that the title was right, that the owner or borrower had in the property? A. Yes. Q. You considered Mr. Miles or J. M. Miles & Son as your general agent in charge of making these loans in the state of Iowa, or in the vicinity of Cedar Rapids, did you not? A. No, I didn't consider him as the agent. Q. You did all these things through him that I mentioned, did you not? A. Yes. Q. Well, what would you call that? You considered him during all this time as your general agent in making and attending to matters that I have mentioned heretofore? A. Yes. Q. It is true, is it not, that J. M. Miles or J. M. Miles & Son had general charge as your agent of all these loan matters and everything necessary to be done to properly secure, protect and collect the money loaned? (Question objected to as to form and for calling for conclusion, and because it embodies several questions in one, and witness refuses to answer the question in that form on advice of counsel.) Q. You knew all this time that the borrowers were in the habit of dealing with J. M. Miles or J. M. Miles & Son directly in all these matters pertaining to those loans from the year 1898 to the end of the year 1912-1913? A. I suppose they did; I don't know. All the money I ever got from these loans from 1898 to 1912 came through J. M. Miles or J. M. Miles & Son. I do not know any of the addresses of the borrowers nor had any correspondence with them."

For these varied services in her behalf, plaintiff paid Miles & Son one per cent on the amounts loaned. Indeed, it would seem that the only function which the plaintiff reserved to herself was to furnish the money, when she had it, to supply the call for loans, and that every other matter and thing connected therewith, the approval of the borrower

as a safe or desirable person to deal with, the approval of the security offered, the sufficiency of the title to the property, the receipts of payments of both principal and interest, whether before or after due, and the renewal or extension of loans, were left solely and entirely to the care and discretion of Miles, or Miles & Son. She at no time rejected any loan he or they negotiated, nor, until about the time this action was begun, did she ever disapprove of his or their management of her business. Indeed, she concedes that, even after she claims to have discovered that Miles had withheld collections made for her, she continued to do business through him. She further says she never at any time knew the address of any of the borrowers. Moreover, it appears that mention of her place of residence was uniformly left out of the mortgages, releases and other papers connected with the loan, to avoid revealing her whereabouts to the assessor and taxing authorities. It was to this end also that, whenever any paper executed by her was of a kind to require acknowledgment, such acknowledgment was untruthfully certified to have been made in Cedar Rapids. The very extensive correspondence between the parties is in entire accordance with the tenor of plaintiff's statements, as above quoted.

There is much more in the record having a tendency to bear out the defendants' theory of the case, and we have little hesitation in saying that, upon the plaintiff's showing alone, the authority of Miles & Son to receive payment from appellant is sufficiently established. On much less persuasive proof we held that the agent's authority to collect was sufficiently shown in *Harrison v. Legore*, 109 Iowa 618; *Townsend v. Studer*, 109 Iowa 103; *Bissell v. Spring*, 179 Iowa 1005.

But counsel argue that Miles & Son were not professing to act as agents for plaintiff in receiving the money, and that in truth it was paid to them merely as part of the pur-

chase price of the land, and not as payment of the mortgage debt. But the record does not bear out this claim. It is true that Matt J. Miles appears to have had some sort of interest as agent for the sale of the land to Prymek, but it does not appear that Prymek paid him the purchase price as agent of the seller and trusted him to clear the title by getting the mortgage released. It is shown, and without dispute, that, when the examination of the abstract of title disclosed the mortgage, Prymek was informed by his legal adviser of the necessity of paying it off, and was directed to Miles & Son as the agents of the mortgagee to whom to make such payment, and that he acted upon that advice. We cannot presume that he would have paid the money just the same had he not learned of their agency. There is nothing in this phase of the case to take it out of the rule of our precedents above cited.

2. PRINCIPAL AND  
AGENT: powers  
of agent: pay-  
ments to  
agent: em-  
bezzlement,  
etc.: effect.

Considerable attention is paid in argument to the claim of plaintiff that the release of the mortgage was a forgery, which appellee charges to have been perpetrated by Matt J. Miles. It is not necessary to the disposition of this appeal that we undertake to determine the truth of this claim. It is proper to say that Mr. Miles flatly denies the charge, and it is to be said in his behalf that the otherwise suspicious circumstance that the certificate of acknowledgment of the release is certified by him as a notary at Cedar Rapids loses much of its force when it is shown that such improper certification was, for more than ten years, the uniform and constant practice between plaintiff and her agents, even with respect to papers the genuineness of which is not questioned. But even if Miles & Son, or either of them, having collected the money, embezzled it and sought to conceal the offense or postpone its discovery by forgery of the release, it in no manner weakens or avoids the defense pleaded, if it be

fairly established, as we hold, that they had authority to receive the money. It should also be said that the death of J. M. Miles took place shortly after the payment of this money and the delivery of the release, and we are deprived of the assistance which his testimony would have afforded in arriving at the truth of these matters.

Again, we are cited to a class of cases in which it has been held that payment of a promissory note to an alleged agent who is not at the time in possession of the paper is made at the debtor's risk, and, if it appear that the alleged agent did not in fact have such authority, the payment to him will be no defense to an action brought by the holder of the note. That this is a correct general rule, applicable in all cases which show no other material facts than those indicated in such statement, we may admit; but it certainly is not a rule which governs all cases where payment is made to an agent or alleged agent not in possession of the instrument. The sufficiency of such payment will be sustained where the conduct of the holder of the note or his manner of doing business has been such as to fairly indicate the authority of the agent to receive payment, or to induce the debtor to believe that he has such authority. Such was our holding in the *Harrison-Legore* case, and in the *Bissell-Spring* case, *supra*. Indeed, an inflexible, cast-iron rule which would disregard all payments made under such circumstances would be grossly unjust, and open a wide door to fraud and oppression. Supporting this view see *Campbell v. Gowans*, 35 Utah 268; *Thomson v. Shelton*, 49 Neb. 644; *Union Trust Co. v. McKeon*, 76 Conn. 508; *General Convention v. Torkelson*, 73 Minn. 401; *Church Assn. v. Walton*, 114 Mich. 677; *Reid v. Kellogg*, 8 S. D. 596; *Fitzgerald v. Beckwith*, 182 Mass. 177; *Doyle v. Corey*, 170 Mass. 337; *Quinn v. Dresbach*, 75 Calif. 159; *Security Co. v. Richardson*, 33 Fed. 16; *Noble v. Nugent*, 89 Ill. 522; *Doe v. Callow*, 64 Kans. 886; *May v. Jarris-Conklin Mtg.*

*Tr. Co.*, 138 Mo. 275; *Johnston v. Milwaukee & Wyo. Inv. Co.*, 46 Neb. 480. To hold that plaintiff can carry on a business of this kind through a long series of years, giving the public and those with whom her agents deal every apparent reason for believing that they are her authorized representatives, and then repudiate their authority when, as she claims, she finds they have abused her confidence, would be very inequitable. It is an old and recognized rule in equity that, where one of two innocent parties must suffer by the wrong or default of a third person, the loss should be borne by the one who put it in the power of the wrongdoer to inflict the injury:

The judgment of the trial court must be reversed, and the plaintiff's bill dismissed.—*Reversed.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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STATE OF IOWA, Appellee, v. CURTIS BURNS, Appellant.

**CRIMINAL LAW: Appeal and Error—Reservation of Grounds—Un-**

- 1 **fair Trial.** An accused cannot waive his legal right to a fair trial. No trial can be said to be fair or be allowed to stand which results in a conviction *with any essential element of the offense unproved*, even though the accused, in the trial below, entered no exceptions of any kind. So held where, on a charge of carrying concealed weapons, the State proved all elements except the element of "non-permit" to carry. (Sec. 5462, Code, 1897.)

**WEAPONS: Concealed Weapons—Indictment—Negating Excep-**

- 2 **tions.** An indictment for carrying concealed weapons must negative the exception in favor of those having permits to so carry. (Section 4775-1a *et seq.*, Code Supp., 1913.)

**INDICTMENT AND INFORMATION: Requisites and Sufficiency—**

- 3 **Negating Exceptions.** Principle recognized that an indictment must negative an exception contained in the statutory section which defines the crime.

*Appeal from Fayette District Court.*—A. N. HOBSON, Judge.

DECEMBER 10, 1917.

DEFENDANT was indicted on the charge of carrying concealed weapons, convicted, and appeals.—*Reversed and remanded.*

*Voris & Haas*, for appellant.

*H. M. Havner*, Attorney General, *H. H. Carter*, Assistant Attorney General, and *James D. Cooney*, for appellee.

GAYNOR, C. J.—On the 23d day of January, 1917, the grand jury of Fayette County returned against the defendant the following indictment:

1. CRIMINAL  
LAW: appeal  
and error:  
reservation of  
grounds: un-  
fair trial.

That the defendant, Curtis Burns, "at and within said county, on or about the 16th day of December, 1916, did go armed with, and have concealed upon his person, a revolver, the same being an offensive and dangerous weapon; he, the said Curtis Burns, being then and there a person not permitted to carry offensive and dangerous weapons concealed upon his person."

On this indictment the defendant was arraigned, and pleaded not guilty, was tried to a jury, and convicted. Judgment being entered upon the verdict, he appeals. The record does not disclose that any objections were made by the defendant to anything that happened or was done upon the trial. No exceptions were preserved to rulings made by the court, and no exceptions taken to the instructions or to the final judgment entered in the cause.

There is but one contention made by defendant that we may consider, to wit: Considering the evidence in all its fullness, and assuming the testimony offered by the State to be absolutely true, does it establish the offense charged against the defendant? We will consider no other, in the absence of objections and exceptions preserved in the rec-

ord. If the evidence for the State, considered in its most favorable light, fails to establish the ultimate fact upon which the verdict rests, then the State has failed to involve the defendant in criminality for which he should be called upon to suffer the penalty of the law. Unless there be a showing of error committed in the making of the record prejudicial to the defendant's rights, or the whole record shows that the defendant has not had a fair and impartial trial, such as our Constitution guarantees, we do not ordinarily interfere in criminal cases.

Section 5462 of the Code of 1897 provides:

"If the appeal is taken by the defendant, the Supreme Court must examine the record, without regard to technical errors or defects which do not affect the substantial rights of the parties, and render such judgment on the record as the law demands; it may affirm, reverse or modify the judgment, or render such judgment as the district court should have done, or order a new trial, or reduce the punishment, but cannot increase it."

In *State v. Barr*, 123 Iowa 139, though in its facts it is unlike the case at bar, this court said, citing *State v. Schwab*, 112 Iowa 666:

"'Certainly a criminal defendant may waive error on appeal. He does so in every instance where an exception is not taken below.' But on the other hand, this court is required by the statute to examine the record in criminal cases without regard to technical errors or defects which do not affect the substantial rights of the parties, and render such judgment on the appeal as the law demands, (citing above statute and *State v. Nine*, 105 Iowa 131, 136). And we can and should reverse a criminal case where it appears on the record that defendant has not had a fair trial, even though no specific error of law in the rulings of the court has been properly preserved. We do not wish to be understood as holding that even in a criminal case we will



reverse for rulings as to which no exceptions have been preserved, but we may and should reverse on the ground that defendant has not had a fair trial, even though no specific rulings have been properly objected to."

It was further said in this case:

"We know of no reason why counsel in a criminal case should not make his objections as specific and definite as is required in a civil case, in order to raise a question of law for consideration upon appeal."

In this *Barr* case, it was the thought of the court in reversing the case that the defendant did not have a fair trial, in that he was forced to come to trial with new counsel without opportunity to prepare. This case suggests what must be apparent to every legal mind, that no man should be convicted of a felony or of any crime unless he has had a fair and impartial trial, such as is contemplated by the law. He has, however, a fair and impartial trial when opportunity is given to him to object and except to what is done to his prejudice upon the trial.

It cannot be said, then, that his constitutional rights were invaded. All that can be said is that the court, in attempting to administer the law, acted erroneously. The case then may or may not be reversed for the errors committed, depending on whether or not they are prejudicial. But there is a broader principle, involving the right of defendant to have such a trial as is guaranteed to him by the Constitution. All our crimes are statutory. Therefore, one called to answer as for a violation of the statute in a criminal way, is entitled to call upon the State to make proof of all facts essential to constitute the crime charged. Until the proof is forthcoming from the State to establish all the essential elements of the crime charged against the citizen, the presumption of innocence stands between him and conviction. It is fundamental that every man is presumed to be innocent, when placed on trial, until

proved to be guilty. To make out his guilt by proof, the proof must affirm the existence of every element essential to constitute the crime. No verdict of a jury can stand in this court where there is absence of proof of any of the elements essential to constitute the crime against which the statute is lodged.

In this case, the defendant was charged, as shown by the indictment, with going armed, and having concealed upon his person an offensive and dangerous weapon, without having a permit to carry it. What are the essential elements of the crime? (1) That he be found carrying concealed upon his person an offensive and dangerous weapon; (2) that he did not have permission to do so.

2. WEAPONS: concealed weapons: indictment: negative exceptions.

Section 4775-1a, Code Supp., 1913, provides:

"It shall be unlawful for any person, except as herein after provided, to go armed with and have concealed upon his person \* \* \* a revolver \* \* \* or other offensive and dangerous weapons or instruments concealed upon his person."

It will be noted that in this statute the act inhibited is not made absolutely unlawful, because the very statute itself excepts conditions upon which it may be lawful. An indictment charging merely that one went armed with, and had concealed upon his person, an offensive and dangerous weapon, which does not state that the party charged does not come within the exception, leaves the mind in doubt as to his criminality. An indictment which charges the violation of a statute must so state the facts that, upon demurrer, the facts being admitted, an intelligent judgment could be pronounced by the court. If an indictment is drawn under a statute which, in itself, excepts some persons from criminality for the act, how can it be charged

that the defendant is guilty unless it is alleged and proved that he is not within the exceptions of the statute? If proof fails on this, it leaves the mind in doubt as to whether there is criminality in the act.

3. INDICTMENT  
AND INFORMATION:  
requisites and  
sufficiency:  
negating exceptions.

The very statute which contains the inhibition against carrying concealed weapons, contains the exception to the inhibition, and, therefore, is a part of the same statute which creates the crime. It is true that the circumstances of the exception are found in subsequent statutes, but the exception itself is found in the statute which creates the crime. It is a rule of general recognition that an indictment which charges one with violation of a statute which has in itself exceptions and provisos, must negative the exceptions or provisos in order to charge a punishable crime. See *State v. Aiken*, 109 Iowa 643. We have had occasion to pass upon this statute recently. See *State v. Cochran*, 179 Iowa 1304. In that case the court said:

"The State had the burden \* \* \* of showing by the evidence beyond a reasonable doubt that the defendant did not at the time have a permit to go armed."

In the case before us, while there was evidence from which the jury might find that the defendant was carrying a concealed weapon, there was no evidence and no attempt to prove that the defendant did not come within the exception. Until there was proof that he was outside the protection of the exception, the State did not prove one of the essential elements of the offense. It is right for us to say that the attorneys appearing in this court did not try the case below.

For the reasons above suggested, the cause is—*Reversed and remanded.*

WEAVER, PRESTON and STEVENS, JJ., concur.

BAIRD BROS., Appellees, v. MINNEAPOLIS & ST. LOUIS RAIL-  
ROAD COMPANY, Appellant.

**COMMERCE: Interstate Commerce—Furnishing Cars on Specified Days Only—Consequent Delay—Reasonableness of Rule—Jurisdiction of State Court.** A state court has jurisdiction to entertain an action for damages by reason of delayed transportation in an interstate shipment, even though the carrier pleads that the delay was occasioned by the fact that it had established a rule—though it had not filed the same with the Interstate Commerce Commission—under which it furnished cars for interstate shipments of the kind in question *only on certain specified days of each week*, and that the plaintiff shipper demanded cars on days not provided by said rule. In other words, the state courts have jurisdiction to pass on the unadjudicated reasonableness of such a rule.

The premises leading to this conclusion are:

(1) The duty to furnish reasonable shipping facilities rests upon an interstate carrier by virtue of (a) the Interstate Commerce Act, (b) the statute law of this state, and (c) the common law.

(2) The primary authority to determine what does and what does not constitute reasonable shipping facilities is not an expressly conferred power of the Interstate Commerce Commission.

*Appeal from Louisa District Court.*—OSCAR HALE, Judge.

DECEMBER 11, 1917.

ACTION at law brought by plaintiffs, who are stock shippers, for damages for refusal of defendant company to furnish cars to ship stock from the town of Marsh, Iowa, to Chicago. Plaintiffs allege they were compelled to keep the cattle in the stockyards of defendant for some time at expense, to their damage in the sum of \$200. The case was tried to the court without a jury, upon an agreed statement of facts. The court found for plaintiff, and rendered judg-

ment against defendant for the sum of \$200. The defendant appeals.—*Affirmed.*

*Burrell & Devitt and Arthur Springer, for appellant.*

*Fred Courts and F. M. Molsberry, for appellees.*

PRESTON, J.—The petition alleges, in substance, that plaintiffs are stock shippers, and that on Monday, June 10, 1912, they gave notice to the agent of defendant at Marsh, Iowa, and ordered two cars to be furnished to the plaintiffs at defendant's station at Marsh, Iowa, for Wednesday, June 12, 1912, for the shipment of 52 head of cattle; that plaintiffs had no notice from defendant or its agent that said cars would not be furnished at said time, or that the said cattle would not be taken by defendant for shipment on that day; that, at about 8 or 9 o'clock in the morning of June 12, plaintiffs delivered to the defendant at Marsh station the 52 head of cattle for shipment on their train No. 90, due at said station at about 10 o'clock that morning; that defendant refused to ship said cattle upon that train, or upon any other train that day; that plaintiffs were compelled to keep said cattle in the stockyards of defendant, and a part of them were not loaded until the next day, and the balance not until the Sunday following; by reason of which plaintiffs were damaged, etc. For answer, defendant admitted its corporate capacity, and that it was operating a line of railroad through Louisa County and other states; denied all other allegations of the petition; and set up affirmative defenses as follows:

"The defendant, further answering, states that it operates a regular stock train from Marsh, Iowa, to Monmouth in the state of Illinois, connecting with the Chicago, Burlington & Quincy Railroad Co., a corporation operating a line of railroad between said Monmouth and the city of Chicago, in the state of Illinois. That this plaintiff well knew that this defendant operated such train and had set

apart Sunday and Tuesday of each week for the purpose of the shipment of live stock over its lines and its connecting lines to stations in other states, and that, notwithstanding such knowledge, and notwithstanding it was necessary that this defendant, in the ordinary course of its business and for the better conduct thereof, established such rule for the speedy delivery of interstate shipments of live stock, demanded of this defendant that it furnish such trains on other days than those above designated, and that if this defendant failed and neglected or refused to furnish such cars, as plaintiff alleges in its petition, that it was because said stock was not delivered to it on the regular days as above specified. Further answering, defendant states that the shipment contemplated by the plaintiff herein and the defendant herein, and for which it seeks to recover damages against the said defendant, was an interstate shipment, being a shipment from the town of Marsh, in the state of Iowa, to the city of Chicago, in the state of Illinois, and that the Federal statutes in such cases made and provided have assumed the jurisdiction of all questions arising out of the interstate shipments, whether before the Interstate Commerce Commission or Court, under the Federal statute or in the district and circuit courts, of said Federal statute, and that by reason of such Federal legislation upon the interstate traffic, it has vested its exclusive jurisdiction of determining the rights of all parties engaged in such shipments, either as shippers or as public carrier, and that by reason thereof this court is without jurisdiction to hear and determine any of the matters alleged and charged against the defendant by the plaintiff, and for which it seeks to recover damages in this action. \* \* \* Further answering, the defendant states that, at, during and prior to the time that plaintiff in Count 1 of his petition complains of the failure of this defendant to furnish cars, there had been established by the defendant company the rule that

stock shipments on the eastern division of the defendant railroad company, running from the city of Oskaloosa, in the state of Iowa, to the city of Monmouth, in the state of Illinois, should be received for shipment for said company and cars furnished for said shipment only on Sunday and Tuesday of each week. That with this rule the plaintiff was, during all the time herein referred to, familiar. That the said rule applied not only to this plaintiff, but to each and all of the shippers of stock along the eastern division of said defendant company, and was enforced alike as to each and all of them. That this plaintiff was not entitled to receive any better or different treatment in the delivery of cars than was any other shipper along said division of said defendant railroad company. That said rule was in force and affected interstate shipments on said division of the defendant company's lines, and that while said rule was in force it would have been unlawful for either the plaintiff or defendant or both of them, if said defendant company had furnished cars or accepted shipments of stock from this plaintiff under any other or different rule than said stock shipments were received or cars furnished to any other shippers along said line. The defendant for further answer states: That if the plaintiff deemed said rule of the defendant company unjust or unfair, that, under the statutes of the United States known as the Interstate Commerce Act and the amendments thereto, it was the duty of said plaintiff, and his only remedy under the terms of said act was an application to the Interstate Commerce Commission to pass on and determine the reasonableness of said act, or in an appeal; and after an appeal to said Commission, and the finding that the said rule was unjust and unfair, to appeal to the district or circuit court of the United States, if he had been damaged thereby. The defendant for further answer states: That this court is without jurisdiction to determine the reasonableness or justness of the

apart Sunday and Tuesday of each week for the purpose of the shipment of live stock over its lines and its connecting lines to stations in other states, and that, notwithstanding such knowledge, and notwithstanding it was necessary that this defendant, in the ordinary course of its business and for the better conduct thereof, established such rule for the speedy delivery of interstate shipments of live stock, demanded of this defendant that it furnish such trains on other days than those above designated, and that if this defendant failed and neglected or refused to furnish such cars, as plaintiff alleges in its petition, that it was because said stock was not delivered to it on the regular days as above specified. Further answering, defendant states that the shipment contemplated by the plaintiff herein and the defendant herein, and for which it seeks to recover damages against the said defendant, was an interstate shipment, being a shipment from the town of Marsh, in the state of Iowa, to the city of Chicago, in the state of Illinois, and that the Federal statutes in such cases made and provided have assumed the jurisdiction of all questions arising out of the interstate shipments, whether before the Interstate Commerce Commission or Court, under the Federal statute or in the district and circuit courts, of said Federal statute, and that by reason of such Federal legislation upon the interstate traffic, it has vested its exclusive jurisdiction of determining the rights of all parties engaged in such shipments, either as shippers or as public carrier, and that by reason thereof this court is without jurisdiction to hear and determine any of the matters alleged and charged against the defendant by the plaintiff, and for which it seeks to recover damages in this action. \* \* \* Further answering, the defendant states that, at, during and prior to the time that plaintiff in Count 1 of his petition complains of the failure of this defendant to furnish cars, there had been established by the defendant company the rule that



stock shipments on the eastern division of the defendant railroad company, running from the city of Oskaloosa, in the state of Iowa, to the city of Monmouth, in the state of Illinois, should be received for shipment for said company and cars furnished for said shipment only on Sunday and Tuesday of each week. That with this rule the plaintiff was, during all the time herein referred to, familiar. That the said rule applied not only to this plaintiff, but to each and all of the shippers of stock along the eastern division of said defendant company, and was enforced alike as to each and all of them. That this plaintiff was not entitled to receive any better or different treatment in the delivery of cars than was any other shipper along said division of said defendant railroad company. That said rule was in force and affected interstate shipments on said division of the defendant company's lines, and that while said rule was in force it would have been unlawful for either the plaintiff or defendant or both of them, if said defendant company had furnished cars or accepted shipments of stock from this plaintiff under any other or different rule than said stock shipments were received or cars furnished to any other shippers along said line. The defendant for further answer states: That if the plaintiff deemed said rule of the defendant company unjust or unfair, that, under the statutes of the United States known as the Interstate Commerce Act and the amendments thereto, it was the duty of said plaintiff, and his only remedy under the terms of said act was an application to the Interstate Commerce Commission to pass on and determine the reasonableness of said act, or in an appeal; and after an appeal to said Commission, and the finding that the said rule was unjust and unfair, to appeal to the district or circuit court of the United States, if he had been damaged thereby. The defendant for further answer states: That this court is without jurisdiction to determine the reasonableness or justness of the

said rule, and has no jurisdiction to entertain an action for damages for a failure to furnish cars as provided by said act for interstate shipment; that by said acts of Congress, the exclusive jurisdiction to determine the rights of the plaintiff and other shippers along the line of the defendant company's railroad is exclusively vested in the Interstate Commerce Commission or in the courts of the United States. Wherefore, the defendant asks that plaintiff's petition be dismissed for lack of jurisdiction. Defendant hereby tenders to plaintiff the sum of \$20 in payment of the cause of action set forth in Count 4 of plaintiff's petition. Wherefore, defendant asks judgment against the plaintiff for costs."

To the affirmative defenses so pleaded by defendant, plaintiff demurred on the following grounds:

"That the facts stated constituted no defense to the plaintiff's cause of action.

"For the further reason that it is not alleged in said answer that the rule pleaded has been determined to be a reasonable rule by the Interstate Commerce Commission or any court of the United States or state court.

"For the further reason that that part of said answer and the amendment thereto does not state or show in any manner that the district court of the United States has exclusive jurisdiction, or does not plead any statute or any rule or regulation of the Interstate Commerce Commission which would in any manner conflict with the jurisdiction of this court or would be a defense to plaintiff's cause of action.

"For the further reason that the questions raised in said answer and amendment cannot be presented and raised in the manner attempted to be raised thereby. That the only remedy of the defendant herein is by filing a petition for removal, as provided by the United States statutes, and having failed to so do, the defendants have waived all their

right to removal and all objections to the jurisdiction of this court.

"Plaintiffs further demur to said portion of Count 1 of the answer and amendment thereto, for the reason that the matters therein set forth raise the question of what is and what is not a reasonable regulation by the railroad company, and this is not a question relied upon or pleaded by the plaintiff, and is not in any manner at issue in this case."

The demurrer was sustained, and exceptions taken by the defendant. Notwithstanding the demurrer and the ruling thereon, thereafter the parties agreed to submit the case on an agreed statement of fact, which is as follows:

"It is agreed that this case shall be submitted to the court for final determination upon this agreed statement of facts, which, with the pleadings, shall constitute the issues upon which a determination of the court shall be made:

"That on Monday, June 10, 1912, the plaintiff requested the defendant to furnish the plaintiff, at the defendant's station at Marsh, Iowa, two cars, for the shipment of 52 head of cattle to be shipped from Marsh, Iowa, Wednesday, the 12th day of June, 1912. That defendant refused to furnish said cars, for the reason that the said company had established and published a rule that cars for live stock shipment from points on its line to Chicago, Illinois, should be furnished to shippers on Sundays and Tuesdays, and not on any other day of the week. Said rule was in full force and effect, and as to all of the shippers of live stock along the line of defendant railroad. The plaintiff insisted on his right to have said cars at said station of Marsh, Iowa, on Wednesday, and that by reason of said refusal of the defendant to furnish the plaintiff cars on Wednesday at his demand, the plaintiff was damaged in the sum of \$200 by delay in shipment, shrinkage and difference in the market price of stock, etc. The plaintiff claims that he did not know that said rule was in force. It is conceded that the

plaintiff has at no time made complaint to the Interstate Commerce Commission, under the provisions of the Federal law known as the Interstate Commerce Act; that said rule or regulation of the defendant company in the relation to the distribution of cars for live stock shipment to Chicago, Illinois, was unreasonable, and said rule has never been held unreasonable by the Interstate Commerce Commission. It is insisted by the defendant that, by reason of the foregoing facts, the court is without jurisdiction to determine this controversy, but it is agreed that, if the court has jurisdiction under the foregoing statement of facts to determine the controversy, that plaintiff's damage by reason of the failure to furnish the cars on Wednesday, as demanded by the plaintiff, is \$200."

No other evidence was offered or considered by the court, and the bill of exceptions recites that the cause was determined upon the pleadings and the agreed statement of facts. The errors assigned are:

"1. The court erred in holding that the court had jurisdiction to award damages in this case under the agreed statement of facts.

"2. The court erred in awarding the plaintiff damages by reason of defendant's refusal to furnish the plaintiff a stock shipper's car at a time when it was refused to furnish cars to all shippers on its line for similar shipments; that in holding that the plaintiff could recover damages the court permitted a discrimination in plaintiff's favor as against all other shippers engaged in competitive shipping with the plaintiff along the line of its said road.

"3. The court erred in holding that, where a rule was regularly established, published and in force by the railroad company, by the terms of which cars were to be furnished for shipments off its line on certain days of the week, that the plaintiff, without an appeal to the Interstate Commerce Commission and a holding by said Interstate Commerce

Commission that said rule in relation to furnishing cars was unreasonable, could recover against the defendant in an action at law for damages.

"4. The court was without jurisdiction to determine the reasonableness or unreasonableness of the rule of the defendant company in relation to the distribution of its cars, and that, until the rule established by the company had been declared unreasonable by the Interstate Commerce Commission, no court, either state or Federal, had jurisdiction to award the plaintiff damages as against the defendant for the reason that the rule was unreasonable. That fact could be determined only by the Interstate Commerce Commission, who, by the acts of Congress, are given authority to determine the reasonableness of rules established by the railroad companies as to the distribution of cars engaged in interstate commerce."

Though four errors are assigned, we think there is but one question in the case, and that is whether the court had jurisdiction to hear and determine the controversy, or whether plaintiff must present the matter to the Interstate Commerce Commission, as contended by appellant. It is thought by appellant that the trial court, in rendering judgment for plaintiff, necessarily determined that the rule of defendant relied upon was unreasonable. In its reply argument, appellant states the defendant's reason for making the rule, which, if it was in evidence, might be a basis for determining whether the rule is or is not reasonable. But this does not appear in the record, and in fact there is nothing in the record from which the court could determine, as a question of fact, whether the rule is a reasonable one or not. Again, it is thought by appellant that, if it is compelled to receive shipment from plaintiff on a day other than the two fixed in the rule, there would be a discrimination by it between plaintiff and defendant's other customers, because under the rule it could only receive shipments from

followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. \* \* \* Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than 120 days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect;" etc.

Appellant's first point, and the citations in support thereof, follow: Under the Interstate Commerce Act, and the amendments thereto, the shipper engaged in interstate commerce who complains of the unreasonableness of any rate, rule or regulation adopted and put in force by a railroad company engaged in interstate commerce must appeal to the Interstate Commerce Commission to determine wheth-

er the "rate, rule or regulation" is unreasonable, this being one of the administrative duties of the Interstate Commerce Commission under the act of Congress. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (51 L. Ed. 553); *Southern R. Co. v. Reid*, 222 U. S. 424 (56 L. Ed. 257); *Northern Pac. R. Co. v. Washington*, 222 U. S. 370 (56 L. Ed. 237); *Baltimore & O. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481 (54 L. Ed. 292); *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 183 Fed. 929 (same case affirmed, 230 U. S. 304, 57 L. Ed. 1494); *Texas & P. R. Co. v. American Tie & Timber Co.*, 234 U. S. 138 (58 L. Ed. 1255).

The second proposition is: The question as to the reasonableness of a rule of car distribution is administrative in its character, and calls for the exercise of the powers and duties conferred by Congress upon the Interstate Commerce Commission (citing *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304 [57 L. Ed. 1494]; *Baltimore & O. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481; *Interstate Commerce Commission v. Illinois Cent. R. Co.*, 215 U. S. 452 [54 L. Ed. 280]; *Loomis v. Lehigh Valley R. Co.*, 208 N. Y. 312 [101 N. E. 907]).

The third: The distribution of cars is within the control of the Interstate Commerce Commission, and the courts cannot award damages for failure or refusal to issue cars on a specific day. *Vulcan Coal & Min. Co. v. Illinois Cent. R. Co.*, 33 Interst. Commerce Commission Rep. 52; *Western & A. R. Co. v. White Provision Co.*, (Ga.) 82 S. E. 644.

And the fourth point: For the preservation of the uniformity which it was the purpose of the act to secure in the regulation of interstate commerce, the courts may not, as an original question, exert authority over subjects which primarily come within the jurisdiction of the Interstate Commerce Commission (citing *Texas & Pac. R. Co. v. American T. & T. Co.*, 234 U. S. 138 [58 L. Ed. 1255]; *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 [51

L. Ed. 553]; *Baltimore & O. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481 [54 L. Ed. 292]; *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506 [56 L. Ed. 288]; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247 [57 L. Ed. 1472]; *Morrisdale Coal Co. v. Pennsylvania R. Co.* 230 U. S. 304 [57 L. Ed. 1494]; *Loomis v. Lehigh Valley R. Co.*, 208 N. Y. 312 [101 N. E. 907]).

It seems to us that some of these propositions are not in this case, and we shall not attempt to refer to all of defendant's authorities.

Under Section 1 of the Interstate Commerce Act as amended, it is provided that it is the duty of a common carrier to provide reasonable facilities and make reasonable rules and regulations with respect to transportation; but appellant has not pointed out, and we do not find anywhere in the act, that it is the duty of the Commission to prescribe what are and what are not reasonable facilities, such as those in question in this case; and where rule has not been filed, and where that, or any other obligation, is not expressly conferred upon the Commission, it is not necessary that it should first pass upon and decide the question as to whether a particular regulation is or is not reasonable. As before stated, it is the duty of a railroad company to receive freight offered, and to provide reasonable facilities and prompt transportation, and this duty could be required before the Interstate Commerce Act was passed. The authorities seem to hold that exclusive jurisdiction to pass upon the question of reasonable facilities was not conferred upon the Commerce Commission by this act; therefore we think it was not necessary to apply to the Commission before the injured party has a right to resort to the courts to recover damages such as are here claimed. This we understand to be the rule in *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.*, supra. That was a case involving the question of rates, and the question being considered was



one covered by the Interstate Commerce Act. By virtue of Section 6, this requires the rate fixed by the company to be filed with the Commission, and this is presumed a reasonable rate until it is otherwise declared by the Commission. In the opinion, the court referred to Section 22 of the act, which provides that nothing therein shall abridge or alter common-law or statutory remedies, but that it is to be supplemental and additional thereto. In that case, the plaintiff was required to first apply to the Commission, the court holding that a common-law remedy could be followed and the Commission disregarded when such remedy would not interfere with the administration of the law under the Interstate Commerce Act. In that case, the rates fixed by the railroad company and filed with the Commission were by the act of filing made reasonable until the Commission had otherwise decided. The instant case differs from that. There is nothing in the act the enforcement of which would interfere with or abridge the rights of the shipper in demanding his right to reasonable shipping facilities, such as are in controversy here, and to recover damages. A shipper's demanding of the defendant reasonable shipping facilities does not abridge or interfere with, nor is it inconsistent with, the provisions of the Commerce Act. It seems to have been the purpose of the Interstate Commerce Act to save common-law and statutory remedies so far as possible, and furnish additional relief in certain cases, and that a specific remedy given by the act should be regarded as cumulative, where other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act, unless it be inconsistent with the act itself. In the case of *Texas & Pac. R. Co. v. American T. & T. Co.*, supra, it was held that damages resulting from the refusal of the railway company to accept crossties could not be recovered, in the absence of previous action of the Interstate Commerce Commission,

where the refusal was based upon the want of any filed and published rate. This was a case involving the question of schedule rates filed with the Commission, which was to determine, primarily, whether the rates filed applied to that particular shipment. The question as to the duty to furnish adequate facilities was not under consideration in that case, but the question was in regard to rate regulation, powers, and the duties of the Commission. *Southern R. Co. v. Reid* was another rate case holding that the provisions of the Interstate Commerce Act invalidated the provisions of a state statute, in so far as they penalized the refusal of a carrier to receive a tender of freight for transportation to a point on the line of another carrier outside the state, where no rate for such shipment has been established, filed or published, and we think it is not in conflict with the holding in the *Abilene* case.

Counsel for appellant argue the instant case as though there was some interference with the rate-regulating power of the Interstate Commerce Commission, in order to bring it within the rule of the cases before referred to. Under the record in this case, the exercise of power by the trial court in determining this case did not interfere with the rate regulation or the authority of Congress or the Commission to prohibit discrimination. It is simply a question of a delayed shipment and damages resulting therefrom by reason of the defendant's failure to perform its duty in receiving the cattle. The effect of holding according to defendant's contention would be that, before a shipper could recover damages for a delayed interstate shipment, he must appeal to the Interstate Commerce Commission or to the Federal courts. It cannot be claimed from this record that the Commission had exercised jurisdiction by granting defendant the right to operate trains only on Sundays and Tuesdays. The *Pitcairn* case, *supra*, and perhaps some of the other cases cited, related to the practice of the distribution

of cars in case of car shortage, and involved the question of the power of the Commission over the distribution of cars, and held that the courts could not, by mandamus, compel the Commission to make a rule, nor by injunction restrain the enforcement of one that it had promulgated in regard to the distribution of cars. We assume that the abuse, or at least one of the abuses, sought to be corrected, was that in such a case a railroad company could not favor one shipper by furnishing more than his proportion of cars, and discriminate against another shipper by giving less than his proportion. The *Pitcairn* case was brought under Section 3 of the Commerce Act, which forbids preferences in furnishing equipment to one and not furnishing the same to another. There is a clear distinction between reasonable facilities such as claimed by plaintiff in the instant case, under the circumstances shown, and a preference extended by furnishing a particular kind or amount of facilities to one shipper and withholding the same kind or amount from another. The case of *Interstate Commerce Commission v. Illinois Cent. R. Co.*, supra, interprets the provision of the Interstate Commerce Act which authorizes the Commission to regulate interstate traffic to prevent preferences. In *Loomis v. Lehigh Valley*, supra, the railway had, prior to a certain date, furnished to the plaintiff, a shipper of produce, cars fitted with grain doors or bulkheads for shipment of produce in bulk, but thereafter refused to furnish cars so fitted. It was claimed by defendant that it was under no common-law duty to furnish plaintiff with cars so equipped, and further that, pursuant to the Interstate Commerce Act and the Public Service Commission Act of the state of New York, defendant had filed tariffs of rates which contained no provision for payments or allowances to shippers for grain doors or bulkheads placed in cars by them. Under such circumstances, it was held that plaintiff could recover the expenses for lumber furnished by him to equip the cars

with grain doors or bulkheads on intrastate shipments, but not so as to interstate shipments. *Robinson v. Baltimore & O. R. Co.*, supra, holds that the Commission must first be resorted to before a shipper can maintain an action for discrimination when the rate has been published under interstate commerce rules; and to the effect that the shipper must first complain to the Commission before he can get relief when the question of rate regulation is involved is held in *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247 (57 L. Ed. 1472), where it is further held that it is not necessary to first bring an action before the Commission where a shipper seeks to recover from a competitor a rebate illegally collected, for the reason that rebates are forbidden, and there is no occasion for administrative action on the part of the Commission.

On the other hand, cases are cited by appellee sustaining the action of the trial court in its holding that it had jurisdiction to determine this controversy. In the case of *Bradbury v. Chicago, R. I. & P. R. Co.*, 149 Iowa 51, it is said, on page 56:

"For the purposes of this case, it may be conceded that the facts bring it within the terms of the Federal statute, and that plaintiff must recover thereon, if at all. The petition stated a cause of action thereunder, and, unless it can be said that Federal courts have exclusive jurisdiction in the enforcement of rights created or declared in advancement of those previously existing, there is no ground for interfering with the judgment entered. The matter of jurisdiction is not touched in the act of Congress, and it is now well settled that state courts may exercise concurrent jurisdiction with the Federal courts in all cases arising under the Constitution, laws and treaties of the United States, unless exclusive jurisdiction has been conferred, expressly or by necessary implication, on the Federal courts."

To the same effect, see *McCullough v. Chicago, R. I. & P. R. Co.*, 160 Iowa 524; also *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1 (38 L. R. A. [N. S.] 44). See also, as having a bearing, *Elliott v. Chicago, M. & St. P. R. Co.*, (S. D.) 150 N. W. 777.

The case of *Bichlmeier v. Minneapolis, St. P. & S. S. M. R. Co.*, (Wis.) 150 N. W. 508, was an action for damages for negligence in an interstate shipment, and it was there held that an action against a terminal interstate carrier for loss of freight occurring on this line may be brought in a state court. It is further said in said case, on page 509:

"The case of *Siggins v. Chicago & N. W. R. Co.*, 153 Wis. 122, was an action to recover a freight overcharge on an interstate shipment. A violation of the Interstate Commerce Act was therefore involved, and, by force of Section 9 of the act, the action could be brought only in a Federal court. This is not such an action. It is one to enforce a common-law liability of a common carrier for which the Carmack amendment gives a remedy concurrent with Federal remedies theretofore existing, and of which state courts have jurisdiction."

A suit to compel an interstate carrier to receive property for transportation from one state to another is within the jurisdiction of the courts, and not of the Interstate Commerce Commission. *Louisville & N. R. Co. v. Cook Brewing Co.*, 96 C. C. A. 322 (40 L. R. A. [N. S.] 798).

The state courts have concurrent jurisdiction with the Federal courts of causes of action for injuries to interstate shipments of live stock, though such shipments are governed exclusively by the Federal law. *Jackson v. Chicago & N. W. R. Co.*, (S. D.) 147 N. W. 732.

Prior to the enactment of the Interstate Commerce Act, it was recognized by the United States Supreme Court that railroads must carry when called upon to do so, and could

make only a reasonable charge. *Munn v. Illinois*, 94 U. S. 113 (24 L. Ed. 77); *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155 (24 L. Ed. 94).

In suits brought for the enforcement of rights concerning interstate commerce, but not for the specific enforcement of the provisions of the Interstate Commerce Act, state courts have concurrent jurisdiction with Federal courts. Judson on Interstate Commerce, Section 47.

It has been held that a failure to transmit a telegram promptly, as prescribed by the statute or the common law in force in the state, will subject the telegraph company to the state court's jurisdiction for damages, and that this is not in conflict with the Interstate Commerce Act. *Western Union Tel. Co. v. James*, 162 U. S. 650 (40 L. Ed. 1105); *Western Union Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406 (54 L. Ed. 1088).

Wherever there is no call for the rate-regulating discretion of the Commission to be exercised, or the question of discrimination between shippers is not involved, or there is no other provision which expressly prohibits state courts from exercising jurisdiction, the state courts have concurrent jurisdiction. *Banner v. Wabash R. Co.*, 131 Iowa 405; *Coad v. Chicago, St. P., M. & O. R. Co.*, 171 Iowa 747, citing *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S. 121 (59 L. Ed. 867); *Illinois Cent. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275 (59 L. Ed. 1306).

The holdings are that:

"The neglect or refusal of the carrier to receive and transport freight tendered to it by a shipper is a private wrong for which he is entitled to recover, in an action at law, such damages as he has sustained." 10 C. J. 70.

"Suits against a carrier for damages arising in interstate commerce for failure to furnish cars may be prosecuted either in the state or the Federal courts, and it makes no

difference whether the action is treated as a suit for a breach of the carrier's common-law duty to furnish cars or an action for damages for the carrier's unjust discrimination in the allotment of cars." 10 C. J. 76; *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S. 121 (59 L. Ed. 867).

Section 8 of the original Interstate Commerce Act provides that, in case any common carrier subject to the provisions of the act shall omit to do anything required by the act, it shall be liable to persons injured thereby for the full amount of damages sustained for any violation of the provisions of the act. This section may have been superseded to some extent by amendments to the act, but not to the extent of depriving state courts of jurisdiction in cases like the present.

"A cause of action for damages does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the government, or to corrective or coercive proceedings at the instance of the Interstate Commerce Commission, but arises from those acts or omissions which inflict some specific pecuniary injury capable of being established. And these being acts prohibited by express declaration of law, it is not necessary to have any preliminary decision to that effect by the Commission, or any reparation order, but the courts may, as in any other case, apply the law to the facts proven, and award damages to the person injured, and their jurisdiction to that end is not open to question." Fuller on Interstate Commerce, 307-312.

In *Pennsylvania R. Co. v. International Coal Co.*, 230 U. S. 184 (57 L. Ed. 1446), the court said:

"The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class."

See also *Mitchell Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 247 (57 L. Ed. 1472); *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304 (57 L. Ed. 1494).

Without prolonging the opinion, it is our conclusion that the trial court had jurisdiction, and rightly so held. The judgment is therefore—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

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H. S. BRIDENSTINE, Administrator, Appellee, v. IOWA CITY  
ELECTRIC RAILWAY COMPANY, Appellant.

**LIMITATION OF ACTIONS: Computation of Period—Amendment**

- 1 **Amplifying Claim.** No new cause of action is pleaded by amendments which accomplish nothing more than unnecessarily pointing out the statute which is the basis of the action.

**STATUTES: Pleading—Non-Necessity to Plead.** No necessity

- 2 exists to specifically mention or point out the domestic statute on which plaintiff bases his alleged cause of action.

**NEGLIGENCE: Contributory Negligence—Travelers and Street**

- 3 **Cars—Relative Rights and Duties.** Relative rights and duties of travelers and those operating street cars, in approaching obscure crossings, discussed, and evidence held to present a jury question on the issue of the contributory negligence of the deceased.

**NEGLIGENCE: Contributory Negligence—Street Cars at Crossings—**

- 4 **Permissible Presumptions.** Travelers have a perfect right to assume that street cars, on approaching a public crossing, will be operated with reasonable care and with due regard for the rights of others rightfully upon the street.

**NEGLIGENCE: Contributory Negligence—Avoidance—“Last Clear**

- 5 **Chance.”** Two persons may be so contemporaneously negligent that, if such negligence continues unbroken, no recovery may be had for a resulting injury to one of the parties; but if one of the parties actually discovers the other party in his position of reasonably manifest danger, at a time when the one discovering can avoid the injury by the exercise of reasonable



care, such discovery presents to the one discovering, the last clear opportunity to avoid the injury, and if he does not, from the time of such discovery, exercise such reasonable care, and thereby avoid such injury, he is guilty of a *new, independent and proximate* negligence—a negligence which neutralizes the former or continuing negligence of the one injured.

**NEGLIGENCE: Acts Constituting Negligence—Street Railways—**

6 **Intersecting Crossings—Unallowable Assumption.** Principle recognized that one in charge of a street car may not assume that a traveler will wait for the car to pass, unless the car is so close to the crossing, or its rate of speed is so apparent, that the traveler cannot reasonably expect to pass over the street in safety.

**NEGLIGENCE: Imputed Negligence—Non-Common Enterprise.**

7 The doctrine of "imputed" negligence does not apply when nothing more appears than the naked fact that the injured party was, at the time of the injury, *riding with and in the conveyance of another*.

**DEATH: Damages—Death of Woman—Elements of Damage.**

8 **Ex-**pert evidence of the money value of a woman as a wife or mother or both, is not only not necessary, but is of trifling value when introduced. The more proper basis for the assessment of such damages is to show, *inter alia*, her capacity, ability and efficiency in the discharge of her duties as wife and mother, along with her age, life expectancy and health.

**DEATH: Damages—Interest—When Allowable.**

9 Interest is allowable on unliquidated claims whenever it appears that the damages were complete at a particular time. So held in case of damages for injury resulting in death.

**TRIAL: Verdict—Amendment by Court.**

10 Verdicts may properly be amended by the court by the addition of interest, such addition being a mere matter of mathematical calculation.

*Appeal from Johnson District Court.—R. P. HOWELL, Judge.*

DECEMBER 11, 1917.

ACTION at law to recover damages on account of the death of plaintiff's intestate. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed*.

*Henry Negus and A. E. Maine, for appellant.*

*S. K. Stevenson and Messer, Clearman & Olsen, for appellee.*

WEAVER, J.—The petition alleges that, on December 11, 1911, while the deceased, Rachel W. Springmire, was lawfully riding in a carriage on Bloomington Street in Iowa City, and in the exercise of due care on her part, and while crossing the defendant's track at the point where Bloomington Street intersects with Dubuque Street, one of defendant's street cars, operated by defendant's servants, was negligently caused to collide with her carriage, throwing the deceased out upon the ground, and inflicting upon her fatal injuries. The negligence charged is alleged to consist in the operation of the car at an unlawful, careless and imprudent rate of speed, in failing to give any signal of the car's approach to the crossing, in failing to have a competent and skilled motorman in charge of the car, and in failing to have the same equipped with sand, and in failing to use proper care to discover the peril of the deceased in time to prevent the collision.

Answering the petition, the defendant denies the same generally, and further pleads that Rachel W. Springmire was, at the time of her decease, a married woman, having no separate or independent business or employment, and was engaged solely in her domestic and family duties as a housewife and mother.

In the original petition, the plaintiff had claimed damages in the sum of \$10,000, but thereafter, on November 24, 1914, he amended his claim by reducing it to \$6,000, which sum he says is recoverable under the provisions of Chapter 163 of the Acts of the Thirty-fourth General Assembly. To this amendment defendant demurred, as stating a new and

1. LIMITATION  
OF ACTIONS:  
computation  
of period:  
amendment  
amplifying  
claim.

different cause of action than was alleged in the original petition, and as being barred by the statute of limitations. The demurrer was overruled and defendant answered, denying the petition as amended. It is also pleaded that the deceased, at the time of the accident, was riding with her son, engaged with him in the pursuit of a common purpose or undertaking; that the son was intoxicated; and that, while they were so engaged in this common purpose, and by reason of their failure to exercise due care, and without any negligence on the part of defendant, the collision was occasioned.

The issues thus joined were tried to a jury, which returned a verdict for the plaintiff for \$2,500, and judgment was rendered thereon for such amount, with interest at six per cent from that date. Defendant's motion in arrest and for a new trial was overruled. Four days after the entry of judgment, plaintiff filed a motion pointing out that the judgment as entered provided for interest from the date of its entry only, and asking that such entry be amended to include in the recovery interest computed from the date of the decease of the intestate. This motion was sustained, and the amount of the judgment was increased from \$2,500 to \$3,101.42.

I. We shall confine our attention to the alleged errors which have been argued on behalf of the appellant. The first of these is based upon the overruling of the defendant's demurrer to the amendment to the petition.

The assignment of error is without merit. It was not necessary for plaintiff to specially plead the statute of the thirty-fourth general assembly, in order to have the benefit of its provisions. The cause of action stated in the original petition is the alleged death of the intestate by reason of defendant's negligence, and this cause of action is in no manner withdrawn or changed in the petition as amended, and the plea of the statute of limitations was properly over-

2. STATUTES:  
pleading: non-  
necessity to  
plead.

ruled. If it requires any authority in support of a proposition so clear and evident on the face of the record, see *Cahill v. Illinois Cent. R. Co.*, 137 Iowa 577; *Gordon v. Chicago, R. I. & P. R. Co.*, 129 Iowa 747; *Benson v. City of Ottumwa*, 143 Iowa 349, '351; *Knight v. Moline, E. M. & W. R. Co.*, 160 Iowa 160; *Basham v. Chicago G. W. R. Co.*, 178 Iowa 998.

II. It is the position of appellant that the deceased was guilty of contributory negligence as a matter of law, in that she appears not only to have been wanting in the exercise of due care for her own safety, but that it also appears that her son, who was driving the carriage, was also negligent, and that his negligence is in law imputable to her.

As has already been mentioned, the collision occurred on the crossing of Bloomington and Dubuque Streets. The car track is laid along the surface of Dubuque Street, which extends north and south, and the carriage in which deceased rode was moving east on Bloomington. The car in question was coming from the south northward, and down grade. The two streets at the point of crossing are depressed below the general or natural surface of the ground.

3. NEGLIGENCE: contributory negligence: travelers and street cars: relative rights and duties. An inspection of the exhibits in evidence indicates that the elevation of the lot or block at the southeast corner of the intersection, together with well grown shade trees planted upon the block and along the street lines, obscures to a material degree the view of Dubuque Street to a person approaching on Bloomington from the west, and we think it cannot be said that such person is, under all circumstances, to be conclusively charged with negligence if he or she approaches the intersection without discovering a street car coasting rapidly down the grade from the south, before reaching a point which commands a clear view in that direction. Much less can it be said, as a matter of

law, that the deceased or her son was in duty bound to stop at any given distance from the track and ascertain whether a car was coming. They were in the rightful use of the street. Their right therein was of equal degree with that of the defendant to operate its cars thereon. Each was required to keep reasonable outlook to avoid collision, and if it was reasonably apparent that to go ahead was to invite danger of collision, it was the duty of the driver of the carriage to yield the way. On the other hand, it was the duty of the driver of the car to be watchful to know that a crossing over which he was about to pass was clear; and if he saw, or in the exercise of reasonable care ought to have seen, that a traveler on the street was using or was about to use said crossing, and that a collision was threatened, it was his duty to use every reasonable means at his command to stop his car, or to so reduce his speed as to prevent it. It is also his duty, in approaching a blind or obscure crossing, where his view of the intersecting street is obstructed, to have his car under such reasonable control that he may stop it or reduce its speed, if any emergency requires this to be done. Whether defendant's motorman did use reasonable care in these respects, and, on the other hand, whether the intestate and her son were negligent with respect to their own safety, we are well satisfied were questions for the jury. The evidence of defendant's neglect was abundant. The motorman, as a witness, admits that he knew that the bank prevented his seeing a team approaching on Bloomington Street. Another motorman testified that they had strict orders from the defendant to operate the cars at high speed up Dubuque Street to the crest of the grade south of this crossing, and then throw off the power and coast, in order to save power, and that, when coasting, the car is ordinarily moving at from 18 to 20 miles per hour. The defendant's president says that the cars are geared to make a speed of 24 miles an hour. He

further says that, when given nine points of power, the car, when well started, is going 24 miles an hour; and the motorman admits that, when he passed over the crest and threw off the power, it was under a pressure of nine points, and that the grade was sufficient so that "the car kept picking up speed as it went down."

One can hardly imagine a more efficient death trap than would be furnished by sending a car at this excessive speed over a crossing so obscured by banks or trees or other obstruction as to conceal the approach of a team coming out of the depression or cut of a cross street. The traveler upon the street could not be held to anticipate such misuse of the railway's right in the street; and, even if the deceased or her son saw the car coming from the south, they could not be held, as a matter of law, to know that it was coming at such a speed as to threaten a collision on the crossing. The trial court did not err in refusing to hold that the deceased was conclusively shown to have been guilty of contributory negligence.

Some of the authorities cited by the appellant on this feature of the case are those in which the injured person was a trespasser, and have no application to facts like those now under consideration; and none of the precedents relied upon are inconsistent with our holding in this respect.

III. It is next objected that the doctrine of the last fair chance has no application to this case. Such is not our view of the situation. Even if it conclusively appeared (as it does not) that deceased or her son approached the crossing carelessly or negligently, the jury might well find that the motorman, had he been in the exercise of reasonable care, could have prevented the collision. He himself says that, as soon as he saw the carriage, he knew there was danger of collision and tried to stop,

4. NEGLIGENCE:  
contributory  
negligence:  
street cars  
at crossings:  
permissible  
presumptions.

5. NEGLIGENCE:  
contributory  
negligence:  
avoidance:  
"last clear  
chance."

but could not—a failure which the jury could properly infer was due to the fact that he had thrown off the power and was recklessly shooting down the grade without having his car under reasonable control. It does not appear that the deceased or her son, after discovering their danger, could have avoided injury. To get up the necessary speed to avoid collision by crossing the track, or to stop their team and to back away from the track, would, in the very nature of the situation, have required at least several seconds of time, and the jury could well find that there was no negligence in their failing so to do in time to escape injury. Counsel have given considerable attention to an exposition of the law of “the last clear chance.” It is probably true that there is some confusion in the cases in stating the terms of the rule, but we need not here attempt any restatement of the principle. It was very thoroughly considered and clearly defined in *Bruggeman v. Illinois Cent. R. Co.*, 147 Iowa 187, and *Wilson v. Illinois Cent. R. Co.*, 150 Iowa 33, 39. The case at bar is well within the scope of the rule as there defined. Even if it be conceded, as argued by counsel, that the motorman was unable to stop the car, this would not necessarily relieve the defendant of the charge of negligence if the failure of the motorman to control the car was due to the fact that he was handicapped in his effort by the result of his own carelessness in attaining such high rate of speed. Neither is it any answer to say that the motorman operating a street car has a right to presume that a driver of a vehicle will not attempt to cross a street car track in front of an approaching car. That proposition is true under some circumstances, and in others it is not. If it were to be approved as broadly as stated by counsel, it would be destructive of the public right in every street upon or across which a railway track is laid. The motorman has no right to assume

6. NEGLIGENCE: acts constituting negligence: street rail-ways: inter-secting cross-ings: unallow-able assump-tion.

that the traveler will wait for the car to pass, unless the car is so near the crossing or its rate of speed is so apparent that the traveler cannot reasonably expect to pass over the track in safety. See *Lundien v. Fort Dodge, D. M. & S. R. Co.*, 166 Iowa 85; *Long v. Ottumwa R. & L. Co.*, 162 Iowa 11, 19; *Hollgren v. Des Moines City R. Co.*, 174 Iowa 568; *Watson v. Boone Elec. Co.*, 163 Iowa 316, 321; *Dow v. Des Moines City R. Co.*, 148 Iowa 429, 442.

IV. Counsel further argue that the deceased was, of her own will, riding in a carriage driven by an intoxicated man, and that she is, therefore, chargeable with contributory negligence.

Whatever may have been her measure of responsibility had there been any substantial evidence that her son was in a condition of intoxication at the time of the collision, we need not take time to decide; for there is no testimony to sustain a finding that he was in fact intoxicated. True, he admits having taken one or two drinks while in the city on that day. No one undertakes to say that he was in fact drunk, or unable to exercise the care and prudence of the ordinary person. The question argued is not presented by the record.

V. Exception is taken to the court's charge to the jury that the negligence of William Springmire, if any, is not imputable to the deceased.

7. NEGLIGENCE: imputed negligence: non-common enterprise.

There is no evidence that William Springmire was in the employ of the deceased on the day of the accident, or was acting under her direction or subject to her orders. The team he was driving did not belong to her, and there is no evidence that they were engaged in any common enterprise or in the transaction of any joint or common business. The most we can infer from the facts



shown is that each had some errand in town, and that the mother availed herself of the opportunity afforded to ride to town with her son. Whatever may have been the rule of earlier years, the doctrine of imputed negligence has only a very restricted application in this state. *Fisher v. Ellston*, 174 Iowa 364; *Lawrence v. City*, 172 Iowa 320; *McBride v. Des Moines City R. Co.*, 134 Iowa 398, 407; *Withey v. Fowler Co.*, 164 Iowa 377, 393. Adopting the rule of law to be drawn from the foregoing cases, it must be said that the instruction given by the court was correct.

VI. The amount of the verdict is complained of as being clearly excessive. The statute, as it stood at the time of the accident, limited the recoverable damages for wrong resulting in the death of a woman to \$6,000, though, by subsequent enactment, the limit has been raised to \$15,000. In justice to the legislature, we should say that, its increased appreciation of the value of woman having been evidenced before the entry of our country into the world conflict now raging, its credit for the later enactment is not to be minimized by attributing it to the general inflation of war prices. It is to be noted, however, in the same connection, that our lawmaking power has not yet placed any limit upon the damages which may be recovered for wrong resulting in the death of a *man*.

The elements of damage recoverable by or on account of a woman for personal injury are stated in the statute (Section 3477-a, Code Supplement, 1913, and Code Supplemental Supplement, 1915) to be loss of time, expense for medical attendance and other expenses incurred as a result thereof, "in addition to any elements of damage recoverable by common law; and if such injury result in causing death, her administrator may sue and recover for her estate, the value of her services as a wife or mother or both in such sum as the jury may deem proportionate \* \* \* in addition

8. DEATH: damages: death of woman: elements of damage.

to such damages as are recoverable by common law." It will be observed that the language clearly suggests that the amount of the recovery in such cases is peculiarly within the impartial discretion of the jury, enlightened, of course, by fair consideration of all the evidence tending to show the condition, capacity, ability and efficiency of the deceased in the discharge of her domestic duties, not only as a laborer performing menial service, but also as the housewife and head and administrator of the internal affairs of her home. In the very nature of things, it is impracticable to obtain any very adequate or accurate estimate of the value of such a life in terms of weekly, monthly or yearly wages, such as might be applied in the case of one who is neither more nor less than a hired servant. The services of a competent wife or mother cannot be weighed in the scales of the money changer. And indeed it would seem almost frivolous to call witnesses to estimate their monetary value. The best that can be done is to prove the facts and circumstances of the woman's life and service in these capacities, her age, health and strength, her expectancy of life, and all that may appear to enlighten the minds and aid the judgment of the jurors, and leave them to assess such recovery within the statutory limit as they find and believe to be just. It is, of course, within the province of the court to control the verdict if it shall clearly appear to have been influenced by passion or prejudice; but, in the absence of such abuse of the jury's discretion, its finding ought not to and will not be disturbed. There are losses and pain and suffering resulting from the wrongful acts of another for which no equivalent in terms of money can be expressed by any witness, however expert or wise, and in such cases the assessment is left to the jury under the instructions of the court, as the nearest practicable approach to a reasonable and just conclusion. *Chapman v. Pfaar*, 153 Iowa 20; *Hall v. Chicago, B. & Q. R. Co.*, 145 Iowa 291,

294; *Scurlock v. City of Boone*, 142 Iowa 684; *Lamb v. City of Cedar Rapids*, 108 Iowa 629; *Platt v. City of Ottumwa*, 136 Iowa 221; *Larkin v. Chicago G. W. R. Co.*, 118 Iowa 652. The evidence tends to show that the deceased was a married woman about 64 years of age, the mother of several children, a good and efficient housekeeper, active and serviceable, both indoors and on the farm, and a woman of more than ordinary business ability. Several of her neighbors, men and women who were heads of families, testified to their knowledge of the value of the services of a wife and mother, under the circumstances shown, and estimate its worth at \$75 to \$100 per month; one appreciative husband saying, "The services of any good wife are worth \$100 per month." No testimony on the subject was offered for the defense.

While, for reasons suggested, we would not be inclined to place high value upon this class of testimony, it was introduced without objection or exception on the part of the defense, and the jury was entitled to consider it. The amount of the verdict is not so great as to indicate passion or prejudice on the part of the jury, and it must be allowed to stand.

VII. The one debatable question presented by the record is upon the exception taken to the action of the trial court in allowing interest upon the amount of the verdict from the date of the death of the deceased. There is an old and general rule to the effect that interest is not recoverable upon an unliquidated demand until it has been reduced to judgment. To this, however, we have come to recognize certain exceptions. One such exception has been stated to be that "interest may be allowable on unliquidated claims wherever it appears that the damage was complete at a particular time, and in such cases it is right to in-

9. DEATH: damages: interest: when allowable.

struct that interest may be allowed." *Collins v. Gleason Coal Co.*, 140 Iowa 114, 124. See also *Black v. Minneapolis & St. L. R. Co.*, 122 Iowa 32; *Hollingsworth v. Des Moines & St. L. R. Co.*, 63 Iowa 443, 447; *Johnson v. Chicago & N. W. R. Co.*, 77 Iowa 666; *Chapman v. Chicago & N. W. R. Co.*, 26 Wis. 295, 304.

It is true, the law in respect to what is called unliquidated damages has been considerably modified in many jurisdictions, and it is not difficult to find apparently inconsistent precedents on the subject. The cases above mentioned, and others to which we shall refer, have settled the proposition for this state that, in cases in which the entire damage for which recovery is demanded was complete at a definite time before the action was begun, interest is recoverable even though the damage is of an unliquidated character. The statement of the rule makes it clearly applicable to an action to recover damages for a death due to a defendant's negligence. There the injury and the resulting damage are complete, and the obligation of the defendant to pay is perfect at the instant of the death; and where payment is resisted, and the obligation is denied until the case has been prosecuted to final judgment, after the lapse of months or perhaps years, an allowance of interest is quite essential to the accomplishment of full justice. That actions of this character are not to be excluded from the benefit of this modification of the ancient rule is quite well demonstrated by reference to our decision in *Jacobson v. United States Gypsum Co.*, 150 Iowa 330, which was an action for damages for personal injury to the plaintiff. The recovery of damages was there modified by striking out the allowance of interest, not because interest is not allowable in any case of that character, but because plaintiff had sued and recovered on the theory of damages continuing down to the day of trial and for future pain and suffering, and the court had so charged the jury that interest on

the entire sum might be computed from the date of the injury down to the time of rendering the verdict. This was manifestly erroneous. But in the same connection, we there said:

"In all the cases cited by appellee, plaintiff's damages were complete at a given time. In such cases interest may be allowed. But where, as here, the damages are continuing and incomplete, it is manifestly improper to compute them as of a given date and then instruct the jury to allow interest on this computation for something over four years in the past."

It follows that plaintiff was entitled to interest on the damages allowed, and, as the court had omitted any instruction to the jury on that subject, it did not err in correcting the verdict and judgment by adding interest to the amount of the damages assessed by the jury.

There is no reversible error in the record, and the judgment of the trial court is—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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CLARA L. BYRNE, Appellee, v. M. L. BYRNE, Appellant.

**MARRIAGE:** Annulment—Evidence—Sufficiency. Evidence reviewed, and held insufficient upon which to base a decree of annulment of marriage.

*Appeal from Wapello District Court.*—F. M. HUNTER, Judge.

DECEMBER 11, 1917.

ACTION by wife against husband for separate maintenance and support. Decree as prayed, and defendant appeals.—*Affirmed*.

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*Gilmore & Moon* and *John W. Lewis*, for appellant.

*Tisdale & Heindel* and *Work & Work*, for appellee.

WEAVER, J.—The plaintiff alleges, in substance, that defendant, having first seduced her, married her to escape criminal prosecution for the offense, but thenceforth failed and refused and still refuses to live with her or to provide for the care or support of herself or of the child which she bore him. She therefore prays that defendant be adjudged to pay her a monthly allowance of \$60 for the support of herself and child, and for temporary alimony and counsel fees.

In answer, defendant admits his marriage with plaintiff, but denies any liability for her support, and, by way of further answer and cross-petition, alleges that his consent to said marriage was obtained by plaintiff through fraud and false representations, as follows: That plaintiff falsely and fraudulently represented to him that she was pregnant, and thereafter falsely and fraudulently represented to him that she had given birth to a baby girl; but he alleges that in truth and in fact plaintiff was not pregnant, and that she did not in fact give birth to the child produced and claimed by her; but defendant, believing and relying upon the truth of her statements, and that possibly he was the father of the child which he was so led to believe was born to her, entered into said marriage, but would not have done so had he known the truth. He further alleges that, a few days prior to the marriage, plaintiff filed an information before a magistrate of Wapello County, charging him with the crime of seduction, and caused a warrant for his arrest to be issued and placed in the hands of the sheriff, which fact, with threat of his arrest, was made known to him: that, at his request, the sheriff temporarily suspended service of the writ, but such arrest would have been made, had not defendant agreed to marry the plaintiff. He further

says that, under these circumstances, and by reason of the false representations made to him by the plaintiff, and by reason of his fear of the threatened arrest and imprisonment, he gave his consent to the marriage, which was performed by the magistrate who issued the warrant. He further says that the charge of crime made against him was false and malicious, and made only for the purpose of forcing him into such marriage, and that such consent was obtained from him by fraud and duress. Defendant therefore asks, by way of affirmative relief, that his marriage to plaintiff be annulled and held to be of no validity, and that the child produced by the plaintiff as her own be adjudged not to be the child of plaintiff and himself, or of either of them.

Upon trial of these issues to the court, a decree was entered denying the prayer of the defendant's cross-petition to annul the marriage, and sustaining plaintiff's prayer for relief substantially as prayed. The defendant appeals.

At the outset of their argument in this court, appellant's counsel say:

"The appellant will concede that the appellee is entitled to the relief granted by the district court, unless this court finds that she (appellee) did not in fact give birth to the baby which she calls 'Martha Louise,' and which she produced in court as a baby born to her at Denver, Colorado, on August 1, 1913. For the purposes of this case, it will be conceded that, if appellee did in fact give birth to the baby, then appellant may be considered the father of the child. But appellant contends that Martha Louise was a waif, adopted or taken by appellee to induce appellant to marry her."

This concession relieves the court of the necessity of looking into any matter of disputed fact except such as may have a legitimate bearing upon the identification of the young child as the daughter of the plaintiff; and the burden

of disproving the alleged relationship of mother and child is necessarily upon the defendant.

The volume of testimony is entirely too great to attempt anything like an adequate statement of it within the reasonable limits of an opinion, and, indeed, the embodiment of such a statement herein would be without value as a precedent. Purely fact cases depend each upon its own peculiar circumstances and upon the ever variable degree of credence to be given the individual witnesses, with the result that its decision furnishes no rule which can safely be followed in another case between other parties, involving other circumstances, disclosed by other witnesses. A few things in explanation of the general situation may be stated. It is the theory of the plaintiff's case that, in the summer of 1913, while living in Wapello County, she was in an advanced state of pregnancy as a result of her association with defendant; that she kept this condition concealed from her friends except as she disclosed it to the defendant and to her physician and possibly to one or two other persons; that, at the advice and direction of defendant, and with money furnished by him, she went to Denver, Colorado, about July 18, 1913, where, in the course of two weeks, she was delivered of a girl child, known in the record as Martha Louise Byrne; that she notified defendant of the birth of the child; that he visited her in Denver in September, 1913, and saw the child in her possession. Later, she returned to Ottumwa and insisted on defendant's marrying her, and, after postponing the matter until a criminal prosecution was threatened or instituted, he married her. Except as relates to the pregnancy of plaintiff and birth of the child, the details above recited of plaintiff's claim are not denied. She testifies that she never had intercourse with any man other than defendant, and that, prior to her visit to Denver, she had never given birth to a child. The physician who examined her before she went to Denver



swears that, in his judgment, she was then pregnant. Another physician who examined her about the time of the trial below swears that he found positive indication that she had at some time given birth to a child. Except an alleged admission, on which little reliance is placed in argument, no evidence was offered on the part of the defense tending to show that plaintiff had indulged in intercourse with any man other than defendant, or that she had ever given birth to a child before going to Denver. Defendant concedes that he had been unduly intimate with plaintiff for more than a year before she left Ottumwa; that plaintiff told him of her alleged pregnancy; that he believed it, and advised her to go where the child could be born, and then given away or placed in some home; and that he believed her statement that the child Louise had been begotten by him, and so believing, he says:

"I married Clara because I thought it the only right thing to do,—to give the baby a name. I told her I didn't love her, and was marrying her only to legitimize the baby."

The defense seeks to meet this case with evidence that plaintiff's story, written to defendant from Denver, of the circumstances attending the alleged birth of her child, and many of her statements made to others concerning it, were untrue, and this she admitted on the trial below, and it is conceded in argument by her counsel. So far as her statements to others than defendant are concerned, she explains her prevarication by saying, in substance, that she left home to hide her shame, and that, when the child was born, she fabricated the story that it was a waif she had adopted from a maternity home, and that many of her false statements were framed to carry out that theory. Defendant also says that it was his purpose to enable her to deceive her folks about having had a baby, and that he was interested in keeping it a secret. Concerning her untrue statements

to the defendant himself as to the place in Denver where she gave birth to a child, the attendance of a physician and her own subsequent condition, her explanation is not so satisfactory; though, if we accept the theory that the child is hers, she may have thought that if she gave the defendant a fanciful picture of her suffering and embarrassments and of the circumstances attending her confinement, his compassion for her and his interest in the child might be more efficiently aroused, and might lead him to marry her, and thus relieve her from a distressing situation. On the witness stand, she makes the claim that, on August 1, 1913, she entered a maternity house kept by one Mrs. Davey, and on the same day was delivered of the child, through the assistance of Mrs. Davey acting as midwife. This person, testifying by deposition in behalf of defendant, denies that plaintiff gave birth to a child there, but says that plaintiff did take and propose to adopt a child recently born to another woman; and if this witness is to be believed, plaintiff is not the mother of Martha Louise. But the character and veracity of Mrs. Davey are so thoroughly impeached by her own statements and admissions, and by the admitted fact that she gave to plaintiff a written certificate over her own name in support of plaintiff's claim that the child was born to her as she now testifies, that we do not feel justified in holding that it establishes the fact on which counsel plant their sole defense. It is true that there is other testimony tending to corroborate Mrs. Davey, but such testimony, if true, does not make plaintiff's story of the birth of the child impossible; and, while plaintiff has weakened her own claim to credibility by admitted misstatements, and while there is an air of improbability about some of the details of her story, the essential features of her claim to be the child's mother are sufficiently strengthened by the circumstances preceding and attending her trip to Denver, and by defendant's own story with relation thereto, and we

are disposed to hold that the charge of fraud alleged to have been perpetrated upon defendant has not been sustained by sufficient proof, and that the finding and decree of the trial court must stand.

We have not considered, and express no opinion upon the question, whether, under the circumstances of this case, deception practiced upon defendant as to the birth of the child would, if proved, justify or require an annulment of the marriage, or constitute a defense to the plaintiff's action.

Our conclusion that the alleged fraud has not been established, disposes of the only question urged by appellant in this court, and the decree of the district court is therefore—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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A. BURGESS COLLINS, Appellant, v. JOHN N. REIMERS,  
Appellee.

**ADVERSE POSSESSION: Hostile Character of Possession—Pos-**  
1 **session Under Unqualified Deed—Presumption—Limitation of Ac-**  
**tions.** Possession of lands is presumed to be referable to the  
possessor's deed, if he have one; that is, he is presumed to have  
and to assert a possession as strong as the terms of his  
deed will justify. It follows that, if his deed be an *unquali-*  
*fied* warranty deed, such possession, if open, notorious and con-  
tinued, is presumed not only to be in good faith but *adverse*  
*to all and every outstanding claim and interest.*

**PRINCIPLE APPLIED:** Goldsbury sold *part* of a tract of  
land to Wood, and had remaining land to the west, north and  
east of the part so sold. Later, Goldsbury sold to Lee all that  
part of his remaining land lying immediately east of the  
part sold to Wood. Though all this land was then on the out-  
skirts of the city and undeveloped, Goldsbury and Wood fore-  
saw, as they thought, the necessity, in the future, of an east  
and west street along the north line of the Wood and Lee tracts  
and through the Goldsbury land to the west of Wood's tract,  
and Goldsbury inserted the following clause in the deed to Lee:

"Subject only to the intention of \* \* \* opening or giving half the width necessary for a street on the north side of said lot whenever said Wood & Goldsbury, or their assigns, shall be willing to give half on their side of the said north line."

Lee, out of his tract, sold a lot fronting 160 feet on his said north line. His grantee and subsequent grantees sold, and the title finally reached plaintiff. *Lee's deed to his grantee and all subsequent deeds were unqualified warranty deeds, no mention being made of the reservation in the Goldsbury deed to Lee.* In the meantime, defendant had acquired all that part of the original Goldsbury tract which was west and north of the Lee tract, but the nature of his deeds does not appear. Plaintiff went into actual possession under his unqualified warranty deed, and soon thereafter acquired actual knowledge from defendant of the reservation or exception in the Goldsbury deed to Lee. Plaintiff brought action to quiet title at a time when his possession, plus the possession of the grantees subsequent to Lee, totaled 23 years. No effort had ever been made to open a street on said north line, but defendant pleaded the necessity for such street and offered to give his half thereof. On the trial, it was taken for granted that defendant had the same rights that Goldsbury would have were he the defendant.

*Held*, plaintiff's possession, in view of his *unqualified* deed, would be presumed to be *adverse*, and in good faith, and whatever claim defendant did have under the reservation in the Goldsbury-Lee deed was lost by operation of the 10-year statute of limitation.

**EASEMENTS: Existence and Termination—Contingent Easement**

- 2 Under Deed of Common Grantor. An owner of land who claims a *contingent* easement or right in adjoining land because of a reservation, for his benefit, in the deed of a common grantor, loses all right to such easement or right by failing to have the same established as a fact prior to the expiration of ten years' open, notorious, continued, and good-faith possession, by the owner of the adjoining land, under an unqualified warranty deed, even though such adjoining owner had knowledge of the claim to such contingent easement or right.

PRINCIPLE APPLIED: See No. 1.

**DEEDS: Exceptions and Reservations—Rights Between Grantees of**

- 3 Common Grantor. A grantee of land who claims a contingent easement in adjoining land because of a reservation for his benefit in a deed of a common grantor, loses the right to such easement by allowing such adjoining owner to remain in undis-

turbed possession for more than ten years under an *unqualified* warranty deed.

PRINCIPLE APPLIED: See No. 1.

*Appeal from Scott District Court.*—F. D. LETTS, Judge.

DECEMBER 11, 1917.

Suit in equity to quiet title. Decree for defendant. The facts are stated in the opinion. Plaintiff appeals.—*Reversed and remanded.*

*Helmick & Boudinot*, for appellant.

*Thuenen & Shorey*, for appellee.

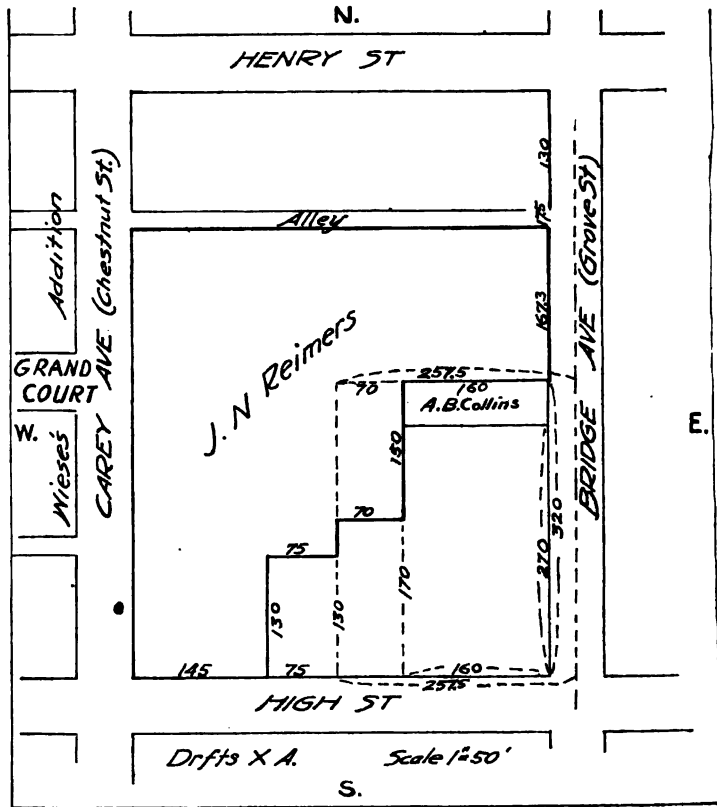
1. ADVERSE POSSESSION: hostile character of possession: possession under unqualified deed: presumption: limitation of actions.

STEVENS, J.—Prior to August 13, 1872, J. Goldsbury was the owner of a tract of land situated in the southeast quarter of Section 24, Township 78 North, Range 3 East of the 5th P. M., Scott County, Iowa, which was within the corporate limits of the city of Davenport. On the above date, the said Goldsbury and wife conveyed to Henry W. Lee a portion of said tract, described as follows:

“Commencing at the southeast corner of a tract of land conveyed by J. Goldsbury and wife to H. R. Wood, on July 10, 1872, and running thence east along the north line of said High Street 257½ feet more or less to land belonging to E. B. Collins; thence north on said Collins west line 320 feet; thence west 257½ feet more or less to the northwest corner of said H. R. Wood's land; and thence south along the east line of said H. R. Wood's land 320 feet to the first named corner containing 1 4/5 acres more or less, subject only to the intention of and opening of Grove Street 40 feet wide on the east side, and to opening or giving half the width necessary for a street on the north side of said lot whenever said Wood and Goldsbury or their

assigns shall be willing to give half on their side of the said north line."

The following plat will assist in understanding the case:



The tract owned by Collins adjoined the land of Lee on the east. Subsequently, Grove Street, now known as Bridge Avenue, was opened between the Lee and Goldsbury tracts and the Collins land. The land of plaintiff abuts on Bridge Avenue, or Grove Street. The defendant's land is in the form of an inverted "L," the east part abutting on Bridge Avenue, and the south part on High Street. The original Goldsbury tract abuts on Carey Avenue (formerly

Chestnut Street) on the west. There is an alley extending east and west across the north end of the original Goldsbury tract, and north of that, a distance of approximately 150 feet, is Henry Street, extending east and west. Through several mesne conveyances, the plaintiff became the owner of a small tract off the north end of the land above mentioned as conveyed to Lee, described as follows:

"Beginning at a point in the west line of Bridge Avenue, in the city of Davenport, Iowa, 270 feet north of the north line of High Street, thence north on the west line of Bridge Avenue 50 feet, thence west 160 feet, thence south 50 feet, and thence east 160 feet to the place of beginning," being, therefore, a tract 50 feet wide and 160 feet long.

The defendant owns that portion of the original Goldsbury tract adjoining the land of plaintiff on the north and west. Plaintiff alleged his ownership of said above described tract; that he and his grantors have been in the adverse possession thereof for a period of 44 years, and that whatever interest the defendant has or claims to have in and to said real estate, by reason of the last clause in the description above quoted from the deed of Goldsbury and wife to Lee, is barred by the statute of limitations; that, prior to the commencement of the suit, plaintiff demanded of defendant a quitclaim deed to said premises, and tendered to him \$1.25, and that defendant refused said tender and to execute said deed. The defendant in answer, after a general denial, states that he is the owner of the land above referred to; that he acquired the same by warranty deed from one of the mesne grantees of Goldsbury; that, in the deed by which Goldsbury conveyed the land to Lee, he reserved to himself and his assigns the right to lay out a street between the land then retained by him, and now owned by defendant, and the land conveyed to Lee and now owned by plaintiff, one half thereof to be taken off the north end of plaintiff's real estate, which said reservation became appurtenant to

the land of plaintiff and his grantors in the real estate now owned by him. He also avers that, at the time of the transfer, the real estate in question was located on the outskirts of the city of Davenport, and that the public exigencies did not require the opening of a street through said tract at the point in controversy, but that the city is developing in that vicinity, and a street will soon be required. He also offers to dedicate to the public enough of his tract to make one half of said street, and prays that his alleged right to have one half thereof taken from the real estate of plaintiff be sustained and established.

It was stipulated by the parties that all deeds conveying the tracts of plaintiff and defendant executed subsequently to that of Goldsbury and wife on August 13, 1872, to Lee, omitted therefrom the reservation or exception contained in that deed. The plaintiff testified that his tract is fenced, and has been for 35 or 40 years; that, very shortly after the purchase thereof, defendant informed him of the provisions of the Goldsbury deed; that he caused a couple of hundred loads of dirt to be put on said lot during the summer of 1915, and a cement sidewalk to be constructed across the front thereof. The defendant testified that two buildings were built immediately north of his tract on Henry Street about 1914; that Bridge Avenue from Henry to High Street was opened up its full width 6 or 7 years previous; and that the alley above referred to, and located north of the defendant's tract, was dedicated to public use 3 years before, and that two houses have recently been erected on the west side of Carey Avenue.

Appellant relied in the court below upon his plea of the statute of limitations and upon an estoppel, but nothing further is pleaded as constituting an estoppel than the facts relied upon to show the alleged adverse possession. The trial court held that nothing had been done to start the running of the statute of limitations, and that plaintiff's



possession of the premises was rightful until a demand was made upon him for the use of the necessary portion of the north side of his lot for a street, as contemplated by the reservation contained in the deed from Goldsbury and wife to Lee, and that his possession was not adverse.

2 EASEMENTS : existence and termination : contingent easement un- der deed of common grant- or.	The deed under which defendant claims title to the tract lying north and west of that in controversy is not in the record, nor does it show whether the reservation in question is referred to or contained therein.
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Counsel for appellant, in argument, however, treats appellee as sustaining the same relation and possessing all the rights reserved by Goldsbury in his deed to Lee, and what is said herein is on the assumption that this is so. The clause in the Goldsbury deed should, perhaps, be construed as the reservation of a right to an easement of indefinite width off the north side of plaintiff's tract, for one half of a public street. No street was, however, ever opened in accordance with the intention declared by Goldsbury in said deed. The trial court held that the reservation in question was of a right which became appurtenant to the tract now owned by defendant; that it was not shown by plaintiff that he had ever denied the right of defendant to said easement, or that he held possession of the premises above described adverse to defendant's right under said reservation. But it is unnecessary to discuss the question whether the right to an easement, as above stated, became an appurtenance to defendant's land, as that question is not presented, and counsel for appellant has argued this case upon the theory that defendant had some right under said reservation that could be destroyed by plaintiff's adverse possession of the entire tract.

Thus simplified, the only question presented for our decision is whether whatever right defendant acquired under and by virtue of said reservation has been lost to him by the

alleged adverse possession by plaintiff of the whole tract which was conveyed to him by warranty deed, without exception or reservation. Counsel for appellee cite numerous decisions of this court to sustain his contention that the statute of limitations has not run against him. We therefore deem it necessary to refer specially thereto, and, if possible, to distinguish same from the case at bar.

The statute of limitations was not involved in *Karmuller v. Krotz*, 18 Iowa 352, and we need not refer specially thereto.

In *Barlow v. Chicago, R. I. & P. R. Co.*, 29 Iowa 276, which was an action for the recovery of a railroad right of way across plaintiff's premises, the defendant claimed title to the disputed strip under a deed from plaintiff's grantor which contained the following provision:

"Provided that, in case said railroad company do not construct their road through said tract, or shall, after construction, permanently abandon the route through said tract of land, the same shall revert to and become the property of the grantors, their heirs or assigns."

Defendant acquired title thereto as purchaser at a mortgage foreclosure sale. Plaintiff demurred to defendant's answer setting up title under the above deed and sheriff's deed, upon the ground that the original grantee of said right of way abandoned the same, and that the defendant's right thereto was barred by the statute of limitations. The court held that plaintiff's use of said premises had not been adverse to the defendant's right, and that a mere nonuser for any length of time would not operate to impair or defeat the right to an easement acquired by deed.

*Fisher v. Beard*, 32 Iowa 346, was an injunction suit brought to restrain the defendant from laying off into lots, selling same for building purposes, and erecting buildings upon, a certain block or square in the city of Pella, known and platted on the recorded plat of said city as "Public

Square," and later changed to "Garden Square," and from diverting said block from its original purpose and use as a public square. Plaintiff and others purchased lots abutting thereon, in reliance upon the statements and representations of the original proprietor that said square would always remain open for public use, and exhibited to purchasers a plat upon which same was designated as a public square. The defendant was the grantee, through several mesne conveyances, of the original proprietor of said tract. The court held that, as defendant had never asserted any right to said public square inconsistent with the original purpose and use thereof until same was laid off into lots and offered for sale, plaintiff's right to maintain an action to enjoin the platting and sale thereof was not barred by the statute of limitations. The court said:

"The law is well settled that, when the owner of lands lays out a town thereon and sells lots to purchasers with reference to the plat thereof, the purchasers of such lots acquire, as appurtenant thereto, a vested right in and to the use of adjacent grounds, designated as public grounds on such plat, to the full extent such designation imports, which right cannot be divested by the owner making the dedication, nor by the town in its corporate capacity."

*Slocumb v. Chicago, B. & O. R. Co.*, 57 Iowa 675, was a suit to enjoin the defendant from moving its right of way fence back 21 feet from where it had stood for more than 10 years, and thereby appropriating a strip of which plaintiff claimed to have had possession for more than 10 years, adverse to defendant. The deed by which plaintiff acquired title to her tract excepted the railroad right of way, which, in fact, included the 21 feet in controversy; but for some reason, the railroad fence was set much nearer to the tracks, so as to leave the controverted strip outside. Plaintiff had planted shrubbery and cherry trees on the strip in controversy, and used same for more than 10 years. The court

held that plaintiff's possession was not adverse to nor inconsistent with the right of defendant to occupy its whole right of way whenever it became necessary or desirable for it to do so, resting its conclusion upon the holding in *Barlow v. Chicago, R. I. & P. R. Co.*, supra.

The land in controversy in *Garstang v. City of Davenport*, 90 Iowa 359, was an alley 20 feet wide, which had never been opened, and of which plaintiff had held possession for more than 10 years. This action was brought to restrain the city from opening said alley, and Pauline Krumbholz, who owned a lot abutting on the north side thereof, intervened, alleging that the said alley was an appurtenance to her lot. The alley was a part of a tract of land formerly owned by one Houghton, grantor of both intervener and plaintiff. The description in the deed to plaintiff was by metes and bounds, and extended "to a 20-foot alley, hereafter to be laid out," but did not include the same. No time was fixed in any of the conveyances within which said alley should be opened. The court held that plaintiff's plea of the statute of limitations was not good, as no time was fixed when the alley was to be opened, and neither plaintiff nor any of his grantors had done anything to set the statute in operation. The court said:

"From the time of the conveyance to Crowell (one of the mesne grantees), there has not been a fact on which to base a color of title or claim of right for the operation of the statute of limitations."

The court further quoted with approval the following from *Tufts v. City of Charlestown*, 2 Gray (Mass.) 271:

"When a grantor conveys land, bounding it on a way or street, he and his heirs are estopped to deny that there is such a street or way. This is not descriptive merely, but an implied covenant of the existence of the way."

Each of the above cases may be distinguished from the case at bar.

In *Barlow v. Chicago, R. I. & P. R. Co.*, supra, the court based its decision upon the fact that the railway company acquired title to its right of way or easement by deed, holding as above stated. It was not shown that plaintiff in that case had color of title or had been in possession under a claim of right. In the case at bar, plaintiff was in possession of the whole tract under a deed which conveyed same to him by metes and bounds, without reservation or exception of any kind.

In *Fisher v. Beard*, supra, the public square was dedicated to public use by the original proprietor, and lots, including those of plaintiff, which abutted thereon were sold with particular reference thereto, and with the understanding that said public square would always remain open for public use. In the case at bar, no easement or right of way has ever been opened, enjoyed or used by defendant or any of his grantors, and plaintiff and his grantors have been in possession thereof under a deed, as above stated, for 44 years.

It does not appear from the record in *Slocumb v. Chicago, B. & Q. R. Co.*, or in *Garstang v. City of Davenport*, supra, that possession by the plaintiff in either of said cases was under claim of right, and neither had color of title to the controverted strip.

We will now refer to some of our more recent decisions in which the facts are more nearly analogous to those in the case at bar than in any of the cited cases. It is the settled doctrine of this court that, when one in good faith enters into possession of a tract of land under a deed conveying the same to him absolutely, without exception or reservation, and continues in possession thereof for 10 years, all outstanding claims or interests in or to said tract are completely barred by the statute of limitations. *Severson v. Gremm*, 124 Iowa 729; *Hughes v. Wyatt*, 146 Iowa 392; *McCarthy v. Colton*, 134 Iowa 658; *Erickson v. Johnson*,

172 Iowa 12. And this is true notwithstanding the fact that the party in possession had actual notice of the defect in his title. *Severson v. Gremm*, supra; *Hughes v. Wyatt*, supra. Possession under a deed to the whole tract, as above stated, is presumptively in good faith. We held, in *Hughes v. Wyatt*, supra, referring to the question of good faith as an incident to title by adverse possession, that:

"The presumption in such a case is with the claimant in possession. Where the claimant puts a deed upon record and enters into possession, his possession is presumptively referable to his deed. In such a case, in so far as good faith is essential to his claim of right, it is presumed in his favor."

The evidence shows, in the case at bar, that the possession of the tract in question in all grantees since Lee parted with the title has been continuous, open, notorious, and under claim of ownership under deeds conveying said tract to them absolutely, without reservation or exception. This possession totals some 23 years prior to the commencement of this suit. Defendant has never attempted to exercise the right which he now claims to possess under the Goldsbury deed, nor has anything been done to open a street at the point in controversy. If defendant acquired some right as a grantee of Goldsbury by virtue of said reservation, he has failed and neglected to exercise the same or make any affirmative claim thereunder until plaintiff demanded a quitclaim deed from him, shortly before the commencement of this suit.

Defendant in *Presbyterian Church of Osceola v. Harken*, 177 Iowa 195, had not been in possession for 10 years of an easement previously opened and used, and the court held that plaintiff's right thereto was not barred by the statute of limitations.

Whatever right defendant and his grantors may have

8. DEEDS: excep-  
tions and res-  
ervations:  
rights be-  
tween gran-  
tees of com-  
mon grantor.

had by virtue of the reservation in the Goldsbury deed, it was in the nature of a right to an easement inconsistent with the title conveyed by plaintiff's deed, and was, at the time of the commencement of this suit, barred by the statute of limitations.

We therefore reach the conclusion that a decree should have been entered in the lower court in favor of plaintiff as prayed. The judgment of the lower court is, therefore, reversed, and cause remanded for a decree in harmony herewith.—*Reversed and remanded.*

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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GEORGE W. DICKY, Appellee, v. C. C. JACKSON et al.,  
Appellants.

**MUNICIPAL CORPORATIONS: Officers, Employees, Etc.—Police-**  
1 **men's Pension—Unauthorized Deprivation.** A policeman once  
duly placed upon the pension rolls of the city may not be re-  
moved therefrom except on notice and hearing, as provided by  
Section 932-p, Code Supp., 1913.

**WORDS AND PHRASES: "Pension" and "Compensation" Con-**  
2 **trasted.** The term "pension," as employed in the Policemen's  
Pension Act (Section 932-j *et seq.*, Code Supp., 1913), and the  
term "compensation," as employed in the Workmen's Compen-  
sation Act (Section 2477-m *et seq.*, Code Supp., 1913), are not  
synonymous.

**STATUTES: Construction—Mandatory (?) or Directory (?).** Prin-  
3 **ciple recognized** that, when the provision of a statute is of the  
essence of the thing required to be done, it is *mandatory*. So  
recognized in a cause involving the procedure to be followed in  
order to deprive a policeman of the benefits of a pension fund.

**STATUTES: Validity—Public Policy.** It is idle to argue to the  
4 court that a constitutional statute is against public policy.

**MASTER AND SERVANT: Workmen's Compensation Act—Award**  
5 **—Appeal—Power of Court.** It is suggested, argumentatively,

that the court, on appeal from an award, may pass on the question of the servant's legal right to the award made.

*Appeal from Polk District Court.*—HUBERT UTTERBACK,  
Judge.

DECEMBER 11, 1917.

The opinion states the case.—*Affirmed.*

*H. W. Byers, Guy A. Miller, and Paul A. Hewitt, for appellants.*

*F. T. Van Liew, for appellee.*

1. MUNICIPAL  
CORPORATIONS:  
officers, em-  
ployees, etc.:  
policemen's  
pension: un-  
authorized dep-  
rivation.

WEAVER, J.—The plaintiff was, for a considerable period, a duly appointed and acting member of the police force of the city of Des Moines, Iowa, and as such was a regular contributor to the policemen's pension fund organized and maintained in that city under the statute authorizing and providing for such fund. Code Supp., 1913, Sections 932-j to 932-r, inclusive. For the support of such fund, the city by its proper authorities regularly deducted one per cent. from plaintiff's salary or wages as policeman, and continued so to do until October 9, 1914, when, acting under the order and direction of his superiors, he engaged in certain physical tests, in the course of which he fell and received injuries permanently disabling him. By reason of the injuries so sustained, plaintiff was placed on the pension roll of said fund at the rate of \$41.25 per month, being one half the monthly salary he was receiving at the date of his retirement from active service. The city continued to recognize plaintiff's right to said pension, and paid the same until July 7, 1916, when the trustees of the pension fund, acting on their own instance, removed plaintiff from the pension roll, and refused further payments to him.



The grounds of such action are set forth in a written order which we here quote, as follows:

"Before the Trustees of the Policemen's  
Pension Fund.

In the Matter of Pension to George W.  
Dickey.

} ORDER.

"And now on this 7th day of July, A. D. 1916, this matter came on for hearing upon the initiative of the trustees of the Policemen's Pension Fund of the city of Des Moines, and said trustees find that, on the 22nd day of December, 1914, an order was entered herein retiring the said George W. Dickey upon a monthly pension in the sum of \$41.25 from the 21st day of November, 1914, until further ordered; and it further appearing that the said George W. Dickey has made application for compensation under the provisions of Chapter 147 of the Acts of the Thirty-fifth General Assembly, and is asserting his rights and claims under said Chapter 147, and has been awarded compensation by a board of arbitrators, and has been and is being paid by the city of Des Moines thereunder, and the trustees of the Policemen's Pension Fund of the city of Des Moines being of the opinion that the said George W. Dickey may have his rights under the provisions of Chapter 147 for compensation, and that, if the said George W. Dickey does have his rights as claimed by him, that his right to compensation under said chapter is exclusive and compulsory and obligatory upon both the city of Des Moines and said George W. Dickey, and that, if the said George W. Dickey is entitled to compensation under said act, he is not entitled to any pension from the Policemen's Pension Fund.

"Wherefore the order heretofore entered on the 22nd day of December, 1914, is hereby rescinded, and the city treasurer is directed to make no further payments to the

said George W. Dickey from the said Policemen's Pension Fund of the city of Des Moines."

The plaintiff, claiming that the foregoing order is illegal, and that, in making same and in removing plaintiff from the pension roll, the trustees acted in excess of their jurisdiction and authority in the premises, brought this action in certiorari for a review of the record and for an amendment of the order complained of. The matter was submitted to the trial court upon a stipulation covering the facts hereinbefore stated, and further conceding that no notice of the proceedings to remove him from the pension roll was given to the plaintiff; that he was never examined by physicians for the purpose of ascertaining whether his disability still continued; that no hearing was had or witnesses examined upon the question of his remaining upon said roll; and that he was not present when the matter was considered or the order made. Accompanying the defendants' return to the writ of certiorari are copies of the proceedings which resulted in placing the plaintiff upon the pension roll, showing that the same were conducted substantially according to the provisions of the statute providing for such fund. There was also shown a copy of an award made by an arbitration committee under the Workmen's Compensation Act of this state, showing that plaintiff had claimed compensation from the city of Des Moines for the injury received by him October 9, 1914, and that he had been awarded such compensation to be paid by the city as follows: \$10 per week for 52 weeks, ending October 23, 1915; \$8 per week from the date last named until March 23, 1916; and thereafter \$5 per week for such period as will make the entire period of compensation 300 weeks.

Upon the showing made by the return of the writ and the stipulated facts, the trial court found for the plaintiff, and entered judgment annulling the order removing him from the pension roll, and directing the city treasurer to

make payment to the plaintiff of his monthly pension of \$41.25. From this judgment, the defendants have appealed.

The statute providing for a police pension fund (Code Supp., 1913, Section 932-j *et seq.*) makes its organization compulsory in all cities having an organized police department. Such fund is supported by an annual tax, and by grants, donations and gifts for that purpose, together with membership fees of \$5 each by the members of the police force, and by an annual deduction of one per cent. from their salaries. Any member of the force who shall be injured or disabled in the discharge of his duty, and upon examination is found, by a physician appointed by the trustees, to be physically or mentally permanently disabled, is entitled to be retired, and the trustees are to order his retirement, whereupon such retired member is entitled to be paid from the pension fund monthly a sum equal to one half the monthly salary which he was receiving at the date of his injury or disability. The only express provision looking to a removal of a member from the pension roll is found in Code Supp., 1913, Section 932-p, which is to the effect that the board of trustees may cause any retired member to be brought before it and again examined by competent physicians, for the purpose of discovering whether such disability yet continues and whether such member should be continued on the pension roll. Of such proceeding the member is to have reasonable notice, and may be present and examine witnesses under oath in his own behalf. The statute further declares that:

"Such disabled member shall remain upon the pension roll unless and until reinstated in such police department by reason of such examination."

That such procedure was not observed or followed by the trustees is conceded.

**2. WORDS AND PHRASES:** "pension" and "compensation" contrasted.

The appellants cite no authorities in support of the position taken by them, or of the validity of the order removing plaintiff from the roll, except one or more where a claim or right to a double pension has been overruled; but these are scarcely in point with the case here presented. The words "pension" and "compensation" are not synonymous, nor are the plan and purpose which underlie the Workmen's Compensation Act necessarily identical with those which induce the establishment of a pension fund. The latter is ordinarily a gratuity from the government, or some of its subordinate agencies, in recognition of but not as payment for past services; though, when provided as part of a scheme of employment, it would seem to include some elements of a contractual character, and is doubtless intended to encourage faithfulness of service. On the other hand, Workmen's Compensation Acts are intended to secure to the injured employes a money allowance, which shall to some degree pay to employes compensation for the loss or damage to which their injuries in the master's service have subjected them. The purposes of the case before us do not require us to attempt solution of the difficult question of how far statutes dealing with these subjects may both stand, and the benefits of both be enjoyed by the same individual. It would seem, however, under familiar principles, that, if there be no express repeal of the earlier statute, and no demonstrable inconsistency between such statute and one of a later enactment, both must be given effect according to their terms.

**3. STATUTES:** construction: mandatory (?) or directory (?).

That the plaintiff in this case was regularly placed upon the police pension roll is not denied, and that, under the statute, he became entitled to recover from that fund a monthly payment of \$41.25, is also conceded.

His status as a pensioner being once fixed, the statute provides one, and only one, method of removing him therefrom. He does not occupy that status by the grace of the city or of the trustees of the fund. His place upon the pension roll is one of statutory right. The trustees may, after notice and opportunity for a hearing, cause him to be re-examined, with a view to discovering whether his disability still continues, and, in case it does not, may remove him from the pension roll and return him to active duty as a member of the police force; but, as we have already seen, it is expressly provided that he shall remain on the roll "unless and until reinstated in active service by reason of such examination." The purpose of this provision is doubtless to protect the pensioner in his position against the exigencies of city politics, and against any device having for its avowed or secret object the release of the city from its statutory obligation to the men who, by disability incurred in its faithful service, have rightfully acquired a place upon the pension roll. The method of effecting the removal of a pensioner having been thus provided in the same statute, and as part of the same scheme or plan by which he acquired his place upon the roll, it is undoubtedly exclusive, and the courts have no duty or function in the premises, except to see that such removal, if made, is accomplished in accordance with the procedure there designated. It being conceded that this method was not followed or attempted to be followed, and that the order of removal was made upon the initiation of the trustees, without notice or warning to the plaintiff or opportunity given him to be heard, it is quite unnecessary to pursue the discussion further to justify us in holding that such order was clearly in excess of the authority vested in the trustees, and that the court did not err in holding it void.

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In view of the argument, however, it is

4. STATUTES : perhaps proper to add that we see no sound  
 validity : basis upon which such an order by the trus-  
 public policy. tees may be upheld on grounds of public policy. The phrase  
 "public policy" is one of very frequent use by lawyers and  
 courts, but it is, nevertheless, a term of very indefinite, if  
 not elastic, signification. Without attempting any defini-  
 tion thereof at this time, it is enough to say that statutes  
 are not to be avoided or held for naught because, in the  
 opinion of the courts, they are not in accord with sound  
 public policy. The legislature, so long as it keeps within  
 constitutional bounds, determines the public policy of the  
 state—so far at least as it undertakes to speak upon any  
 given subject. The statute creating police pension funds  
 is not challenged upon any constitutional ground, and it is  
 the duty of cities and their officers, as well as the courts, to  
 maintain unimpaired the rights and remedies so created.

Counsel on both sides have called our

5. MASTER AND attention to the fact (of which we may also  
 SERVANT : take judicial notice) that, since this action  
 Workmen's  
 Compensation Act : award :  
 appeal : power  
 of court. was begun, the legislature has so amended  
 the Compensation Act as to exclude from its  
 list of beneficiaries, officers and employes of cities who are  
 entitled to retirement on pension. It is further said, and  
 not disputed, that, since the amendment became effective,  
 July 4, 1917, the city has refused to make any payment to  
 the plaintiff, either of the pension or of the award under  
 the Compensation Act. It is argued by appellant that this  
 repeal does no more than declare the real purpose and in-  
 tent of the Compensation Act in its original enactment, and  
 that it was never intended by the legislature that a disabled  
 member of a police department should be entitled to receive  
 both compensation and pension. Let this be taken for  
 granted, for our present purposes, and the easy answer  
 is that, if such be the case, the opportunity was open to the

city to deny and resist plaintiff's right to any award in the proceedings instituted by him under the Compensation Act, and, upon the pointing out of such legislative intent, it must be presumed that the arbitration board would have refused to assess any compensation in his favor; or, if such award was improperly made, the court would have overruled it in the manner provided in such act. The record does not disclose whether the city resisted plaintiff's claim for compensation. If it did, and its theory of the law be correct, its remedy against what it deems to be double payment was quite clearly to raise the question in that proceeding. If it did so, and the holding there was adverse to its defense, the legal proposition could have been finally settled on appeal. If it did not, it is hardly necessary to say that it could not submit to such adjudication and then even up its account with the plaintiff by arbitrarily removing him from the pension roll.

For the reasons stated, the judgment of the district court is—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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KATIE FLYNN et al., Appellants, v. EMMET MOORE, Appellee.

**DEEDS: Validity—Mental Infirmary—Unbelievable Traits of Char-**

1 **acter—Effect.** The fact that the grantor in a deed had been shockingly cruel to his wife, was a hermit, starved himself from choice, and not from necessity, possessed unspeakably filthy personal habits, and entertained beliefs unbelievable to an ordinary mind, does not necessarily show that he was incapable of understanding in a reasonable degree the nature and consequences of his business transactions.

**DEEDS: Consideration—Support for Aged Grantor.** The recogni-

2 tion of past kindnesses and an agreement by grantee to care for the grantor for the remainder of his life may furnish adequate consideration for a deed to property of large value, though the financial consideration be wholly inadequate.

**DEEDS: Validity—Undue Influence and Fraud—Burden of Proof.** A

3 grantee in a deed, executed wholly without grantee's instigation,

though largely in the nature of a gift to grantee, does not have the burden, no fiduciary relation appearing, to show that the deed was free from fraud and undue influence.

**DEEDS: Consideration—Failure of Consideration—Support and Care.**

- 4 An obligation on the part of a grantee in a deed to care for the aged grantor is fully met by furnishing such care and comforts to the grantor as he, in view of his abnormal and desired way of living, is willing to receive.

*Appeal from Emmet District Court.*—D. F. COYLE, Judge.

DECEMBER 11, 1917.

SUIT in equity by the heirs of Thomas Maher, deceased, to set aside a conveyance of 80 acres of land, and to quiet title thereto. The court dismissed plaintiffs' petition and entered judgment against them for costs. From this judgment, plaintiffs appeal. The facts are fully stated in the opinion.—*Affirmed.*

*Byron M. Coon and S. G. Bummer, for appellants.*

*Morse & Kennedy, for appellee.*

1. **DEEDS: validity: mental infirmity: unbelievable traits of character: effect.** STEVENS, J.—I. Thomas Maher died testate November 6, 1915, at the age of 94 years, seized of a tract of something over 100 acres of land in Emmet County. He was survived by two daughters, the appellants herein, and several grandchildren, as his only heirs at law, all of whom are named as beneficiaries in his will. He was twice married, but both of his wives were deceased long prior to his death. The appellant Mary McSweeney is a daughter by his first marriage. On April 27, 1911, he executed a will by the terms of which he bequeathed \$200 for mass; a like sum for a tombstone; \$1,000 to the Catholic Church of Estherville; \$100 to a Norwegian Protestant church located near his residence; \$200 to St. Mary's Academy, at Quincy, Illinois; \$2,000 to each of his two daughters; and the residue of his estate to his children, grand-



children, and Jerry Flynn, his son-in-law, share and share alike. The will was filed and admitted to probate without objection. On October 11, 1912, he conveyed to appellee the north half of the northeast quarter of Section 11, Township 98, Range 33, and to Andrew Rokne the southeast quarter of the northwest quarter of Section 11, Township 98, Range 35. The consideration expressed in the deed to appellee was \$250. The deed to Rokne is not set out in the abstract, but the consideration therein appears, from the evidence, to have been \$500. On the 28th of the same month, deceased, appellee, and Rokne entered into a contract in writing as follows:

"State of Iowa, Emmet County, ss.:

"This agreement entered into between Thomas Maher, party of the first part, and G. E. Moore, party of the second part, both of Emmet County, Iowa, to wit: In consideration of \$250 paid by the party of the second part to the first party, and the farther valuable consideration that the second party has for the last 10 years or more befriended, cared for in sickness, that the second party has cared for the first party as a child to parent and that the second party farther agrees to care for, nurse and provide for the sickness as in health for the first party, during the lifetime of the first party. In consideration of aforesaid valuable consideration and other considerations not herein mentioned, the first party has this day deeded to the second party, his heirs and assigns, the north half of the northeast quarter of Section eleven ( $N\frac{1}{2}$  of  $NE\frac{1}{4}$  of Sec. 11), Twp. 98, Range 33, to be holden by the second party to himself and his heirs forever. To my two living daughters, Mrs. Jerry Flynn and Mrs. McSweeney, I expect to give my personal property, about \$3,500, consisting of cash and certificates of deposit. To Andrew Rokne I expect to give the southeast quarter of the northwest quarter of Sec. 11, Twp. 98, Range 35, since said Andrew Rokne has also befriended

me, and assisted with G. E. Moore in nursing and caring for me in sickness and in health and paid me in cash \$500 in further consideration. The remainder of my property consisting of about 100 acres of land I have willed and bequeathed for various purposes as provided in said will. Dated this 11th day of October, 1912, in Emmet County, Iowa."

The contract was dated back to correspond with the date of the deed, but it is admitted that same was not in fact executed until the 28th of October, 1912, the date on which same was acknowledged. Two or three days after the execution of the deed above referred to, deceased moved to the home of appellee and resided therein for several months, when he returned to his own home and remained for a considerable period. In the meantime, appellee erected a small house on his premises near his residence, in which deceased thereafter resided alone.

The grounds for setting aside the deed to the 80-acre tract, and upon which plaintiffs pray that title be quieted in them thereto, are as follows: (1) That at the time of the execution of said deed deceased was a person of unsound mind; (2) that the consideration for said conveyance was wholly inadequate; (3) that same was induced by appellee by the exercise of undue influence; and (4) that there was a failure of consideration.

Principal reliance is placed by appellants upon their contention that, at the time of the execution of said instruments, deceased was not possessed of such mental capacity as to comprehend and understand the nature and consequences thereof. No medical testimony was offered upon the trial, and it therefore does not appear of what physical ailment deceased was at the time suffering. It is conceded that he was ill, and, on the day preceding or the day on which the deeds were executed, summoned a priest from Estherville, who administered the sacrament to him. No

physician was, however, called to attend him. Appellee and Rokne came to see him, and the deeds were executed at the request of deceased, and, so far as appears from a careful reading of the record, without previous knowledge upon their part of the intention or desire of deceased to convey the above respective tracts of land to them, and without solicitation or inducement upon their part. At the time the priest visited him, deceased requested him to notify appellee and Rokne that he desired to see them, and gave him directions where they might be found. At the time of the above transactions, deceased resided in a filthy hovel on his premises on the banks of a small lake, and the priest testified that his bedding, clothing and person were so extremely filthy and dirty that he appeared not to have washed his face or hands for many years. To sustain plaintiff's claim that the deceased was at the time of unsound mind, evidence was offered tending to show the extremely filthy surroundings in which deceased lived and his long-established habit of personal uncleanness; that about 30 years before his death he was extremely brutal and unkind to his wife, who, on account thereof, separated from him, and moved, with the children, to Estherville; that upon one occasion he inflicted upon her such severe physical injuries and became so violently angry that she went out in the woods and remained for several days; that upon her return he manifested no interest in her condition nor regret for his brutality, and refused to call a physician to attend her or permit her to use a team to go to town for the purpose of consulting a doctor. He was penurious and close in financial matters, and shortly after he separated from his wife began talking to his friends and neighbors upon religious subjects, claiming that he was not a worldly, but a spiritual, man, that he would live until his flesh fell from his hands; often expressed a desire to be crucified, and one witness testified that he requested him to get a sharp ax

and cut off his head; claimed that God had revealed to him that chairs had spirits, and that the world was going to be destroyed. Other peculiarities of mind and eccentricities were testified to by some of the witnesses, but the above are the principal facts detailed touching his mental condition. He lived as a hermit in his hut on the banks of a lake, but it is not shown that he did not possess average capacity to understand and carry on and transact ordinary business.

Upon the occasion when the priest visited him, he apparently believed he was about to die, and gave to the priest \$1,000 to be given to one of his daughters and \$1,900 to be given to the other. He requested him to transmit these separate amounts to the daughters named. The priest did so, at the same time informing the daughters of their father's condition. Upon the following day, they visited him, and, when called as witnesses herein, testified that he recognized them; that he was very feeble, and apparently could not live very long. They remained with him for about an hour, then returned to their homes at Rock Valley, and neither of them saw him again for many months. They apparently made no inquiry as to his condition for several weeks and received no reply to their inquiry for months, but they did not visit him until as above stated. Several witnesses called on behalf of plaintiffs detailed conversations with him relating principally to matters above stated, and expressed the opinion that he was of unsound mind. Other witnesses called on behalf of appellee expressed the contrary opinion. At the time of his illness he gave some bees to a neighbor, but, when he recovered, demanded and was paid \$12 therefor. He was at one time the owner of an old corn planter, which witnesses testified was wholly worthless, but which he claimed to have improved by removing some of the necessary parts therefrom, and he offered to sell same for \$10 and refused to take less. But few other business

transactions are referred to in the evidence. When he and his wife separated, he deeded her one third in acreage of the 320 acres of which he was then possessed, but included therein 21 acres of practically valueless swamp land. He was in no wise related to either appellee or Rokne, and the conveyance to them of the respective tracts above described appears to have been induced by the feeling upon his part that appellee had been kind and helpful to him in his old age, and when ill, and that he desired to be nursed and cared for by these friends during the rest of his life. Apparently he had become, to a considerable extent, estranged from his children. They went with their mother at the time she separated from deceased, and never thereafter resided with him, but occasionally visited him. It is claimed by them that they often requested him to either live with them or permit some of them to live with him, but this he declined. The scrivener who wrote the will testified that he gave all directions therefor, naming his children and grandchildren. He declined to receive food and clean bed linen from the priest, and often stated that he could and did fast for weeks at a time, and it appears from the evidence that he required and ate but very little food.

To justify the court in cancelling the deed to appellee and quieting title to said land in plaintiffs, we must find from the evidence that the mental powers of deceased had so far deteriorated or been destroyed by age, disease or physical weakness that he was incapable of understanding in a reasonable degree the nature and consequences of the transactions complained of. *Nowlen v. Nowlen*, 122 Iowa 541; *Corrette v. United Pres. Church*, 154 Iowa 383; *Altig v. Altig*, 137 Iowa 420; *Mathews v. Nash*, 151 Iowa 125; *Swartwood v. Chance*, 131 Iowa 714.

It has been repeatedly held by this court that a contract or conveyance cannot be avoided upon the ground of insanity, where the evidence shows only that grantor was suscep-

tible to illusions, hallucinations or delusions respecting matters not affecting or relating to the subject of the contract or conveyance. He was a member of the Roman Catholic Church, and apparently much devoted to its principles. The priest testified that upon the occasion of his visit, Maher repeated some very beautiful prayers, which he had evidently learned many years before, and other witnesses testified to similar acts upon other occasions. His capacity to comprehend and transact ordinary business does not appear to have been in any way affected by his apparent belief in his ability to receive revelations from God, or his peculiar religious experiences. His often-expressed desire to be crucified was not mentioned by him to the priest, and to other friends who frequently visited him he said nothing of such wish. That his mind had undergone some deterioration, due to his advanced age, and that he may have desired to die, is probable, but that he was mentally incompetent to recognize and understand his duties to those having claims upon his bounty, or to form a rational and intelligent purpose or wish to execute the deeds in question, in recognition of past favors and in consideration of future care and nursing, is not shown by the evidence. He appears to have been mentally rugged for one of his age, except for the certain peculiar beliefs and eccentricities above referred to; and we cannot say, from the matters shown, that the conveyance in question was the result of an unsound mind. Plaintiffs have not shown that deceased was incapable of transacting business intelligently at any time, nor are any improvident transactions referred to by the witnesses. It is our conclusion upon this point that deceased was of sound mind and wholly capable of transacting the business in question. We have carefully read the entire record, and, while we have not referred to nor reviewed herein all the evidence relating to his mental condition, we have considered same in reaching the conclusion above expressed.

2. DEEDS: consideration: support for aged grantor.

II. The land in question was worth at the time from \$5,000 to \$6,000. Of course, the small payment of \$250 was wholly inadequate; but the conveyance, as evidenced by the contract in writing, imposed upon appellee the necessity of providing care and nursing for the old gentleman so long as he should live. He was taken to the Moore home, notwithstanding his filthy condition, and lived with them in the house for many months; and that he was cared for and looked after so far as he was willing that appellee should do so, satisfactorily appears from the evidence. He lived for nearly 3 years after the deed was executed. Appellee built a small house for his use and paid therefor. The contract recognized past kindness, the extent or character of which is not shown, nor was any evidence offered to contradict this statement in the contract. Whether the services rendered by appellee were a fair equivalent for the land we are unable to say, but that the transfer thereof brought to him the care and nursing which he desired, as well as such methods of life as were suited to his condition and desires, is doubtless established by the evidence, and we do not feel that this cause should be reversed upon the ground of inadequacy of consideration.

3. DEEDS: validity: undue influence and fraud: burden of proof.

III. There is no direct evidence of undue influence on the part of appellee. It is argued by counsel that the relations between the parties were such that the burden rested upon the defendant to show that the transaction was bona fide and free from fraud or undue influence. The rules stated in the cases cited by counsel are well understood, but they are not applicable or controlling in this case. It does not appear from the evidence that appellee at any time or under any circumstances suggested to deceased that he convey the land to him or to Rokne, or that

any inducement whatever was offered to him to do so. The first suggestion, so far as appears in the evidence, that deceased desired or intended to make said conveyance, was when he requested the priest to notify the parties, and summoned them to come and see him. The witnesses who were present upon that occasion, some of whom appear to be men of intelligence and wholly disinterested, testified that the transaction was in accordance with the wish expressed at that time by deceased.

Without further discussion or elaboration of the evidence, nothing appears in the record tending in any way to sustain plaintiffs' claim that there was any effort made by appellee to induce deceased to make the conveyance.

IV. It is also contended by counsel for appellants that the consideration for said conveyance failed. It is claimed that deceased was neglected and not cared for by appellee or his family; that he lived alone in the small house near appellee's residence, surrounded by unspeakable filth; that his bedding and person were permitted to become filthy; that no screens were placed upon the window or door; and a granddaughter of deceased testified that she visited him upon one occasion when he was lying in bed covered with flies, and that his bed and clothing were dirty. The evidence does not show what effort, if any, was made by appellee to care for and nurse deceased or to provide for him clean and sanitary surroundings; but, in the absence of testimony that he was actually neglected by appellee, it may be assumed that he preferred the surroundings in which he lived to those which were more comfortable and attractive. He had spent the latter part of his life, at least, in filth, neglecting to even wash his hands and face for years. He resided upon the premises of appellee until shortly before his death, when he was removed to a hospital in Estherville, where he soon thereafter died.

4. DEEDS: con-  
sideration:  
failure of con-  
sideration:  
support and  
care.



It appears that the expenses of the hospital and medical attendants during the time he was at the hospital were paid by appellants and that appellee declined to pay the same, but the evidence is meager on this point. It is also claimed that during the time he lived on the premises of appellee he went without food, but this was doubtless in accordance with his desire, and, perhaps, belief that he could live upon very little sustenance. He preferred to fast, and the efforts of his friends, including the priest, were unavailing to induce him to desist therefrom.

We have carefully examined the record in this case, with a special reference to each ground relied upon by appellants for reversal of the judgment of the trial court; and, while the evidence shows many eccentricities and peculiarities of deceased, we reach the conclusion that the court rightly dismissed plaintiffs' petition and taxed the costs to them, and the judgment is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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JOSEPH HARN, Appellee, v. CEDAR VALLEY ELECTRIC COMPANY, Appellant, et al.

**TRIAL: Instructions—Applicability to Evidence—Warning as to**

- 1 **Danger—Negligence.** Evidence tending to show that a workman was warned of the existence of a danger attending his place of work does not justify an instruction which submits to the jury the question whether the workman was "instructed not to work in the place in question."

**NEGLIGENCE: Acts Constituting Negligence—Trespasser. A**

- 2 workman who has been warned of a possible danger attending the pursuit of his task does not become a trespasser by continuing his work, especially when he was in no wise subject to the direction of the one giving the warning.

**NEGLIGENCE: Contributory Negligence—Conflict of Evidence.**

- 3 Conflicting testimony as to whether a workman was warned of

the danger attending his work necessarily presents a jury question as to the real fact.

**TRIAL:** Verdict—\$4,000—Excessiveness—Personal Injury. Verdict  
4 of \$6,000, reduced by the trial court to \$4,000, sustained. Plaintiff, 20 years old, and married, was injured by coming in contact with wires carrying 2,300 volts of electricity. He was apparently dead when picked up, suffered excruciating pain, which was later aggravated by an attack of tetanus, and was confined to his bed for several weeks. He was incapacitated from working at his trade as a painter, and from doing any hard work. Prior to his injury, he was earning \$2.50 per day. Probability and extent of permanent injury were problematical.

*Appeal from Butler District Court.*—M. F. EDWARDS, Judge.

DECEMBER 11, 1917.

ACTION for damages. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

N. R. Lovrien, W. T. Evans, and Edwards, Longley, Ransier & Smith, for appellant.

E. H. McCoy and E. R. O'Brien, for appellee.

STEVENS, J.—I. The defendant Cedar Valley Electric Company, a corporation, having its principal place of business at Charles City, Iowa, also owns and operates an electric power plant at Parkersburg, Iowa, and, at the time of the injury complained of by plaintiff, furnished light and power to the defendant Electric Roller Mills, a copartnership, composed of George Johnson and W. S. Meade, to run a motor in said mill. The main power plant and dynamos of defendant Electric Company were located about 80 feet from the mill. Three electric wires, carrying 2,300 volts of electricity, were stretched from said power plant to a cross-arm fastened to the west end of the mill. The wires were attached to insulators on a cross-arm. In making the connection of the wires to the insulator, the ends of the wires were exposed and the insulation so torn and worn away as to leave the same bare and unprotected. From these

insulators, wires encased in a metal pipe extended downward along the outside of the west end of the mill to a point below where they entered the wall thereof and connected with the motor therein installed. The wires were covered with "weather proof" insulation, which is ordinarily used on ordinary wires carrying ordinary voltage, and, it appears from the testimony, was not sufficient to prevent the escape of electricity from a wire carrying 2,300 volts. Plaintiff, a married man about 20 years of age, was employed by John Keneppe, a contractor, who had arranged with the defendant Johnson to paint the mill, and, while working thereon and painting in the immediate vicinity and around said wires, was severely injured by his wrist's coming in contact with the exposed ends of the wires. The nature and extent of plaintiff's injuries and the manner in which same were received are hereinafter fully stated. The jury returned a verdict in favor of plaintiff for \$6,000. A motion for new trial was filed, and the court held that the verdict was excessive, and reduced same to \$4,000, which plaintiff elected to accept, and judgment was rendered therefor.

Several grounds of negligence were alleged in plaintiff's petition; but, as no question is presented upon this appeal involving the same, it is unnecessary to set them out in detail. Defendant for answer admitted the corporate capacity of defendant Electric Company, and that it owned and operated a plant at Parkersburg, and owned the wires in question, and furnished the current to the mill; and averred that the said wires were properly and efficiently constructed, according to the general and accepted standards of electrical construction, and that same were, at the time of the injury, in good repair; and denied the remaining allegations of plaintiff's petition. The cause was tried against the defendant Cedar Valley Electric Company only, the other defendants having been granted separate trial, and the cause continued as to them.

George Johnson, one of the defendants, testified that, when he observed plaintiff start to paint the west end of the mill, he said to him, in substance:

1. TRIAL: instructions: applicability to evidence: warning as to danger: negligence.

"When you get over to these wires, I would rather you would leave a strip; they told me that the wires was safe, but there is no use in taking any chances, and I would rather you would leave a strip, and then Jerry and I will paint that some time when the current is off, on Sunday."

He also testified that he made substantially the same statement to James Deo, Sr., who was apparently in charge of the work for the contractor, in the presence of his son and plaintiff, to which statement Mr. Deo responded: "I will keep on warning the boys." James Deo, Sr., testified that he told his son that he would rather paint around the wires himself, and for the latter to keep away from them. He testified, however, that he did not know positively whether Harn heard him say that or not; that his son was nearer to him than Harn, who was some distance away. James Deo, Jr., testified that he did not remember hearing his father say anything about the wires' being dangerous. Plaintiff testified:

"No one told me that it was dangerous to work near the wires or warn me of any danger with reference to the wires. I have never had any experience with electricity."

Another witness, an employe of defendant mill company's, corroborated the testimony of Mr. Johnson.

Based upon the foregoing testimony, counsel for defendant requested the court to instruct the jury, in substance, that, if it found from the evidence that plaintiff was instructed not to paint around the wires but to leave that portion of the mill unpainted, then plaintiff, in painting same, was a trespasser, acting beyond the

2. NEGLIGENCE: acts constituting negligence: trespasser.

scope of his authority, and could not recover, under the evidence. The court, however, refused the requested instruction, and instructed the jury that plaintiff was lawfully at work painting the mill at the time of the injury, and further told the jury that plaintiff had no right to work about the wires attached to said mill if the place where same were attached, or the wires, were obviously dangerous; but that the mere fact that plaintiff may have known that the place was dangerous would not in itself deprive him of the right to recover, if his injury resulted from the negligence of defendant, and without negligence upon his part contributing thereto. The record shows that plaintiff was not at the time employed by Johnson, but by an independent contractor, and he was not, therefore, under the direction of Johnson. *Callahan v. Burlington & M. R. R. Co.*, 23 Iowa 562; *Healy v. American Tool & Machine Co.*, (Mass.) 107 N. E. 977; *Hannah v. Connecticut River R. Co.*, (N. H.) 28 N. E. 682.

No other instruction was asked by defendant, nor were exceptions taken to any of the instructions given by the court. The requested instruction was too broad, and was not justified by the evidence. What, if anything, was said by Johnson to plaintiff, or heard by him, or any warning given by James Deo, Sr., of any risk or danger involved in painting the mill in the immediate vicinity of, or around, the wires, were questions of fact for the jury. The language claimed to have been used by the defendant Johnson was doubtless intended as a warning, rather than a direction to plaintiff not to paint in the vicinity of the wires, and seems to have been so understood by James Deo, Sr., who, as above stated, replied that he would keep warning the boys. The evidence, of course, was material, and had a direct bearing upon the question whether plaintiff's injuries were the result of negligence upon his part, but did not justify the court in saying to the jury that, if it believed

said evidence, plaintiff was a trespasser and could not recover. The instruction was properly refused by the court.

II. It is also urged by counsel for appellant that plaintiff disobeyed the positive direction of the defendant Johnson by painting in the immediate vicinity of and around the wires, and was, therefore, guilty of contributory negligence. What has already been said sufficiently covers the evidence relied upon by appellant to establish contributory negligence. If plaintiff received warning of the dangerous character of the wires and the risk incident to working in the immediate vicinity thereof, as claimed by the witnesses and denied by him, it was a question of fact for the jury, under the evidence, to say whether or not he was guilty of contributory negligence. That question was submitted to the jury by instructions apparently satisfactory to counsel, as no exception was taken thereto, and its finding is conclusive upon this point.

III. The principal ground, however, relied upon by appellant for reversal, is that the verdict of the jury was excessive, and so large as to indicate that same was the result of passion and prejudice, and, therefore, defendant's motion for a new trial should have been sustained by the court. Plaintiff testified that, at the time of the injury, he was working on a 16-foot ladder, near the wires and about even with them; that he was painting up and reached over the wire to finish painting around them; that he had one foot on a rung of the ladder above the other, and his wrist came in contact with the wire, and one leg with the lead cable covering the wires.

James Deo, Sr., testified that he heard the flash of the electricity on plaintiff's arm; that plaintiff's face was perfectly black; that his eyes bulged out of his head, and that his tongue stuck out an inch or more from his mouth; that

3. NEGLIGENCE:  
contributory  
negligence:  
conflict of  
evidence.

4. TRIAL: ver-  
dict: \$4,000:  
excessiveness:  
personal in-  
jury.

he fell to the ground, and appeared to be dead. Plaintiff was taken to a doctor's office, from which he walked home, and was attended by a physician for about a week. Plaintiff further testified that the first recollection he had after the injury was when he woke up at about 4 o'clock in the afternoon; that, immediately following the injury, he felt a burning or smarting sensation in his wrist, after which the same pained him severely; that in a few days his leg became sore where same had been burned, and pained him considerably; that he was very nervous, irritable, could not sleep, had very severe headaches much of the time, suffered pains in his back and groin, which, most of the time, were severe, had no appetite, and was sick at his stomach all the time. He remained in bed about a week, when his condition became improved, and, after being around for a few days, suffered a very severe attack of tetanus, or lockjaw. Concerning his condition at that time, he testified as follows:

"I took to my bed about a week from the Monday that I got hurt. I was in bed a week after the accident; that is, laying down, anyway. I was in bed a week, and then up around for about a week, and then went down again to bed. I laid flat on my back, you might say, for three weeks in bed; I couldn't turn over unless they helped me, and if I did turn over, then my head would draw back and pain worse than otherwise. It would draw back so that my feet and my head would be all that would touch the bed. I was stiff and rigid in my body. When they tried to turn me in some other position than on my back, my head would draw back worse than ever; I couldn't stay or be placed in any other position. Only my feet and head touched the bed; nothing else. I was in that condition about a week, and then part of it, to that extent, left. I couldn't open my mouth, for one thing. Didn't have anything to eat

except broth or soup, and nothing to drink except a little water to moisten my mouth and throat, and these they had to give me with a spoon. It was about three weeks before I could open my mouth. My bowels would not work. I was not able to get my hands to my mouth."

During the time he had lockjaw, he had two severe spasms, during which time he lay on his back, his body so rigid that only his head and feet touched the bed. He further testified that he suffered more or less from sleeplessness for a long time; that, at the time of the trial, his wrist pained and hurt him; that he also had pains in his arm near the elbow and in his shoulder; that he had no grip in his fingers; that he had been unable to work at his trade since the injury, or to do other hard work; that, at the time of the injury, he was receiving \$2.50 per day. The physicians who attended him testified that, during the time he had lockjaw, the muscles of his body were rigid; that he apparently suffered severe pain; that he had two severe spasms; that the rigid condition of his body continued for about three weeks; that his body was so stiff during said time that, by placing the hand under his head, he could thereby be raised to a perpendicular position; that he was unable to turn over in bed without help; that he had no use of his muscles, could not control the same or any member or part of his body.

It appears to be practically conceded that tetanus resulted from some infection of the wound on plaintiff's wrist. The medical witnesses were quite uncertain as to the probability and extent of plaintiff's permanent injuries, if any; although they all agreed that the burn on his wrist was severe, and a large scar had formed thereon; and they stated that he might suffer some permanent impairment of the use of his hand, due to the injury to the tissue surrounding the tendons that move the fingers. The extent of such



impairment, however, could not be ascertained until the scar had completely formed on the wrist. None of the witnesses expressed the opinion that he was likely to suffer any serious permanent injury or impairment of the use of his hand or finger. All agreed that no necessary permanent impairment or injury followed lockjaw.

The court reduced the verdict from \$6,000 to \$4,000. The verdict was, no doubt, rather large, but plaintiff suffered a severe and painful injury, and, during the time he was afflicted with tetanus, excruciating pains; and while the probability is, as appears from the testimony of the medical witnesses, that he will suffer little, if any, permanent damages from said injury, yet none of them testified that he would not suffer to some extent, or that his hand would be as strong and sound as before, while plaintiff testified that he had been unable to follow his trade or do other substantial labor since his injury. He has lost time and incurred medical expenses to a considerable amount. We have carefully gone over the record, and do not feel inclined to say that the verdict was so large as to indicate passion and prejudice on the part of the jury, and the judgment for \$4,000 will not be interfered with.—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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J. C. HARTEK, Administrator, Appellant, v. C. A. HARTEK,  
Appellee.

**APPEAL AND ERROR:** Review, Scope of—Hearing in Probate.

- 1 Hearings on claims in probate are at law, with the consequence that findings of fact by the court have the force and effect of a jury finding.

**EXECUTORS AND ADMINISTRATORS:** Presentation and Allow-

- 2 ance of Claims—Belated Presentation. Claims in probate against solvent estates may be presented, proved, and allowed, as late as the time of hearing on the administrator's final report. So held

in the case of a husband's claim for expenses attending the sickness and burial of his wife.

*Appeal from Davis District Court.*—SENECA CORNELL, Judge.

DECEMBER 11, 1917.

THE opinion sufficiently states the case.—*Affirmed.*

*Payne & Goodson*, for appellant.

*Taylor & McCash*, for appellee.

WEAVER, J.—Sarah A. Harter died in-  
1. APPEAL AND  
 ERROR: review,  
 scope of:  
 hearing in pro-  
 bate. testate November 16, 1913. She was sur-  
 vived by her husband, C. A. Harter, and two  
 children, J. C. Harter and Gertrude Emman-  
 uel. The estate left by the deceased wife and mother con-  
 sisted principally of 3 promissory notes, 2 of which, of  
 the aggregate principal sum of \$2,650, had been made to  
 her by her son, J. C. Harter, and the third, for the prin-  
 cipal sum of \$425, by her daughter, Gertrude Emmanuel.  
 It appears quite satisfactorily that, soon after the death  
 of the intestate, the surviving husband and the son and  
 daughter had some sort of an agreement or arrangement  
 by which the estate and its business should be settled with-  
 out probate proceedings, and to that end the husband took  
 charge of such settlement and took or had possession of  
 the notes. It seems to have been understood between the  
 parties that the husband should waive any claim he had to  
 share in the estate, and that, after paying all proper charges  
 against it, what remained should be divided equally between  
 the son and daughter. Acting, as he claims, in pursuance  
 of that agreement, he surrendered to the daughter the  
 note given by her, and at the same time endorsed upon one  
 of the notes given by the son an equal amount, increased  
 by certain payments made by the son to defray some of

the charges against the estate. There were some other transactions between father and son with reference to their mutual personal claims or demands, which serve to obscure somewhat the merits of their present dispute, but are still readily capable of adjustment. It is true that, as witnesses, the son and daughter seem to deny any agreement on their part that defendant should undertake the settlement of the estate out of court, but in this respect we think the preponderance of evidence is with the defendant. It is practically conceded at least that they both permitted him to proceed in that manner, and for a considerable period dealt with him on the theory that he was acting in that capacity. It appears, however, that, after a lapse of several months, the son and daughter discovered, or thought they discovered, that their father was courting the favor of a certain marriageable woman with a view to matrimony, and feared that, if he had not done so already, he very likely would give to her or expend upon her some portion of the property, and thereupon, to prevent this disaster, the son secured his own appointment as administrator of his mother's estate, and thereafter the father insisted upon his legal share therein. In due time the son, as administrator, filed a final report, to which the defendant made objections. Pending the ruling upon these objections, the administrator filed a substituted report, by which it appeared that, upon making all proper charges and credits, there remained in his hands for distribution: To C. A. Harter, \$456.86; to J. C. Harter, \$510.12; to Gertrude Emmanuel, \$575.03.

Upon hearing the evidence, the court ordered the final report amended in certain respects. These changes are in most respects unimportant, except with reference to the amount to be distributed to C. A. Harter. The administrator had charged against the distributive share of C. A. Harter the aggregate amount of \$615.64, and gave him no credit for what he had paid for the expenses of the sick-

ness and burial of the deceased, or for one or two other minor items. The trial court found him entitled to these credits, and, upon adjusting the account upon this basis, ordered that the amount to be charged against the distributive share of the defendant be reduced to \$95.40. Upon the basis of the report as thus ordered amended, the court directed the administrator to distribute the fund shown to be in his hands. It is from this final order that appeal has been taken.

We shall waste no space in a discussion of the testimony or in demonstration of its preponderance. The proceeding is at law, and the finding of the trial court is to be accorded the force and effect of a jury verdict. Aside from the legal proposition hereinafter mentioned, the decision of the controversy depends solely upon questions of fact, which, for the purposes of the appeal, are to be considered as conclusively found in favor of the appellee.

2. EXECUTORS  
AND ADMIN-  
ISTRATORS:  
presentation  
and allow-  
ance of  
claims: be-  
lated presenta-  
tion.

The question of law upon which the appellant largely grounds his assignment of error is that, as the husband had not formally filed a claim for the expenses of his wife's sickness and burial, the court could not properly consider it or allow him credit therefor in distributing the estate. If he was otherwise entitled to such credit,—and of this there is no serious dispute,—it would seem that the presentation of the claim at the administrator's accounting and his demand then made for credit accordingly would be a sufficient filing to entitle it to consideration, where, as here, it is conceded that the estate is perfectly solvent, and the rights of creditors are in no manner prejudiced or delayed. It has been held that, under such circumstances, preferred charges of this nature are not barred by a failure to present them within the first six months. *Wolfe v. Knapp*, 127 Iowa 479. Had the husband

been the administrator, we see no good reason why, in his final accounting, he would not have been entitled to charge and retain from the funds of the estate whatever amount he had expended from his own funds for funeral expenses, even though he had never gone through the form of filing a separate formal claim for allowance. Indeed, we think that is the usual and ordinary method adopted for the adjustment of such claims, and if, as administrator, he could rightfully bring his alleged credit in this respect to the attention of the court in his final report, there would appear to be no valid reason why he may not make use of his claim in a similar manner when it comes to a matter of accounting with the administrator for the ascertainment of his share in the distribution of the estate. In this manner, he gets no more than he would be entitled to had he presented his claim in another manner, and the due and proper share of the other distributees is in no wise decreased. Indeed, as long as the estate is solvent and unsettled, it may be charged with payment of expenses of this nature; for they are not subject to the time limitations provided in Code Section 3348, but are governed by the provisions of the preceding section, 3347.

We find no good reason for disturbing the judgment of the trial court. The case is one less remarkable for its intrinsic merits than for its display of bad blood between father and children, and the necessity under which counsel seem to labor to draw liberally upon their reserve stores of denunciation. It is enough for us to say that no reversible error is shown, and the judgment appealed from is—*Affirmed.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

IOWA IMPROVEMENT COMPANY, Appellant, v. AETNA EXPLOSIVES COMPANY, Appellee.

**LANDLORD AND TENANT: Leases—Provision for Renewal—Oc-**

- 1 cupancy by Succeeding Tenant. The removal of one tenant from rented premises, and the act of another in moving in and paying the same rent as was paid by the former tenant, do not constitute such assumption of the former tenant's lease as to bind the latter tenant to a provision in said former lease to the effect that remaining in possession for a stated time after the expiration of the lease shall work a year's renewal of said lease.

**COVENANTS: Covenants Running With Land—Provision for Re-**

- 2 newal of Lease. A provision in a lease that the act of the lessee in remaining in possession of the leased premises for a period of three days after the expiration of the lease shall work a renewal of the lease for another year is not a covenant "running with the land."

**LANDLORD AND TENANT: Tenancies at Will—Holding Over. A**

- 3 holding over by a tenant, after the expiration of a lease, for a stated time, and pending negotiations for a new lease, constitutes a tenancy at will.

**CONTRACTS: Construction—Practical Construction by Parties—Ef-**

- 4 fect. The practical construction placed upon a contract by the parties may quite persuasively point the way to the court to reject a contrary and subsequently asserted construction. So held on an issue as to the proper construction of that part of a lease providing for renewal.

**APPEAL AND ERROR: Presumptions—Existence of Essential Fact.**

- 5 It will be presumed, on appeal, that the trial court found the existence of a fact, when such fact is essential to sustain the judgment.

*Appeal from Polk District Court.—W. H. McHENRY, Judge.*

DECEMBER 11, 1917.

THE opinion sufficiently states the case.—*Affirmed.*

*Keithley & Bump*, for appellant.

*Tomlinson & Gilmore*, for appellee.

1. LANDLORD AND  
TENANT:  
leases: pro-  
vision for  
renewal: oc-  
cupancy by  
succeeding ten-  
ant.

WEAVER, J.—On December 1, 1914, plaintiff, by a written contract, leased to a corporation known as the Aetna Powder Company a room in a business building in the city of Des Moines, for the term of one year from December 1, 1914, to December 1, 1915, at a monthly rental of \$50, to be used as an office for said powder company, and for storage. Among the provisions of said lease was the following:

"12. That should lessee hold over by permission of lessor for three days after expiration of this lease, it is agreed by all parties signing the same that it shall constitute a renewal hereof for the same term and upon the same conditions, except that lessor at his election may terminate such renewed lease by giving three days' notice to quit."

After this lease had been executed, and during the term thereof, another corporation, known as the Aetna Explosives Company, being the defendant herein, was organized and took over the business of the lessee and went into possession of the leased premises, paying to plaintiff the stipulated monthly installments of rent as they fell due. The defendant is a New York corporation, its business in Des Moines being in charge of one McCauley, its agent or employe. A short time before the expiration of the year for which the lease was made, a representative of the plaintiff approached McCauley upon the subject whether his company desired to retain the building another year, but no agreement was then made. Plaintiff prepared a form for a new lease for the succeeding year, naming defendant as lessee, and gave it to McCauley, who appears to have for-

warded it to the home office of the company for its consideration. Before the home office had reported its conclusion with reference to a new lease, the year under the old lease expired, and McCauley paid the rent for an additional month, December, 1915. During that month, McCauley informed plaintiff that the company would not enter into a new lease, but would vacate the building, and gave plaintiff written notice to that effect. As the time covered by the notice extended into January, 1916, defendant also paid the rent for that month. Plaintiff took the position that the act of defendant in remaining in possession of the premises for more than three days operated to effect a renewal of the old lease for an additional year, and an obligation upon defendant's part to pay rent for such additional period at the same rate and upon the same terms as specified in the original contract. The defendant quit the premises within the time stated in its notice, and denies that it is in any manner bound to pay plaintiff rent since it surrendered possession of the premises. To enforce plaintiff's claim for rent under the alleged renewal of said lease, this action was brought.

The defendant, answering, denies the plaintiff's claim, and denies that it ever assumed any obligation to pay rent under said lease except for the time it was in possession of the property. It further pleads the fact already stated: that, before the lease expired, plaintiff tendered a form of lease for another year to defendant's agent, who sent it to the defendant for approval; that said negotiation terminated in the determination of the defendant not to accept the lease, of which conclusion it notified the plaintiff, and that defendant also gave plaintiff 30 days' written notice of its intention to vacate the property, and that in fact it did vacate within the time so fixed, having paid the full rental for all the time it had occupied the premises.

The testimony offered on either side indicates nothing



inconsistent with the foregoing statement. The issues appear to have been submitted to the court without a jury. The judgment was for the defendant, and the plaintiff appeals.

I. Counsel for appellant, with much industry, have collated authorities to the effect that, where one corporation takes the entire business and effects of another which is dissolved and goes out of business, the former is held to have assumed the obligations and liabilities of the corporation so absorbed. This abstract proposition may be admitted for the purposes of this case, though it is doubtful whether the facts developed in this record are such as to call for an application of the principle contended for. In other words, the proposition of fact which counsel assumes, that the defendant corporation is but another name for the lessee in the written lease, is not so clearly or conclusively shown in the evidence that we can say that it has been established as a matter of law.

Nor are we prepared to concede the further proposition that the clause we have quoted from the lease as to the effect of a holding over is in the nature of a "covenant running with the land" and becomes binding upon the defendant to the same effect and extent as it would have bound the original lessee. A covenant running with the land is usually, though not always, some covenant or promise of the grantor of the land, and inures not only to the benefit of the grantee but also to subsequent grantees or assignees of the title which passes by virtue of the conveyance in which the covenant is made. A covenant which does not so inure to the benefit of subsequent grantees and assignees is personal in its character, and no right to enforce the same passes to a subsequent grantee by virtue of the conveyance of the property to him. We regard it clear

2. COVENANTS:  
covenants running with  
land: provision for re-  
newal of lease.

that the agreement between the lessor and lessee that a holding over for three days with the consent of the lessor should operate as an extension or renewal of the lease is no more than an agreement between the lessor and lessee upon the manner in which a renewal of the lease might be effected, if such should be the minds of the parties after the expiration of the lease. It was left open to the tenant to withdraw from the possession, should he then elect to do so, and incur no further liability; and if it remained in possession for the period of three days beyond the term, it was left open to the election of the lessor whether to consent thereto, and treat it as a renewal of the lease, or to refuse his consent and demand possession of the property. This agreement imposed no duty or obligation upon either party to enter into a new lease or a renewal of the old lease, but provided a means by which such renewal could be effected. It follows that, while the acts of the defendant in going into possession and occupying and using the premises and paying the rent stipulated in the lease may be treated as a sufficient showing that it assumed the obligations of the original lessee upon all the terms of such lease so far as they related to the use of the leased premises for the full term thereof, it did not assume or become bound by the further agreement of those parties which contemplated a possible renewal of such lease. That agreement related solely to a result which should follow certain conduct of the parties after the expiration of the lease; and it cannot be presumed that the defendant, in assuming and performing the lessee's duties under the lease, took upon itself the other and further obligations, if any, of the lessee relating to conditions which might arise after the expiration of the lease. As to such matters, there is no privity of contract between the plaintiff and the defendant. *Cohen v. Todd*, 130 Minn. 227 (153 N. W. 531).

11. Under the record here presented, it is unnecessary to consider the extent to which the ancient law of landlord and tenant has been modified, if at all, and for the purposes of this case we may admit that counsel's statement of the legal effect of the holding over by the tenant is entirely correct as a general legal proposition; but even so, we think the case falls within the scope of a recognized exception thereto. That is, if, when the rent year expires, negotiations are pending between the parties for a further lease, the possession of the tenant after the expiration of the period is treated as that of a tenant at will, and not as that of a tenant holding under a renewal of the former lease. *City of Dubuque v. Miller*, 11 Iowa 583, 586; *Smith v. Allt*, 7 Daly (N. Y.) 492; *Leggett v. Louisiana Purchase Exposition Co.*, (Mo.) 114 S. W. 92 (137 S. W. 893); *Schilling v. Klein*, 41 Ill. App. 209; *Grant v. White*, 42 Mo. 285; *Hilsendegen v. Scheich*, 55 Mich. 468; *Salas v. Davis*, 120 Ga. 95.

4. CONTRACTS : construction : practical construction by parties : effect.

The plaintiff's conduct in proposing a new lease and in submitting a form of such lease for approval and execution by the defendant clearly evidenced the fact that it was not relying upon a continuation of the old lease for another year, and that its consent to the retention by the defendant of the possession of the premises was with a view to the making of a new contract and not for the purpose of effecting a renewal or extension of the old one. At the very least, it must be said that, under the circumstances shown, the question whether the continued possession of the defendant and the plaintiff's consent there-to shall operate as an extension of the old lease depends

5. APPEAL AND  
ERROR: pre-  
sumptions:  
existence of es-  
sential fact.

upon the intent of the parties, and this question of fact will be considered as having been determined by the trial court adversely to the plaintiff,—a finding with which this court is not at liberty to interfere.

*Leggett v. Exposition*, supra; *Rosenberg v. Sprecher*, (Neb.) 103 N. W. 1045; *Davis v. Brown*, (Miss.) 29 So. 172; *Pusey v. Presbyterian Hospital*, (Neb.) 97 N. W. 475; *Andrews v. Marshall Creamery Co.*, 118 Iowa 595; Taylor on Landlord and Tenant, Sec. 60; *Turner v. Wilcox*, (Okla.) 40 L. R. A. (N. S.) 498.

We find no error in the record, and the judgment of the district court is—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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FREDA JACKSON, Appellee, v. ROY C. FERGUSON, Appellant.

**LIBEL AND SLANDER:** Words Actionable—Imputation of Immorality. To charge that a married woman "*had been making dates with men*" is not slanderous *per se*, unless accompanied with allegation and proof that such charge was made with the intent to charge immorality on the part of the woman, and that the persons to whom the statements were made so understood them.

*Appeal from Woodbury District Court.*—W. G. SEARS, Judge.

DECEMBER 11, 1917.

ACTION at law to recover damages for alleged slander. Verdict and judgment for plaintiff for \$150, and defendant appeals.—*Reversed and remanded*.

*Jepson & Stecker* and *Henderson & Fribourg*, for appellant.

*J. A. Prichard* and *Schmidt & Pike*, for appellee.

WEAVER, J.—The plaintiff and her husband and the defendant Ferguson and wife are comparatively young people, having their homes in the same neighborhood. On one occasion, the two husbands had been from home over night, and on their return, or soon thereafter, information came to them that, on the night of their absence, their wives stayed together at the home of one of them, and that two young men visited them, staying with them until nearly morning. This caused some ill feeling, and defendant made the story the subject of certain statements respecting plaintiff which she alleges to be slanderous. The petition alleges that defendant said of and concerning plaintiff and his (defendant's) wife, "They have been making dates with men for immoral purposes;" "they have been making dates with men all winter and have been found out." The defendant denied the alleged slander, and pleaded certain matters in mitigation.

The proof tended to show that defendant did say that they (plaintiff and defendant's wife) "had made dates with some other men;" that he and Jackson had found out by the boys "that they had made dates and been there;" and that "they have been making dates with other men and doing things while we were gone that were simply awful;" "they have been making dates with other men and stayed up nights or one night with them." There is no evidence that he said that the "dates" to which he referred were made for immoral purposes. No special damages were alleged, and no evidence of special damage offered.

At the close of the testimony on the part of plaintiff, defendant moved for a directed verdict in his favor, on the ground, among other things, that the words shown to have been spoken by the defendant were not slanderous *per se*, and no special damages had been alleged or proved. The motion was denied. At the close of all the evidence, the defendant asked the court to instruct the jury, among other

things, "that the words shown to have been spoken are not slanderous *per se*, and the burden is on plaintiff to show they were spoken maliciously, and that to recover she must allege and prove special damages." The instruction was refused.

In our judgment, the court's rulings in these respects were erroneous. There is nothing in the expression, "making dates with men," which necessarily or as a matter of law can be said to mean that plaintiff is a lewd woman, or that the dates said to have been made with men were for lewd purposes. It is true that the petition alleges that the words were used by defendant with that slanderous meaning, and were so understood by those who heard him; and, had there been any evidence to support these allegations, then it would doubtless have been proper for the trial court to have instructed the jury that, if they found the words were used in that defamatory sense, and that the hearers so understood their meaning, then the statement would be slanderous *per se*, and malice and injury would be presumed. But there is no such evidence in the record. It is not an unheard-of thing in these days for a married woman to make one of a theater party or card party or joy-riding party or other social gathering in which her husband has no part, and whatever may be said of her wisdom or prudence in so doing, it would be a most unjustifiable thing to say that the acceptance of an appointment or date for such diversion is an act of immorality, or to say that a statement based on such acts, to the effect that a woman has made dates with men (no covert defamatory sense being intended), is, as a matter of law, slander *per se*. "Making a date" is, perhaps, an inelegant expression; but, giving the words no more than their ordinary and natural effect, they mean nothing more than the making of an appointment, or the fixing of a time or date for some specified purpose. If, without more, they be made use of to indicate an

appointment for some unlawful or immoral purpose, it is a perversion of their natural meaning, and will not be so construed, in the absence of proof that such was the intention of him who so used it, or that it was so understood by those who heard it. *McLaughlin v. Bascom*, 38 Iowa 660; *Barton v. Holmes*, 16 Iowa 252, 254; *Wimer v. Allbaugh*, 78 Iowa 79. The instructions given to the jury are inconsistent with this view of the law, and constitute reversible error.

Our conclusions above stated are sufficient to require a new trial, and other points suggested in argument become immaterial. For the reasons stated, the judgement appealed from is reversed, and the cause will be remanded for a new trial.—*Reversed and remanded.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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S. JACOBSON, Appellant, v. DONALD P. FULLERTON et al.,  
Appellees.

**HUSBAND AND WIFE: Actions—Negligent Injury to Wife—Loss**

- 1 **of Time—Expenses—Right of Recovery.** A woman, whether married or single, has the *sole* right to recover for *loss of time* and *all expenses* proximately resulting from a negligent, non-fatal injury to her, even though, if married, she is engaged in no separate business of her own, and even though, if married, such expenses have been contracted or paid by the husband. (Section 3477-a, Code Supplemental Supplement, 1915.)

**HUSBAND AND WIFE: Actions—Death of Wife by Negligence—**

- 2 **Loss of Consortium.** Whether the death of a wife by reason of a negligent or willful injury to her leaves the husband with a cause of action for loss of consortium, *quaere*.

*Appeal from Polk District Court.*—LAWRENCE DE GRAFF,  
Judge.

DECEMBER 11, 1917.

ACTION for damages. The demurrer of defendants was sustained, and the plaintiff appeals.—*Affirmed.*

*Roy E. Cabbage*, for appellant.

*Sullivan & Sullivan* and *Nourse & Nourse*, for appellees.

PRESTON, J.—The petition states that plaintiff is the husband of Mrs. S. Jacobson, who, in July, 1914, was injured in an automobile collision through the negligence of defendant Donald P. Fullerton, while he was operating the automobile as the agent of defendant Robert Fullerton. It is alleged that her injuries were permanent. It is also alleged that Mrs. Jacobson was crushed, bruised, cut and wrenched; her back was injured; she sustained a deep cut extending from the top of her head down across her forehead to the eyebrow; she suffered a severe nervous shock, leaving her subject to headaches; that she is nervous, unable to sleep, and was confined to her bed a long time; that she is still unable to perform her ordinary household duties, and is confined to her bed a large part of the time; that plaintiff has been compelled to expend large sums of money in securing help to do the work which Mrs. Jacobson had done prior to the injury, and was compelled to expend large sums of money for medicine, physician's care, hospital services and medical services; that plaintiff will be compelled to expend large sums of money in the future on account of said injuries, whereby Mrs. Jacobson was rendered permanently unable to perform her usual work.

The defendant demurred on the ground that, under the statutes of Iowa in force at the time of the alleged injury, the right of action for loss of time, medical attendance, and other expenses resulting from an injury to a married woman, caused by negligence of another, is in the



wife, or in the administrator of her estate in case of her death, and not, in any event, in the husband. Section 3477-a, Code Supplemental Supplement, 1915, in so far as it applies to the facts of the instant case, is as follows:

"When any woman receives an injury caused by the negligence or wrongful act of any person, firm or corporation, including a municipal corporation, she may recover for loss of time, medical attendance and other expenses incurred as a result thereof in addition to any elements of damages recoverable by common law."

It is conceded by counsel that this section applies to a married woman. Appellant contends that the court erred in holding that the statute just quoted took away from the husband his common-law right to recover damages sustained by him for loss of his wife's time occasioned by personal injury to her through the negligence of another, and cites *Meuchirter v. Hatten*, 42 Iowa 288; *Omaha & R. V. Ry. Co. v. Chollette*, (Neb.) 59 N. W. 921; *Birmingham Southern R. Co. v. Lintner*, (Ala.) 38 So. 363; *Blair v. Bloomington & Normal Ry., E. & H. Co.*, 130 Ill. App. 400; *Riley v. Lidtke*, (Neb.) 68 N. W. 356; *London v. Cunningham*, 20 N. Y. Supp. 882; *Kirkpatrick v. Metropolitan St. Ry. Co.*, (Mo.) 107 S. W. 1025; *Booth v. Manchester St. Ry. Co.*, (N. H.) 63 Atl. 578; *Baltimore & O. R. Co. v. Glenn*, (Ohio) 64 N. E. 438.

Appellant also contends that the court erred in holding that the statute took away from the husband the right to recover moneys expended by him in procuring medical and hospital attendance for his wife following such injuries, citing the cases supra. It is said by appellant, and conceded by appellees, that at common law a husband could recover at law for loss of his wife's services, as well as for medical and surgical attendance. They cite Blackstone, Bacon and Cooley, and the following Iowa cases: *McKinney*

*v. Western Stage Co.*, 4 Iowa 420; *Tuttle v. C., R. I. & P. R. Co.*, 42 Iowa 518.

In the *Mewhirter* case, *supra*, it was held, under the statute which provided that the wife may receive the wages of her personal labor and maintain an action therefor in her own name and hold the same in her own right, that this has reference to cases where the wife is employed, to some extent, in performing labor or services for others than her husband, or carrying on some business in her own behalf. Counsel for appellant quote a sentence from the opinion in that case, as follows:

"Certainly, such consequences were not intended by the legislature, and we cannot so hold in the absence of positive and explicit legislation."

And they say that Section 3477-a of the present statute is not such positive and explicit legislation; that that language was used in regard to the discussion in the opinion that, if the construction contended for were to be placed upon the statute, the wife would have a right of action against her husband for domestic service or assistance rendered by her as wife in caring for the children, etc. Appellee contends in this case that the decision in the *Mewhirter* case did not take from the husband any right of action which he had prior to that act for loss of services, on the theory that there could not be two causes of action for the wife's labor or the loss of her time.

Under our decisions, even under the old statute, the wife could recover for her services when engaged in a separate business, and we think it was the purpose of the legislature, in enacting the last statute, to place all married women on that basis, though not engaged in a separate business, and to place a married woman in the same situation as though she were single, as to the items of damage recoverable under the new statute.

Appellee cites *Rose v. City of Fort Dodge*, 180 Iowa 331; *Lane v. Steiniger*, 174 Iowa 317, 319; *Fisher v. Ellston*, 174 Iowa 364, 372. Appellant concedes that there is language in these decisions which seems to be against his contention, but says that all such is dictum. The argument for appellee is that:

"The language of this statute is clear, and provides that 'any woman' may recover for (a) loss of time; (b) medical attendance; (c) other expenses incurred; (d) any (all) elements of damages recoverable by common law; (e) punitive damages. In case of injury resulting in death, the administrator of the deceased may sue and recover (a) the value of her services as wife; (b) the value of her services as mother; (c) loss of other services; (d) expenses incurred before death (if not previously recovered by her); (e) damages recoverable at common law; (f) punitive damages. The legislature evidently intended to make 'a clean sweep' of the matter; for it expressly provided for the recovery by the wife, or, in case of her death, by her administrator, of all that counsel claims his client (the husband) is entitled to recover in this case. Not only in so many words does the statute provide for the recovery by the wife or her legal personal representative for 'loss of services' and 'medical attendance' and 'all other expenses,' but it provides for the recovery of 'services as wife,' and, that there may be no misunderstanding, ends with this sweeping clause: 'Any (all) elements of damages recoverable at common law.' This statute takes away all common law claims of the husband and completely emancipates the wife."

In the *Rose* case, supra, a wife brought action for personal injury, including pain and suffering, present and future. No claim was made for loss of time and expenses of treatment. On appeal, the defendant there contended that the verdict of \$5,000 was excessive, and the court said, at page 339:

"In view of the elimination of all questions of loss of time and earning capacity and expenses of treatment, we think it must be said that the verdict was a very large one. We are not wholly agreed as to whether we would be justified in ordering a reduction, as a condition of affirmance. In this consideration, we are not unmindful that, under the provisions of Chapter 163 of the Acts of the Thirty-fourth General Assembly, the plaintiff could have recovered for loss of time, as well as for her pain and suffering, and that, by reason of such statute, there can be no outstanding claim against the city in favor of the husband for such item."

It is contended by appellant that in that case the court was not concerned with any claim urged by a husband for moneys expended in procuring medical attention for his wife. We shall, later in the opinion, refer to the matter of money actually expended for medical attention. It is true that such expenses, and the question of loss of time, were not directly involved in the *Rose* case, but the matter was considered as bearing on the question as to whether the amount awarded there was excessive for the injury, pain and suffering. It did have some bearing on that question.

The *Fisher* case, *supra*, was an action brought by the administrator to recover damages for personal injuries resulting in the death of a married woman, and the claim of the defendant there was that the court erred in submitting to the jury the question of damages occasioned by the death of decedent, without evidence as to the value of her services to the plaintiff or to her estate, and the court said, at page 372:

"It is plain that, but for this section (3477-a), the husband might have recovered damages for the loss of the services of his wife, but this section gives a right of recovery to her if she survives, and to her administrator if she dies. This practically takes from the husband, if he should elect

to sue, the right to recover for these things specified in the statute. There could not be double recovery for the same wrong."

It is said by appellant, of the language quoted, that the administrator had included in his claim for damages all of the items permitted under the statute, and there was no claim on behalf of the husband to recover. That is true. But the question involved in that case was as to the measure of damages which might be recovered by the administrator.

In *Lane v. Steiniger*, 174 Iowa 319, the husband brought action for the death of his wife because of the negligence of another, and asked damages because of having been deprived of the services and society of his wife. Subsequently, an amendment was filed to the petition, by which plaintiff sought to recover as administrator of his wife's estate, and the husband withdrew as plaintiff, taking with him his cause of action. The court, referring to the section of the statute now under consideration, said:

"This [statute] necessarily confers on the administrator of the wife's estate, if she die in consequence of the injury, the right to recover for loss of services. All left to the husband, then, was the inconsiderable claim for loss of consortium during a few hours. \* \* \* The husband might also have claimed damages for loss of services, but for the enactment of Section 3477-a."

Appellant argues that consortium cannot be distinguished from loss of services, and appellee concedes that the attempted distinction in some cases between loss of society and the loss of services of the wife is largely visionary. But appellee argues that, whether right or wrong on this, the statute under consideration sets the matter at rest; that not only does it expressly confer on the wife, and, in case of her death, upon her administrator, the right of action for "loss of time, medical and other expenses," but also "any

elements of damages recoverable by common law." That is the wording of the statute in one place, and in another it is, "in addition to such damages as are recoverable by common law." They say that the right of action formerly to recover for loss of society—for consortium—was a common-law "element of damages," and not statutory, and that the sweeping clauses of the statute quoted were intended to take that right from the husband and give it to the wife and her administrator. And they say further that there is in the statute the specific statement that there is conferred upon the administrator of the wife the right to recover "the value of her services as a wife," and that, therefore, in view of the history of the law upon the question, this can have no other meaning than that for the loss of society, and that the cause of action was conferred upon the administrator of the wife. And they say also that it is apparent that whatever injury to the wife deprives the husband of the enjoyment of his wife's society deprives her of the same enjoyment of her time, the enjoyment of each arising from the loss of the wife's time, and they are so bound together that they cannot be separated, even theoretically.

There is an intimation in the *Lane* case that there may still be a recovery for loss of consortium; for it is said in one place, at page 318, that, because the wife survived several hours, the husband might have maintained an action for loss of his wife's society, but that the damages for this would be inconsiderable; and again, at page 319, it was said that all left to the husband was the inconsiderable claim for loss of consortium during a few hours. But we need not discuss or determine the question as to whether there is still left to the husband the right to recover therefor, for the reason that there is no claim in the petition in the instant case for damages for loss of the wife's society.

There can be no question but that, in this case, the wife could recover for loss of her services. This being so, it is

equally clear that the husband may not recover for the same thing. This is so, we think, too, as to the claim in the petition for money expended in securing help to do the work which Mrs. Jacobson had theretofore done in the household. It is argued by appellant that this is a family necessary. This is true as between the person furnishing such help, on the one hand, and the husband and wife, on the other, but such help merely took the place of the wife in the performance of her services. Clearly, there could have been a recovery for this item by the wife, had she sued. This is true, too, as to the items for medicine, medical services and hospital services.

Under these circumstances, we think the plaintiff was not entitled to recover for these last mentioned items, and that the right of recovery for the items sued for is in the wife alone.

It is our conclusion that the demurrer to the petition was properly sustained. The judgment is therefore—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

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P. S. JUNKIN, Appellee, v. PLAIN DEALER PUBLISHING COMPANY, Appellant, et al.

**SPECIFIC PERFORMANCE:** Evidence—Sufficiency. While specific  
1 performance will be decreed only on clear and satisfactory evidence, yet this goes no further than to exact a clear *preponderance* of the evidence.

**CORPORATIONS:** Corporate Powers—Ultra Vires—Debts in Excess  
2 of Authorization. Corporate debts in excess of corporate authorization are not void because of such excess.

*Appeal from Union District Court.*—H. K. EVANS, Judge.

DECEMBER 11, 1917.

ACTION in equity to enforce specific performance of contract. Decree for plaintiff, and the defendant Plain Dealer

Publishing Company appeals. The material facts are stated in the opinion.—*Affirmed.*

*E. L. Carroll*, for appellant.

*L. J. Camp*, for appellee.

WEAVER, J.—At the date of the transaction which is the subject of this controversy, there were three established newspapers published in the city of Creston, to wit: The Advertiser-Gazette, of which the plaintiff herein was proprietor; the Plain Dealer, owned by the Plain Dealer Publishing Company, a corporation; and the Morning American, owned by W. H. Robb. The defendants Beatle and Sampson were stockholders in the Plain Dealer corporation, the former being also its president, and Nye was the editor and general manager of the paper. It is plaintiff's claim that, having learned that Robb desired to dispose of the American, and believing it desirable that said journal be eliminated from the Creston newspaper field, he and the defendants entered into an oral agreement, by which he was authorized to purchase the American, together with its subscription list and other assets, and that, when such property was acquired, plaintiff would take the subscription list at such reasonable valuation as might thereafter be agreed upon. The remainder of the property and materials so purchased, he alleges were to be sold, and, after applying the moneys so realized and the value of the subscription list to the reduction of the cost or expense incurred in the purchase, the remainder was to be treated as a loss, one half of which was to be assumed and borne by plaintiff, and the other half by the defendants. Proceeding according to this agreement, plaintiff says that he did purchase the American from Robb, paying therefor the sum of \$6,000; but when he demanded of defendants the performance of the undertaking on their part, they neglected and refused to proceed any further, or to pay their share of the loss so incurred.



The defendants deny having entered into any such agreement, and further aver that the corporation publishing company was at that time already indebted to the full limit of its authority under its articles of incorporation, and the corporation could not lawfully enter into the alleged contract.

On trial to the court, decree was entered in plaintiff's favor against the publishing company, substantially as prayed, and for a money recovery of one half the loss incurred in the purchase of the property and its subsequent sale. No money judgment was rendered against the other defendants. The corporation alone appeals.

I. In this court, appellant, invoking  
1. SPECIFIC PERFORMANCE: evidence: sufficiency. the rule that specific performance will not be enforced except upon clear and satisfactory evidence of the equitable character of the plaintiff's demand, questions the sufficiency of the evidence to justify the decree rendered. We shall not attempt to recite the statements of the witnesses on either side. We have read the testimony, as shown by the abstract, in full, and while, upon the naked proposition whether there was a final agreement between the parties as alleged by the plaintiff, there is a conflict of evidence, it very clearly preponderates in support of the trial court's finding. It is conceded that there were negotiations between the parties looking to such a deal, and that plaintiff made an offer to proceed and make the purchase on the conditions stated by him. He testifies that Beatle, Sampson and Nye were present, and in one form or another expressed their assent to such arrangement. In this he is corroborated in a very material degree by two other witnesses who were present at some of their meetings; also by the testimony of some of the defendants themselves, and by the acts done and the statements made by the defendants after the purchase was made. It is unnecessary to question the honesty or veracity

of any of the parties to the deal. Disputes and misunderstandings are of very frequent occurrence, even where all parties are of acknowledged integrity, and in cases of this character the courts are concerned only in ascertaining where, under all the attendant circumstances, the apparent preponderance of the evidence is found. Subjected to this test, there can be little doubt that plaintiff's claim has sufficient support to entitle him to a decree.

II. Appellant also relies upon its plea

2. CORPORATIONS: of *ultra vires*, and further asserts that there  
     corporate  
     powers: *ultra*  
     *vires*: debts is no showing of authority from the corpo-  
     in excess of au- ration to Beatle, Sampson and Nye to enter  
     thorization. into any such agreement on its behalf. A  
 corporate debt contracted in excess of the maximum limitation in its articles of incorporation is not void because of such excess. *Garrett v. Burlington Plow Co.*, 70 Iowa 697; *Warfield Howell & Co. v. Marshall County Canning Co.*, 72 Iowa 666; *Traer v. Prospecting Co.*, 124 Iowa 107; *Sioux City Terminal R. & W. Co. v. Trust Co.*, 173 U. S. 99. No other reason is suggested why the contract should be held to be *ultra vires*.

We also agree with the trial court that there was sufficient circumstantial evidence that the three individual defendants were authorized to treat with plaintiff on behalf of the corporation, and that, in any event, their action in that respect was ratified by the conduct of the defendant. It did receive, and for some purpose made at least temporary use of, the subscription list. It also, after the purchase had been made by plaintiff, published in its own newspaper and announced to the world that, in conjunction with the plaintiff, it had purchased the American and eliminated it from the newspaper field in Creston.

The case presented by the appeal is purely one of fact; and, as we are satisfied that the trial court's findings there-

in are well supported by the record, it follows that the decree appealed from is in all respects—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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V. E. MILLER et al., Appellees, v. R. B. BOHANAN, Appellant.

**TRIAL: Instructions—Objections—Waiver.** Objections to instructions not made prior to the submission to the jury are waived. (Section 3705-a, Code Supp., 1913.)

**TRIAL: Issue, Proof and Variance—Date of Contract.** Proof that a contract was entered into a month and a half prior to the time alleged, presents no fatal variance.

**BROKERS: Employment—Bad-Faith Revocation.** A principal may not, after he knows that the broker's proposed purchaser is on the ground, revoke the broker's employment, and then avail himself of the purchaser produced, and escape payment of the agreed commission.

*Appeal from Adams District Court.*—H. K. EVANS, Judge.

DECEMBER 11, 1917.

ACTION at law to recover commissions alleged to have been earned in the sale of land for the defendant. Verdict and judgment for plaintiffs, and the defendant appeals.—*Affirmed*.

*Myerhoff & Gibson*, for appellant.

*A. E. Lee, A. Ray Maxwell*, and *Stanley & Stanley*, for appellees.

WEAVER, J.—The plaintiffs allege an oral contract with the defendant, by which they were authorized to procure a purchaser for defendant's farm of 170 acres, at a rate or price which should net to the defendant \$100 per acre; that by such agreement plaintiffs were to receive as their commission or compensation for procuring such a purchaser whatever sum should be realized upon a sale, so effected, in

excess of \$100 per acre, it being also verbally agreed and understood that defendant should price the land to proposed purchasers at \$110 per acre, and not recede therefrom without the plaintiffs' consent. Plaintiffs further allege that, acting under such agreement, they did procure and furnish to defendant a buyer to whom he sold the land at \$110 per acre, whereby defendant became indebted to them in the sum of \$1,700, for which they ask judgment.

Answering the petition, defendant pleads as follows: (1) Denies the allegations therein made; (2) alleges that, before the alleged procurement of a purchaser, he had specifically and in good faith revoked all authority theretofore given the plaintiffs to act as his agents; that such revocation was made by oral communication direct to the plaintiffs, and by himself entering into a contract with one Dillon, whereby the latter acquired, for a period of several months, beginning with July 1, 1913, an option to purchase the land; and thereafter, defendant notified plaintiff that, pending such option, he would neither sell nor rent the land at any price. Defendant further pleads that after such revocation he placed upon the land a price of \$110 per acre, and listed it with different agents at that price, and that he offered to so list it with the plaintiffs, but they refused to accept the agency on those terms. For a further answer, he alleges that, after the sale of the land, he had a full and complete settlement with the plaintiff Miller, whereby all their mutual accounts and claims were settled and adjusted, and in accordance therewith, Miller then and there paid the defendant the sum of \$324.10, in full of the remainder found due him.

Plaintiffs, replying, denied all the affirmative matters pleaded in the answer. Upon these issues there was a jury trial, and a verdict and judgment for plaintiffs for the full amount of their claim, \$1,700. Various assignments of

error have been argued in support of appellant's demand for reversal of the judgment against him.

I. It is objected that defendant pleaded a settlement with plaintiffs, or one of them, and that the court stated that issue to the jury, but wholly failed to give the jury any instruction whatever as to the law applicable thereto. Ordinarily, such an objection, if well founded, would have to be sustained; but, under the statute as it existed at the time of the trial, the defendant was required to make his objection to the court's charge before the case was submitted to the jury, and to state the grounds upon which the charge was claimed to be erroneous. Appellant did make and file objections to the court's charge, but nowhere raised the particular objection which he now makes thereto. This operates as a waiver, and the question cannot be raised for the first time in this court. *Parkhill v. Bekin's Van & Storage Co.*, 169 Iowa 455, 468. Furthermore, we think it must be said that there is no evidence in the record to support a finding in defendant's favor on this particular issue.

II. In their petition, the plaintiffs allege that the oral contract on which they sue was made on or about August 11, 1913.

On the trial, the testimony offered by them to sustain their claim of a contract of agency had reference to a conversation between the parties, which plaintiffs say took place on July 29, 1913. It is argued that this is a substantial variance from the pleadings, and amounts to such failure of proof as will defeat plaintiffs' right of action. We think the variance is not material, except, perhaps, as it may bear upon the credibility of the plaintiffs as witnesses. The material allegation is that plaintiffs made with defendant an oral agreement, by which he authorized them to procure him a purchaser

for his land on certain stated terms; and if on the trial they offered competent and sufficient evidence of such agreement, and that they furnished a purchaser on the authorized terms before the agency was revoked, and that defendant sold to such purchaser, it would be quite immaterial that the date of the agreement proved was July 29th, instead of the alleged date, August 11th.

III. Defendant as a witness says that, a year or more prior to the date of the alleged agreement upon which the plaintiffs sue, he did list the land for sale with the plaintiff Miller, upon an agreement to pay a commission of \$1 per acre, but that, on July 28, 1913, he revoked that agency because he had given to one Dillon an option to buy or rent the land. Plaintiffs deny ever having the land listed before July 29, 1913, and deny that defendant told them he had given Dillon any option except to lease the property. The defendant insists that even the information given plaintiffs of Dillon's option to lease was itself a sufficient revocation of their agency, if any they had, and that he was prejudiced on the trial by the court's failure to so instruct the jury. We are unable to see how this could operate to defendant's prejudice. Plaintiffs base no claim in this action upon any contract of agency existing prior to the alleged agreement in July, 1913. They claim that such an agreement was made at the date last mentioned, and this the defendant denies. The making of such contract, became, therefore, a jury question, and upon this the verdict is adverse to the defendant. Even if defendant then informed plaintiffs of Dillon's option, as he says he did, that fact does not necessarily disprove the plaintiff's claim that he then gave them an agency to procure a purchaser. Assuming that the jury credited the plaintiffs and their witnesses, the testimony was sufficient to sustain a finding

8. BROKERS: employment: bad-faith revocation.

that such an agreement was made; that plaintiffs or one of them wrote to the man Evans, who became the purchaser, advising him of the opportunity to buy the land at \$110 per acre; that Evans, being thus induced, came to the home of the plaintiff Bargaenholdt, who requested his father to take Evans to the defendant for the purpose of making the sale, if the purchaser was satisfied with the property and the terms; that the elder Bargaenholdt telephoned to defendant, telling him that the proposed purchaser had arrived, and asking if the land was still for sale; that defendant answered in the affirmative, and invited them to come down; that on the next morning the elder Bargaenholdt and Evans went to defendant's home, where negotiations looking to the sale of the land were begun, which ended two days later in a binding contract for a conveyance to be made on the 1st day of March of the next year. There is evidence that, on the evening of the day on which the telephone conversation was had, or on the following day, defendant met the plaintiff Miller, and said that, as the season was getting late, he would revoke the agency he had given plaintiffs, or words to that effect. It is argued for appellant that, if such conversation occurred, it was concededly before defendant had been informed of the production of Evans as a purchaser, and operated to relieve defendant of all further liability. But the evidence was such that the jury could find that the attempted revocation was after defendant had been informed by telephone from Bargaenholdt of Evans' arrival, and, if so, it was then too late for him to revoke the agency, and, while taking advantage of the opportunity so afforded to sell his land, deny the right of plaintiffs to the promised commission, if a commission was promised; and this, as we have said, is quite clearly a question for the jury.

We have examined the record as to other questions raised by counsel, but nowhere find any material error in

the rulings of the trial court. It follows that the judgment appealed from must be and is hereby—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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LOUIS PLAGMANN, Appellee, v. CITY OF DAVENPORT et al.,  
Appellants.

**FRAUD: Pleading—Sufficiency.** An allegation that a certain article or thing is a "fraud," without any allegation of fact, presents no issue.

**MUNICIPAL CORPORATIONS: Public Improvements—Assessment**  
2 —**Injunction—Fraud.** Fraud sufficient to justify enjoining the collection of a special assessment for the cost of an improvement may not be inferred from the naked fact that, after several years of service, the improvement proved to be of poor quality.

**MUNICIPAL CORPORATIONS: Public Improvements—Enjoining**  
3 **Assessments—Limitation of Actions.** It is suggested that an action to test the legality of a street improvement, on the ground that the poor quality of the improvement has resulted in a fraud upon the property owner, is barred after the lapse of three months from the date of the order for the issuance of the certificates or bonds. (Section 989, Code, 1897.)

*Appeal from Scott District Court.*—WM. THEOPHILUS,  
Judge.

DECEMBER 11, 1917.

SUIT in equity to enjoin the collection of a special assessment levied on plaintiff's property for the cost of paving the street upon which it abuts. There was a decree for plaintiff, and defendants appeal.—*Reversed and remanded*.

Waldo Becker and Carl H. Lambach, for appellants.

Scott & Scott, for appellee.

WEAVER, J.—The petition in this action was filed January 16, 1916. It alleges that plaintiff is a resident taxpayer of the city

1. **FRAUD: plead-  
ing: suff-  
iciency.**



of Davenport and owns a certain lot fronting on Fillmore Street in that city; that, on March 16, 1909, the city entered into a written contract with the Davenport Granitoid Company for the paving of Fillmore Street; that on November 9, 1909, the cost of such paving in front of said lot was assessed and levied thereon, and made payable in seven successive annual installments; that plaintiff, without any knowledge of fraud committed in the performance of said contract, has since that date paid several of said installments; and that, unless restrained therefrom, the city will proceed to collect the remaining installments as they fall due; that said pavement so constructed "has become worthless and useless and a fraud upon your plaintiff," in that its surface has become cracked and worn and rutted; that the top coat was "permitted to become frozen when laid down on the street," and that "after four years its life was spent," causing it to crumble and disintegrate; that the contractor made use of an improper mixture of materials, and thereby affected the durability of the work; and that the contractor in many other respects failed to construct the paving according to its agreement and according to the requirements of the specifications. By an amendment, plaintiff further pleads that he did not know of the alleged fraud until within the year prior to the beginning of this suit.

The defendants deny the allegations of fraud, and allege that the pavement was regularly ordered and laid in the manner provided by law. They further aver that plaintiff, in consideration of being allowed to pay the assessment on his lot in deferred installments, signed and delivered to the city his written promise and agreement to waive all objection to said assessment, on account of any illegality or irregularity in said assessment or levy on said property, and to pay the same with interest as the installments should become due; and that he not only thus waived the objections he now attempts to raise, but in fact did pay several of

said installments, by reason of all of which he ought not now to be heard to deny the validity of the charge upon his property. It is further alleged in defense that more than six years had elapsed after said levy before this suit was begun, and in so acting, plaintiff has allowed the contractor's bond guaranteeing the pavement to expire, leaving the city without remedy against the contractor, should it be held liable to plaintiff in this action.

The evidence on the trial tends to show

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|-------------------------------|---|
| 2. MUNICIPAL<br>CORPORATIONS: | that the paving is of concrete, and, at the   |
| public im-                    | time of the trial, some seven years after the |
| provements:                   | work was done, it had developed many          |
| assessment:                   | cracks and broken areas, and in numerous      |
| injunction:                   |   |
| fraud.                        |   |

places showed signs of crumbling and disintegration. The expert witnesses in the case quite generally agree that, while such results may have been attributable to a freezing of the material when newly laid, or to an improper mixture of parts, or to the quality of the cement, yet concrete or cement is of such erratic nature and is as yet so imperfectly understood that, even where the materials seem to be of good quality and the work carefully done, it will sometimes prove a failure, while at other times, under apparently the same circumstances, it will prove to be solid and durable. Except as the inference is drawn from the unsatisfactory character of the paving, there is little, if any, substantial evidence that the work was not done in accordance with the contract specifications, nor that any concealment or artifice was practiced by the contractor to deceive or mislead the city or the property owners as to the materials used in the paving, or as to the kind or quality of the work done. It may be admitted that the paving was not a good job of work,—evidently it was not; and, if we were trying an action between the city and the contractor for the recovery of damages on account of nonperformance of the contract, the testimony given in this proceeding would, for

the most part, be both competent and material; but it falls far short of proving a case of fraud. Indeed, there is not an allegation in the entire petition which in any proper or legal sense amounts to a charge of fraud. To call a thing a "fraud," without a statement of facts constituting fraud, is not an issuable allegation. Fraud, as used in this connection, has reference to conduct, words or representations which partake in some material degree of artifice or deception employed to deceive, cheat or circumvent another; it is some form of deception consciously employed for the purpose of misleading another. Nothing of that kind is here pleaded or shown. It is shown clearly enough that the paving is of poor quality, though the cause thereof is left in great doubt; but that does not show a cause of action in the plaintiff's favor. The plaintiff lived in the city and saw the work as it was done. He had daily opportunity to examine it as it progressed. He does not claim or show that anyone deceived or misled him as to the facts. When the work was done, he made no objection thereto and did not appeal from the assessment, but took advantage of the law which allowed him seven years in which to pay the assessment, on condition that he sign the waiver and a written promise to pay the assessment, thus transmuting the character of the charge from a simple lien on his property into a personal obligation to pay. He did pay three successive installments. To now say, as stated in his petition, that the pavement "has become worthless and useless and a fraud upon your plaintiff," is not a charge of fraud, nor will any quantity of evidence that the pavement with the passage of the years had crumbled or disintegrated, or become cracked or broken, amount to proof of fraud. The case made by plaintiff is without any equitable feature to justify the court at this late day in disturbing the assessment on his property, and the petition should have been dismissed. Under very similar circum-

stances, it has been held in Wisconsin that a property owner acting in time may have a remedy at law against the city, but that question is not involved in this action. *Crowley v. City of Milwaukee*, (Wis.) 164 N. W. 833.

The conclusion above announced renders

8. MUNICIPAL  
CORPORATIONS:  
public im-  
provements:  
enjoining as-  
sessments:  
limitation of  
actions.

it unnecessary that we enter upon any discussion of the statute of limitations pleaded by the defendants (Code, Section 989), which reads as follows:

"No action shall be brought, questioning the legality of any street improvement or sewer certificates or bonds, from and after three months from the time the issuance of such certificates or bonds is ordered by the proper authority."

There are many obvious reasons why actions of this kind should be subject to a shortened statute of limitations, and the terms of this statute would seem to be fairly applicable to the present proceeding. See also *City of Topeka v. Gage*, (Kans.) 24 Pac. 82; *Gaastra v. City of Kenosha*, 146 Wis. 93.

It follows that the decree appealed from must be reversed, and the cause remanded, with directions to the district court to enter final judgment dismissing the plaintiff's petition.—*Reversed and remanded.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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H. H. QUINN, Appellee, v. J. H. MUMM, Appellant.

LANDLORD AND TENANT: Attachment—Delivery Bond—Valid-

- 1 ity. A delivery bond, *though not provided for by law*, by which defendant in landlord's attachment obtains possession of the attached property, conditioned "that he will deliver the property or its value in satisfaction of any judgment which the landlord might obtain in the action," is enforceable as a common-

law bond, *without any showing that the landlord actually had a lien on the property attached.*

**BONDS: Requisites and Validity—Common-Law Bonds.** Bonds <sup>2</sup> when neither provided for nor prohibited nor condemned by public policy may nevertheless be valid and enforceable as common-law obligations.

*Appeal from Scott District Court.*—M. F. DONEGAN, Judge.

DECEMBER 11, 1917.

THE opinion states the case.—*Affirmed.*

*Ruymann & Ruymann*, for appellant.

*Scott & Scott*, for appellee.

WEAVER, J.—In March, 1915, plaintiff herein began action to recover from one Adolph Mumm a sum alleged to be due and unpaid on account of rent of real property, and in aid of his claim sued out a landlord's writ of attachment, which was levied upon certain personal property. The said Adolph Mumm resisted the claim, and, desiring to relieve the property from the lien of the levy before the cause came on for trial, delivered to the sheriff his bond with the present defendant as surety thereon, conditioned that, if the attachment defendant should thereafter redeliver to the attachment plaintiff or to the sheriff or other person lawfully entitled thereto, the property which had been attached, or its money value, for the purpose of satisfying any judgment plaintiff might recover in that action, then the bond should become void; otherwise, to remain in full force and effect. The bond was accepted and the property released to the attachment defendant. Upon trial of the attachment case, the plaintiff recovered judgment against Adolph Mumm for the sum of \$71.52, with costs taxed at \$125.10. Thereafter, said Adolph Mumm paid the sum of \$79.52 upon the judgment, and, as he failed

1. LANDLORD AND  
TENANT: at-  
tachment: de-  
livery bond:  
validity.

to pay or satisfy the remainder of the recovery, the plaintiff brought this action upon the delivery bond.

The petition states the facts hereinbefore recited, sets out the delivery bond, and demands judgment thereon. The answer filed is simply a denial of each and every allegation of the petition. The cause was submitted upon a stipulation or agreed statement of facts, the same being substantially as hereinbefore stated, together with a copy of the lease upon which the original action was brought. The court found for the plaintiff, and rendered judgment against defendant for the amount due and unpaid on the recovery in the attachment proceeding, and the defendant appeals.

The defense, if we understand counsel, is based on the proposition that the statute which provides for a delivery bond for the release of attached property has no application to proceedings to enforce a landlord's lien, and therefore no action will lie upon such obligation. Such defense is clearly without merit. The same objection was raised in *Painter v. Gibson*, 88 Iowa 120, involving a very similar state of facts, and it is there said that, although the statute does not provide for the giving of a delivery bond in landlord's attachment proceedings, it is still "the well-settled law in this state, however, that a bond not provided for by statute may be valid as a common-law obligation, if not in violation of a statute, nor contrary to public policy." The same thing was held in *Garretson v. Reeder*, 23 Iowa 21. And why should not such bond be held good? The defendant desired to release the attached property, and for that purpose tendered the bond to return it to the officer or pay its value in satisfaction of any judgment plaintiff might recover in that proceeding. His offer was accepted, and the property released. He thus received full consideration for his promise. The condition

2. BONDS: required sites and validity: common-law bonds.

of the bond has confessedly been broken, and there is and should be no principle of law which will enable him to escape the fulfillment of his undertaking. There is certainly no statute or principle of public policy which excuses a man from the performance of his voluntary promise when made upon adequate consideration. But it is said that the landlord could not subject the property to his claim unless he had a lien upon it, and there is here no showing that he had such lien. This plea is unavailing in an action upon the bond. Defendant recognized the fact that an attachment had in fact been levied on the property, and, in consideration of having the property released, he promised to return it in kind or its money value in discharge of plaintiff's judgment, and this was a waiver of any irregularity in the attachment. *Case Threshing Machine Co. v. Merrill*, 68 Iowa 540; *New Haven Lumber Co. v. Raymond*, 76 Iowa 225. Whether, had the property been returned to the officer, pursuant to the terms of the bond, the defendant could have then interposed objection to its sale under the writ, on the ground that it was not subject to the landlord's lien, we need not consider or decide, as it is not presented by the record.

The trial court was right in the premises, and the judgment appealed from is—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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W. L. RILEY, Appellant, v. ED. CRAWFORD et al., Appellees.

**CERTIORARI: Proceedings and Determination—Scope of Review—Discharge of Policeman—Insufficiency of Evidence.** On certiorari to review the action of the Civil Service Commission and other city officers in discharging an employee, the *sufficiency* of the evidence on which the discharge was based will *not* be reviewed. The review will go no further than to determine whether the

discharging board and officers exceeded their jurisdiction, or otherwise acted illegally.

*Appeal from Polk District Court.*—W. S. AYRES, Judge.

DECEMBER 11, 1917.

THE opinion states the case.—*Affirmed.*

*A. L. Steele*, for appellant.

*H. W. Byers, Guy Miller and Thomas Watters, Jr.*, for appellees.

WEAVER, J.—This is a proceeding in certiorari begun in the district court of Polk County to review the action of the defendants Ed. Crawford, as chief of police of the city of Des Moines, W. F. Mitchell, as superintendent of public safety of said city, and H. H. Stipp, C. W. Hummell and Jay Tone, constituting the Civil Service Commission of said city, in discharging the plaintiff from his position as a member of the police force.

The petition alleges that plaintiff was, for more than 12 years, a duly appointed, commissioned and acting member of said force, paying a portion of his salary into the Police Pension Fund, in which he had acquired a vested interest; that, on December 10, 1914, he was orally notified by the night captain of the force that he was discharged, and his further services dispensed with; that he was informed that there had been filed with the chief of police an order, signed by the superintendent of public safety, purporting to have been made under instructions from the civil service commission, discharging from service 10 members of the police force, including the plaintiff; that he thereupon, at once and in due time, appealed from the order of the superintendent of public safety to the civil service commission; that the defendants wrongfully refused to make or specify written charges in justification of the order discharging the plaintiff; that he received oral notice that the



commission would meet to consider his case on the evening of January 12, 1915; that he appeared at the time and place mentioned, but still no written charge or accusation was made against him, though he did receive information that he was accused of protecting vice,—but the charge was untrue and no evidence was offered sustaining it; that thereupon the commission entered upon its record a dismissal of his appeal.

In all these matters, he alleges that the commission exceeded its jurisdiction and acted illegally and without jurisdiction or authority, and he asks that such proceedings may be reviewed, and that the order discharging him from the service be annulled.

The writ was issued, and, responding thereto, the defendants caused the record of its proceedings to be certified to the district court. They admit that the civil service commission of the city did, on November 30, 1914, pass a resolution discharging plaintiff from the police force, and that thereafter plaintiff appealed, and his appeal was dismissed. They admit that plaintiff was appointed to a place on the police force, that he served for a period of years thereon, and contributed to the Police Pension Fund as alleged; but deny all other allegations made.

These issues were submitted to the trial court, together with the record returned to that court by the defendants and a transcript of testimony taken upon the hearing of the appeal before the commission. Upon consideration of the entire record, the trial court found that it was without jurisdiction to pass upon the sufficiency of the evidence, and dismissed the proceeding. Plaintiff appeals.

While counsel have more or less extensively discussed the proposition whether certiorari will lie to review the action of the civil service board in dismissing a police officer, we think that question is not presented by this appeal. The court did not find or rule that it had no such jurisdic-

tion, but what it did find and announce was that it was without jurisdiction to pass upon the sufficiency of the evidence upon which the civil service commission acted in ordering the plaintiff's discharge. In other words, we interpret the action and ruling of the court to be that, although it has jurisdiction to entertain certiorari to review any action of the commission which is charged to be illegal, or in excess of its jurisdiction, it does not extend to or include the determination of disputed questions of fact; and, as the present controversy seems to have settled down to a dispute upon the sufficiency of evidence to sustain the action of the commission, the court refused to pass upon it in this proceeding. We are disposed to approve the ruling as correct. To hold otherwise is to make use of the writ of certiorari as a remedy for the correction of errors—an office it is not intended to perform. *Lehigh Sewer Pipe & Tile Co. v. Town of Lehigh*, 156 Iowa 386; *Butterfield v. Treichler*, 113 Iowa 328; *Ferguson & Son v. Board of Review*, 119 Iowa 338; *Tiedt v. Carstensen*, 61 Iowa 334. In *Butin v. Civil Service Commission*, 179 Iowa 1048, the right to review the evidence upon certiorari was sustained expressly upon the ground that a special statutory provision applicable thereto granted such right; but it was there carefully pointed out that, except for such statute, certiorari would not be available for the correction of errors on the part of the commission. There is no such statute applicable to this case, and whatever right plaintiff may possess to have the action of the commission reviewed in certiorari proceedings is to be found in the general law on the subject; and this, as we have said in the *Butin* case, does not extend to a review of the sufficiency of the evidence. If it should be suggested that in this case the absence of evidence in support of the action of the commission is so complete that the question becomes one of law, we have to say that we think this is not the case. It may be admitted that the

showing in support of the charge is by no means conclusive, but, on the contrary, is weak and inconclusive; yet it would be going entirely too far to say that there is an entire absence of evidence on which to base a finding unfavorable to plaintiff. The rule which prevents the court, upon certiorari or by any other proceeding, from undue and meddling interference in the details of municipal government, is one so manifestly wise as to deserve and command general approval. If the law were such that every order of discharge or suspension or other measure of discipline intended to insure prompt and faithful discharge of duty by employes and ministerial officers generally could be dragged through the courts and set aside or nullified because the courts may disagree with the municipal authorities upon the merits of disputed questions of fact, discipline would be destroyed, and efficiency in public positions become a lost art. Wherever the statute has guarded the right of the officer to his position by prescribing the manner in which and means by which he may be removed, the courts will protect him in that right,—that is, the court will support his claim that the methods provided by the law shall be substantially followed; but the court will not assume or take to itself authority to try the merits of a charge which the statute has expressly delegated to another tribunal.

The trial court correctly refused to enter that field, and the judgment below is, therefore,—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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HENRY SCHAFROTH, Appellant, v. BUENA VISTA COUNTY et al., Appellees.

**DRAINS: Establishment—Engineer's Report—Sufficiency.** Preliminary reports by the engineer, even though lacking in *some* information which might be of value, may be sufficient to give

the establishing board jurisdiction. So held when the report *did* show (a) the boundaries of the proposed district, (b) the location, starting point, route, and terminus of each of the proposed drains, (c) the overflowed lands, and (d) elevations and depressions.

**DRAINS: Establishment—Territorial Extent—Lands Already Fully**

**2 Drained.** Lands *already completely tiled* are justifiably included within a drainage district if *some* special benefit will result to the lands by reason of the drainage district's furnishing a more adequate outlet for said tile.

*Appeal from Buena Vista District Court.—D. F. COYLE, Judge.*

DECEMBER 11, 1917.

APPEAL from the establishment of a drainage district. The facts are fully stated in the opinion.—*Affirmed.*

*James De Land*, for appellant.

*Faville & Whitney* and *Guy E. Mack*, for appellees.

STEVENS, J.—I. Plaintiff is the owner of the south one half of Section 34, Township 90, Range 36, Buena Vista County, Iowa. On April 28, 1915, a petition was filed in the office of the county auditor of Buena Vista County, praying the establishment of a drainage district, which was, on the 16th day of August, 1915, established by the board of supervisors. Appellant, in due time, filed objections to the establishment, and, upon hearing, same were rejected, and the improvement established in accordance with the recommendations of the engineer. From this order, plaintiff appealed to the district court, and from its order and judgment sustaining the finding of the board of supervisors, to this court.

But two questions are presented upon this appeal, and what is said herein is confined wholly to a consideration thereof. Appellees contend: (1) That the report and plat of the engineer appointed by the board of supervisors to

examine and report on the feasibility of the proposed improvement are so inadequate and incomplete that the board was not sufficiently advised thereby of the matters required by statute to be shown by the engineer in his report, of the nature, extent and character of the proposed improvement recommended by him; and (2) that the lands of appellant included within the boundaries of said district will not be improved or benefited in any way thereby.

The engineer in his report refers to a profile and plat, but we do not have the profile before us. A blue print of the map or plat accompanies appellant's abstract, and shows the boundaries of the district, the location of the proposed tile drainage to be constructed, the swamp and other overflowed lands, and other data necessary to an intelligent understanding of the condition of the lands sought to be improved. The report of the engineer, which is set out in full, shows the starting point, route, terminus and location of each drain, with numerous elevations, ponds and depressions included within the district. While other information might have been incorporated therein that would have been helpful to the board of supervisors in passing upon the feasibility of the proposed improvement, we think the plat and report of the engineer sufficiently comply with the statute, and that the board of supervisors had jurisdiction to act upon the petition and recommendation of the engineer.

II. The principal contention of appellant, however, is that he has already installed on his premises a complete system of tile drainage which effectually drains the same; that his land is higher than the surrounding land and is not subject to overflow from surface waters; and that same will be in no wise specially benefited by the proposed improvement. It appears to be conceded that

1. DRAINS: establishment: engineer's report: sufficiency.

2. DRAINS: establishment: territorial extent: lands already fully drained.

appellant has placed approximately 27,000 tile on his land, that same is well drained thereby, that no part thereof is swamp, and that the water accumulating thereon will be more rapidly carried away by the proposed system of drainage than at present; and it is claimed that, by connecting the tile drainage which it is proposed to construct with that of appellant, the fall at the outlet and the outlet for his tiling will be improved and rendered less likely to become obstructed, and the water gotten away underground more rapidly, and that appellant's land will, to some extent, benefit thereby. The engineer in charge of the improvement testified:

"By this proposed district we provide adequate means to take care of all that water by tile, so there would be no surface water overflowing in the area, except at some periods of extra heavy rains. The three 40's of the Rodda land, and the Schafroth land, would, the same as the total area, receive what we call a nominal or general benefit—the whole watershed. We make the tiling system continuous, instead of their having an outlet to maintain. Our system will improve this outlet in that we will take all the water underground in our tile, whereas at present their outlet is partially filled ahead with dirt in their open ditch. We will provide them a free outlet and a permanent outlet of such depth that they will not have the dirt washed away from the top of their tile and have to replace it, as they have done this summer. If the dirt washes down from over the tile, it causes a stoppage in the outlet. If that is cleaned out, it will recur again. If our system is put in, and adequate tile placed at the outlet, it will be just like any other point in the tile system. This will improve the outlet for their whole system of tile, and make the maintenance of an outlet at that point unnecessary. The system I have planned is designed to be adequate to take care of the water that

would be brought through the drainage system of Rodda and Schafroth and Storey, and the increased water that would flow into the tile naturally from the ground where it is laid, and take care of the whole proposition under normal conditions."

From the above evidence, it appears that appellant's land will derive some benefit from the improvement.

As above stated, the plaintiff appealed from the order establishing the district; but his only grievance is the inclusion of his land therein. The question of whether the land in question will be benefited to a large or small extent is not before us. The engineer appointed by the board of supervisors, who, it must be assumed, was competent and disinterested, reported in favor of the inclusion of plaintiff's land in the district, and, upon the trial, testified as above set out. The board of supervisors and the district court found that plaintiff's land would receive some benefit, and ought to be retained in the district. It is contended by appellees that the highways included within the district will be greatly improved by carrying the water therefrom through tile drains, and that appellant will derive some benefit therefrom. The highway which it is sought to improve lies more than half a mile from plaintiff's land, and it does not appear from the evidence that the improvement of the drainage of the highway will confer any special benefit thereon. Plaintiff's land can be assessed only for such special benefits as are conferred thereon by the improvement, and such as are separate and distinct from the benefits accruing therefrom to the public generally. *Zinser v. Board of Supervisors*, 137 Iowa 660; *Wood v. Honey Creek Drainage & Levee Dist.*, 180 Iowa 159.

The evidence offered upon the trial is in conflict. Appellant and several witnesses called by him, including a civil engineer, testified that his land would derive no

benefit whatever from the improvement; but the board of supervisors and the district court found otherwise, basing their finding, no doubt, largely upon the report and testimony of the engineer in charge. The authority of the board to establish the improvement with boundaries including therein appellant's land, does not depend upon the extent to which the lands will be benefited, but upon whether same will in fact receive some benefit from such improvement. None of the lands included within the district should be assessed in excess of the actual benefits accruing from the improvement. We cannot assume that the lands of appellant will be assessed for any portion of the costs in excess of the benefits derived therefrom.

Upon a careful consideration of the record and the questions argued by counsel, we reach the conclusion that the judgment of the district court should not be disturbed, and same is, therefore,—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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L. A. SEELMAN, Appellee, v. FARMERS' CO-OPERATIVE COMPANY, Appellant.

**MASTER AND SERVANT: The Relation—Wrongful Discharge—**

- 1 **Evidence—Pleading.** Evidence tending to show a cause for the discharge of a servant is wholly inadmissible when there exists no basis in the pleading for such evidence, and when, if there was such basis, no attempt is made to show that the servant was responsible for such cause.

**MASTER AND SERVANT: The Relation—Wrongful Discharge—**

- 2 **Non-Moving Cause.** A wrongful discharge of a servant may not be justified by establishing a fact which in no manner was the moving cause of the discharge.

*Appeal from Worth District Court.*—M. F. EDWARDS, Judge.

DECEMBER 11, 1917.



ACTION at law to recover upon contract of employment. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

*M. H. Kepler*, for appellant.

*Dunn & Bryant*, for appellee.

WEAVER, J.—The plaintiff alleges that on or about August 1, 1914, he entered into a written contract of employment with the defendant, the terms of which contract are stated therein as follows:

“Contract between Farmers Co-operative Co. and L. A. Seelman.

“The party of the first part agrees to pay to the party of the second part \$110 (One hundred ten dollars) per month, for one year beginning August 1, 1914, as manager of their elevator at Northwood, or as long as he gives satisfaction. The party of the second part agrees to manage their business to his best ability, and keep accurate account of all business done by him and to render a statement or report every three months.

“Party of the second part—L. A. Seelman.

“Party of the first part—Otto Buth, Ed. Swensrud.”

He further alleges that in pursuance of such contract he entered upon such employment and continued therein until the 5th day of November, 1914, when defendant leased its elevator which plaintiff was employed to manage, and wrongfully discharged him from their service. He further alleges that under his said contract he was entitled to continuous employment in said capacity at \$110 per month until August 1, 1915; that after his said discharge, though he made reasonable effort to obtain other employment, he failed to do so until May 1, 1915, when he secured a place for the remainder of the term at the rate of \$100 per month.

He asks judgment for the damages thus sustained in the aggregate sum of \$671.65.

Answering the petition, defendant admits making the written contract therein mentioned, but avers that such writing does not contain the entire agreement between the parties. It alleges that such contract was made upon the express oral agreement that plaintiff should give to defendant a bond, with approved sureties, in the amount of \$5,000 for the faithful performance of his duties, and that the contract might be terminated at any time by the defendant. It is further alleged that the defendant is a corporation, the by-laws of which require that the manager of its elevator shall give bond acceptable to its board of directors, but plaintiff wholly neglected and failed to comply with such requirement, although he orally promised so to do as an inducement to the making of the contract sued upon. In another count of the answer it is alleged that, after the making of said contract, "the plaintiff failed to give satisfaction to the defendant, and the services of the plaintiff rendered to defendant were not satisfactory." By way of counterclaim defendant further alleges that, while in its employment, plaintiff took and converted to his own use, of the property of the defendant, \$10 in money and 10 tons of coal of the value of \$90, for all of which it asks judgment.

Upon a trial of these issues to the jury, there was a verdict for plaintiff for \$631.65, and from the judgment rendered thereon, the defendant appeals. The number of errors assigned is very large, but of those argued the following are all which require discussion.

- I. It is said that the court erred in ruling out the testimony of one of the directors of the company that he could see that the elevator was losing trade, "that most of the trade was going away;" also of another

1. MASTER AND  
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witness that he noticed that the manner and demeanor of the plaintiff in dealing with customers was different from what it had been earlier in his service; and of another that he (the witness) told the board of directors that he "didn't think the business was running exactly right,—we wasn't getting our share of the grain." As to these complaints there are two sufficient reasons for overruling the assignment of error. In the first place there is no pleading or answer to which the testimony is relevant. Under the issues joined, plaintiff was not bound to prove that his services were satisfactory to the defendant. If the defendant desired to defend on the theory that plaintiff had in some manner given defendant reasonable ground for dissatisfaction with his services, and that for such reason it had terminated the contract of employment, that fact would constitute an affirmative defense which, to be of any avail, should be pleaded. A mere statement that plaintiff did not give satisfaction, or that his services were not satisfactory, is not an issuable averment, in the absence of some allegation of the cause of such dissatisfaction. Nothing of the kind is attempted in the answer. Again, the offer of evidence that the trade was falling off, or was becoming unprofitable, would be entirely immaterial upon this question unless plaintiff proposed further to show that such decrease in business or profits was in some manner due to the fault of the plaintiff. No such offer was made. A decrease in business could easily happen without any reason therefor chargeable to the manager of the elevator. Indeed, it appears in the record that shortly before the date of the contract a rival grain buyer had opened business in competition with the defendant, and if this had the effect to divert some of the defendant's trade, it affords no just ground for dissatisfaction with the plaintiff's services. It may be added also that, when the contract in this case was made, plaintiff had already been in defendant's employment in that capacity

for a year, and it may be presumed that his ability and fitness for the position were already well known to the defendant.

II. Appellant's counsel further argue

2. MASTER AND SERVANT: the relation: wrongful discharge: non-moving cause.

that defendant is absolved from any claim by plaintiff under the contract because he failed to furnish a bond to secure faithful performance of his services. The defense is without merit. Had the giving of the bond been made a condition of his employment, and plaintiff, failing to provide the bond, had been discharged on that account, the plea would be good. But such is not the record. Plaintiff had served the defendant in this capacity during the preceding year, and defendant itself had paid for the bond. When the new contract was made, it appears that for some reason a rebonding in the same company was not found practicable, and plaintiff was asked if he could not procure one, and said he would do so. There is no competent evidence that the contract of employment was made subject to that condition. On the contrary, plaintiff entered upon and continued his service under said contract, and was paid his contract wages without objection until defendant put an end to the business by leasing the elevator. It further appears from the official record of the meeting of the board of directors in October, 1914, that the subject was up for discussion, and it was first voted to call on plaintiff to furnish the bond by November 1, 1914; but, the subject of leasing the elevator having also arisen, the motion was "recalled," and at the same meeting it was voted to make the lease. The only reasonable explanation for reconsidering or recalling the vote to require the bond is that, the business being closed out by the lease, and the plaintiff's services being no longer required, the matter of a bond became immaterial. When plaintiff was discharged, there was no pretense that it was because of his failure to furnish a bond, nor even that

it was because of unsatisfactory service, the only explanation then given being that the company was going out of business and did not need him any more, except that it wanted him to remain another week in order to complete the books and accounts and to make out a report of the business. Indeed, it is a fair inference, if not the only inference, from the admitted facts, that defendant closed out its business without taking into consideration its liability to plaintiff upon the contract with him, and all of the effort thereafter made to plead the failure to give a bond, and to show dissatisfaction with plaintiff's services, by way of a defense to his action for damages, is the fruit of afterthought. Having kept him in its service under the contract until it had disposed of the business, and then discharged him when it no longer required the service of anybody as a manager of the elevator, it is entirely too late, when sued for damages, to fall back on its reserved right to discharge him for failure to do his work satisfactorily.

III. Some exceptions have been preserved to the charge of the court to the jury. We have examined the record with reference thereto, and find no error of which the defendant can complain, the charge as a whole being, if anything, more favorable to the defendant than it was entitled to.

Other questions argued are governed by the conclusions already stated, and require no further discussion. The judgment below is—*Affirmed*.

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.

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STATE OF IOWA ex rel. W. M. BEU et al., Appellants, v E. H. LOCKWOOD et al., Appellees.

**SCHOOLS AND SCHOOL DISTRICTS: Consolidation—Election—**

1 **Failure to Provide Separate Ballot Boxes.** Failure of election officials to provide separate ballot boxes for electors residing

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within and without villages, etc., does not invalidate an election in favor of consolidation when it is made to appear that a majority of the electors both *outside* and *inside* villages, etc., voted in favor of the consolidation. (Sec. 2794-a, Code Supp., 1913.)

**ELECTIONS: Conduct of Elections—Irregularities.** Principle recognized that irregularities and omissions of clear statutory requirements *by election officials* do not necessarily invalidate an election.

**SCHOOLS AND SCHOOL DISTRICTS: Consolidation—Election—**

3 **How Elector Voted—Oral Testimony.** The voluntary oral testimony of electors as to *how* they voted at an election to form a consolidated school district is competent on the question whether a majority of the electors, both *inside* and *outside* a village, voted in favor of consolidation, and *no other means exists to decide said question*. So held where there was an omission to provide separate ballot boxes. (Sec. 2794-a, Code Supp., 1913.)

**ELECTIONS: Contests—Oral Testimony as to How Elector Voted.**

4 Principle recognized that, under some circumstances, an elector may voluntarily testify *how* he voted

*Appeal from Bremer District Court.*—J. J. CLARK, Judge.

DECEMBER 11, 1917.

ACTION to test the legality of the attempted consolidation of certain territory in Bremer and Fayette Counties into a consolidated school district. There was a trial to the court upon an agreed statement of facts. Plaintiff's petition was dismissed, and it appeals.—*Affirmed*.

*Sager & Sweet*, for appellants.

*C. B. Hughes, W. J. Ainsworth, and W. H. Antes*, for appellees.

1. SCHOOLS AND SCHOOL DISTRICTS: consolidation: election: failure to provide separate ballot boxes.

PRESTON, J.—Upon the refusal of the county attorneys to bring suit, a judge of the district court gave relators leave to commence action. Plaintiffs thereupon filed their petition, and alleged, in substance, that they are property owners and taxpayers

within the limits of the territory of the proposed school district; that defendants are exercising authority illegally, as the pretended officers and directors of the pretended school district; that there is in fact no such school district, because no valid election was ever held authorizing the same; that the platted village of Oran is within the pretended district; that, at a pretended election held about February 23, 1915, for the organization of said pretended school district, no separate ballot boxes were provided in which the voters within and without the village of Oran deposited their ballots, but that all ballots were cast in one box; that voters residing in the village and outside thereof voted at said election. Relators ask that defendants be required to show by what authority they claim to hold and exercise the rights, powers and authority of officers and directors of said district; that defendants be ousted and altogether excluded from such offices, etc.

The allegations are denied, except that some are admitted. Further answering, defendants say that, at the date of said election, there resided within the village aforesaid 18 voters who cast their ballots, and that, without the platted limits of said village, there resided 76 voters who cast their ballots; that, of the 94 ballots so cast, 62 were in favor of consolidation, 31 were opposed, and 1 ballot was spoiled; that every ballot cast by the voters within the platted village of Oran was in favor of consolidation; and that, of the voters outside, 44 were cast in favor of consolidation and 31 in opposition; that a clear majority of the votes both within and without said village were cast in favor of the organization and consolidation of the aforesaid district. It was stipulated in writing as follows:

"1. The plaintiffs are citizens of the state and taxpayers owning land within the limits of the territory embraced in the proposed consolidated school district referred to in the pleadings.

"2. That plaintiffs are acting not only in their own behalf but in behalf of numerous other taxpayers living within the territory embraced by the proposed district.

"3. That the defendants John Clark, Jesse Clark and Henry Etgeton are citizens and residents of Bremer County, and the defendants E. H. Lockwood, August Bahe and L. A. Rohde are residents of Fayette County.

"4. That all of said defendants reside in and about the village of Oran in Fayette County, and claim to exercise authority, and claim the right to act as officers and directors of the 'Bremer-Fayette Consolidated Independent School District of Bremer and Fayette Counties,' under and by virtue of the election hereinafter referred to. That the defendants are acting and claim the right to act under such election as officers, directors and secretary of said district.

"5. That within the territory included within the consolidated district which was sought to be established by the election is located the village of Oran, which is and for years has been a regularly laid out and platted village.

"6. That the proposed consolidated school district included not only the village of Oran, but included territory outside of the platted limits of said village of Oran.

"7. That on February 23, 1915, there was held an election for the purpose of determining the question whether the consolidated district herein named should be formed, and that at the election so held votes were cast by residents of the village of Oran and residents of the platted portion thereof, and also by voters residing upon the territory outside of the platted limits of said village of Oran.

"8. That at said election but one ballot box was provided for the reception of all the ballots cast at said election, there being no separate ballot boxes provided in which to deposit the votes cast by the voters for their respective territory.

"9. That at said election a number of voters residing



in the village of Oran voted at said election, and at the same election a number of voters residing outside of said village voted thereat—all ballots being deposited in the one ballot box. \* \* \*

"11. It is further stipulated that, if the voters who voted at said election were called, and allowed to testify over the objection herein set out, they would testify to the facts hereinafter set forth; and the court may regard such facts as offered by the lips of said voters, subject to the following objection, which shall be considered and ruled upon as if the voters were called and sworn and offered to testify to said matters in open court, to wit:

" 'Plaintiffs object to the testimony proposed to be offered on the ground that the same is incompetent, irrelevant and immaterial; that the voters are not competent to testify how they voted at said election; that the evidence proposed to be offered is secondary and not the best evidence, and that the only competent evidence on the question of how many votes were cast and whether cast in the affirmative or negative of the question voted upon are the ballots themselves, as deposited in the ballot box provided for said election; that the individual voters cannot testify as to how they voted at said election, neither can the court go behind the ballots and election returns.'

"If the court overrules said objection, it shall consider the case as if the witnesses had testified to the matters hereafter set out; but if it sustains the objection, such matters shall not be considered, to wit:

"The village of Oran is situated within said district, is platted, and within the platted limits of said village there resided, on the date of the aforesaid election, to wit, February 23, 1915, eighteen (18) voters who cast their ballots in said election. That without the platted limits of said village of Oran on said date, there resided seventy-six (76) voters who cast their ballots in said election.

That of the ninety-four (94) votes cast by the voters of the district aforesaid, sixty-two (62) were in favor of consolidation, thirty-one (31) were opposed to consolidation, and one (1) ballot was spoiled.

"That each and every ballot cast by the voters residing within the platted limits of the village of Oran were in favor of consolidation.

"That of the ballots cast by the voters of said district residing without the platted limits of the village of Oran, forty-four (44) ballots were cast in favor of consolidation and thirty-one (31) ballots were cast in opposition to consolidation.

"Exceptions shall be reserved to the ruling of the court on the objection above set out."

Two questions are involved: Does the absence of the two ballot boxes invalidate the election? Second, if it does not, may the voters be allowed to testify as to how they voted, and show that a majority in each of the territories affected by the proposed consolidation voted in the affirmative? The trial court held that the election was not invalidated by the fact that but one ballot box was used, and ruled that the evidence of the voters was competent.

The voters were not compelled to testify, but gave their testimony voluntarily. No fraud is charged, and the fairness and honesty of the election are not challenged.

1. Section 2794-a, Code Supplement, 1913, provides that, if a majority of the votes cast by the electors residing either within or without the limits of the city, town or village, as the case may be, is against the proposition to form a consolidated independent corporation, then the proposed corporation shall not be formed, and that the voters within and without such limits shall vote separately, and further:

"The judges of said election shall provide separate ballot boxes, in which shall be deposited the votes cast by the voters from their respective territory," etc.

Appellant contends that the statute is mandatory, and that because, in the instant case, two ballot boxes were not used, the election is invalid; while appellees contend that the provision is directory. Doubtless the purpose of having two ballot boxes is to determine whether there is a majority for or against the consolidation in the territory within and without the limits of the village.

Both appellant and appellees cite *State ex rel. Thompson v. Booth*, 169 Iowa 143, each claiming that the decision there determines the point now under consideration in this case. But we think that the point now under consideration was not directly determined therein. That case was decided on demurrer which admitted the allegations of the petition, so that it appeared affirmatively that all the votes within the village were cast in favor of the consolidation, and that a clear and large majority of the votes cast from outside of the village was in favor of such consolidation, and that, under such a showing, the election was not rendered void by the mere failure of the judges to furnish two ballot boxes. It is thought that it must necessarily be inferred from the holding in that case that the court did consider the statute directory. It is contended by appellant that there is a presumption that the use of the word "shall" in the statute is in an imperative, and not a directory, sense. To support their contention they cite 25 Am. & Eng. Encyc. of Law 633, *Ex parte Jordan*, 94 U. S. 248, 251 (24 L. Ed. 123), 5 Encyc. of Evidence 45, 46, 15 Cyc. 317, 35 Cyc. 1451, and *De Long v. Brown*, 113 Iowa 370, to the proposition that there must

2. ELECTIONS: be a substantial compliance with the elec-  
conduct of tion statute. This is doubtless true, so far  
elections: ir- as the judges of the election are concerned,  
regularities.  
—it is the judges who are required to provide separate bal-  
lot boxes. The failure of the election officers to do so was  
no fault of the voters. There are numerous instances  
where a failure of election officers to comply with the stat-

ute, though the statute may be mandatory as to them, may not deprive the voters who are not at fault of their right to vote. We think that the duty of the election officers to furnish two ballot boxes was a ministerial duty, and that their failure to perform such duty does not invalidate the election. Many authorities are cited to sustain this proposition, and we shall not attempt a review of the cases or the reasoning. The rule is stated in 15 Cyc. 316, 352, 372, 373. See also *Younker v. Susong*, 173 Iowa 663; *Hope v. Fleptge*, (Mo.) 47 L. R. A. 806, 821; *Gilleland v. Schuyler*, 9 Kans. 569; *Perry v. Hackney*, (N. D.) 90 N. W. 483; *District Twp. of Lincoln v. Independent Dist. of Germania*, 112 Iowa 321; *State v. Alexander*, 129 Iowa 538; *Chapman v. State*, (Tex.) 39 S. W. 113; *Allen v. Glynn*, (Colo.) 15 L. R. A. 743; *Independent School Dist. v. Independent School Dist.*, 153 Iowa 598; *State v. Shanks*, (S. D.) 125 N. W. 122; *Cook v. Fisher*, 100 Iowa 27; *State v. Russell*, (Neb.) 15 L. R. A. 740; 5 Encyc. of Evidence, 69.

Some of the cases state the rule that such proceedings are mandatory if sought by direct proceedings before election, but thereafter all should be held directory, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote or the ascertainment of the result, or unless the provisions affect an essential element of the election, or it is expressly declared by statute that the particular act is essential to the validity of the election, or that its omission will render it void. In *State v. Shanks*, (S. D.) 125 N. W. 122, 123, it was said that an election will not be defeated by a failure to comply with the statute, provided the irregularity has not hindered anyone who is entitled to the right of suffrage from exercising it, or rendered doubtful the evidence from which the result was to be declared.

It is conceded that, because the ballots of voters residing within and without the village were all deposited

in one box, and the ballots would not show whether the voter resided within or without the village, it would be impossible to determine from the returns, or from the ballots themselves, whether the majority of the voters within and without the village were for or against consolidation. This being so, it is thought that, under such circumstances, the election should be held invalid because it obstructs the ascertainment of the result. This might be so; but, as said, the voters were not to blame, and if there is any legal way to determine the result, we should seek it, since the election in question was free and fair, and no one deprived of a right of expression on the question; otherwise the voters would be disfranchised, and the will of the people defeated.

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2. This brings us to the question whether the voters may voluntarily testify how they voted.

It appears that there were 93 valid ballots cast by the electors of the whole district; 62 of these were in favor of consolidation and 31 opposed; 18 of these were cast by the voters residing within the platted limits of the village of Oran; and if it is a fact that a majority of the 18 electors of the village voted in favor of consolidation, then there can be no question of the clear majority's voting for consolidation outside the platted limits of said village. If the evidence of the voters as to how they voted is competent, then, under the stipulated facts, the 18 in the town all voted for consolidation, and 44 of those residing outside were so in favor.

4. ELECTIONS:  
contests: oral  
testimony as  
to how elec-  
tor voted.

It is contended by appellant that even the ballots themselves are not receivable, except on proof that the ballots have been properly preserved, citing *Davenport v. Olerich*, 104 Iowa 194; and that to allow

the electors to testify as to how they voted would enable them to change their votes and thus change the result, after it was known how many votes were needed to accomplish that purpose, and that, therefore, such evidence is not receivable; and they cite on this *People v. Tisdale*, 1 Doug. (Mich.) 59, *Pennington v. Hare*, 60 Minn. 146 (62 N. W. 116). They further contend that the ballots are the best and only evidence as to how the electors voted, citing *Tebbe v. Smith*, 108 Calif. 101 (29 L. R. A. 673, 49 Am. St. Rep. 68); *Mallett v. Plumb*, 60 Conn. 352; *Neichouse v. Alexander*, 30 L. R. A. (N. S.) 603; *O'Gorman v. Richter*, 31 Minn. 25 (16 N. W. 416). And they say, too, that to allow the voters to testify as to how they voted would amount to another election in court by calling a sufficient number of voters and allowing them to testify that a majority of the voters in each of the territories affected voted in the affirmative. But it occurs to us that it is not a question how the voters would vote when called to testify, but how they did vote in the election. In other words, it is simply seeking to ascertain the facts. That there might be inducement for voters to testify falsely is not of itself sufficient to exclude all the evidence. Such is the situation in many cases. It must be conceded that ordinarily the ballots are the best evidence as to how the electors voted; but in this case the ballots themselves would show only that 75 voters voted for the consolidation, but would not show how many of these resided within and without the village. The returns did not show that fact. As said, there is no way, under the circumstances of this case, to show that fact except by the testimony of the voters themselves; and if it may not be done in this way, all those voting at this election would be disfranchised. Under the facts of this case, the ballots might as well have been destroyed. There is nothing in the law requiring or authorizing any identification of the ballots themselves to show whether they were cast within or outside the village.

Among the cases cited by appellees are *Dishon v. Smith*, 10 Iowa 212; *Wimmer v. Eaton*, 72 Iowa 374. In the *Dishon* case, the defect was that it was not shown that the judges and clerks of election were sworn, and it was urged that this defect vitiated the returns. But it was held that this was not so, and the court said, at page 219:

"Whilst it is the law that the canvassers cannot adjudicate upon the sufficiency of returns, as we have held in the former case, where a case of this kind comes into a court of justice, such court, or a jury trying it, not only may, but it is their duty to, look behind the returns, and even behind the ballot box in some cases."

In the *Wimmer* case, electors were examined as witnesses, and, over objection, permitted to testify that ballots cast by them bore the name of F. Wimmer, and that they supposed that that was plaintiff's name, E. Wimmer, and that it was their intention to vote for him. To the same point see *People v. Wintermute*, (N. Y.) 86 N. E. 818.

In 5 Encyc. of Evidence, 69, 70, it is said:

"In cases in which, from any cause, the returns, ballots and other records of the election proceeding are incompetent or unavailable as evidence of the true result in any precinct or district, evidence *aliunde* is admissible to prove the same."

Cases from a number of states are there cited. Other cases use this language:

"Whenever by any means the prima-facie presumption of the correctness of the returns is overthrown, the true vote may be proved, and it is never thrown out if, by any process, it can be discovered."

15 Cyc. 424 states that, according to the weight of authority, the exemption from obligation to disclose the character of his vote can be claimed only by the voter himself, but that the question may properly be put to the witness,

and if he sees fit to answer it, there can be no objection to the testimony (citing cases); though it is said at the same citation that there are cases holding that the voter may not testify as to how he voted. McCrary on Elections (4th Ed.), Sec. 492, holds the evidence competent. See also *Strebin v. Lavengood*, (Ind.) 71 N. E. 494, 498; *People v. Wintermute*, supra; *Buckingham v. Angell*, (Ill.) 87 N. E. 285; *Williams v. Stein*, 38 Ind. 89; 5 Jones on Evidence, Sec. 892, Note 64, and cases. Some of the cases go so far as to hold that declarations of a voter voluntarily made are admissible on the theory, as some of the cases put it, that he is considered a party, when the result of the election is in controversy. *People v. Pease*, 27 N. Y. 45; *State v. Lally*, 134 Wis. 253 (114 N. W. 447); 9 R. C. L. 1150. It is thought that the holding in *State ex rel. Thompson v. Booth*, supra, necessarily involves the holding that the evidence is admissible, because there, as here, but one ballot box was used. True, that case was decided on demurrer, wherein the petition alleged the number of votes that were cast in each part of the territory, so that there would be the same difficulty in identifying the ballots as here. If the evidence of the voters is admissible, then the result of this election is not doubtful, because the evidence is undisputed. It is our conclusion that the evidence is competent.

The judgment of the district court is, therefore,—*Affirmed*.

GAYNOR, C. J., WEAVER and STEVENS, JJ., concur.

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SWANEY LAND COMPANY, Appellee, v. SCOTT BRADFORD et al.,  
Appellants.

**BROKERS: Compensation—Dual Agency—Who Entitled to Commission—Deceit.** On the issue as to which of two brokers is entitled to a commission, he must fail who secured his broker's



contract with the principal by falsely pretending to the principal that the purchaser produced had been secured by him, when in truth such purchaser had been secured by the other agent.

**PLEADING: Issue, Proof and Variance—Pleading Quantum Meruit**  
**2 and Proving Express Contract.** Principle recognized that a plea of *quantum meruit* for services, with proof of express contract for specified compensation, presents a fatal variance.

**PRINCIPAL AND AGENT: The Relation—Brokerage Contract—**  
**3 Fraud and Deception.** Principle recognized that frankness and fairness in the highest degree are imperatively required on the part of an agent towards his principal.

*Appeal from Des Moines Municipal Court.*—JOS. E. MEYER,  
 Judge.

DECEMBER 11, 1917.

THE opinion states the case.—*Affirmed on condition.*

*Hunn & Jones* and *J. W. White*, for appellants.

*A. F. Brown* and *Carr*, *Carr & Evans*, for appellee.

WEAVER, J.—The plaintiff, a partner-  
 1. **BROKERS: com-** ship engaged in buying and selling real es-  
   **pensation:** tate for themselves and others at Spirit  
   **dual agency:** Lake, Iowa, brought this action originally  
   **who entitled**  
   **to commission:** against Bradford and wife to recover com-  
   **deceit.** missions alleged to have been earned by plaintiff in the sale  
 to one Waltzen of a section of land in the vicinity of Spirit  
 Lake, belonging to the Bradfords. It is alleged that in De-  
 cember, 1915, D. L. Swaney, of the plaintiff firm, had a con-  
 versation with Scott Bradford, who requested Swaney to  
 endeavor to perfect an exchange of the section of land above  
 referred to for other land owned by Waltzen near Linden,  
 Iowa. It is further alleged that, acting upon such re-  
 quest, he, Swaney, did open negotiation with Waltzen to  
 bring about such exchange, and did finally bring the par-  
 ties into agreement upon the terms thereof, and that such  
 exchange so negotiated was consummated by the execution

and delivery of proper conveyances on both sides. The services so rendered, plaintiff says, were reasonably worth \$640, for the recovery of which sum judgment is asked. The defendants Bradford, answering, admit that they exchanged lands with Waltzen, and that in such transaction they incurred a liability for commission, but deny any indebtedness to plaintiff or that they employed plaintiff's services in that transaction. By cross-petition the Bradfords bring into the case H. H. Northrup, David Reese, Daniel O'Donnell and S. K. Kastlow, and allege that, in 1915, they (the Bradfords) owned a section of land near Superior, Iowa, which they exchanged for land belonging to one Waltzen in Guthrie County, Iowa, and it is for alleged services in effecting this exchange that the plaintiff claims commission in this action. It is further alleged that the said Northrup, O'Donnell, Reese and Kastlow each claims to have been the agent for the said Bradfords in negotiating the exchange and to have effected the same, for which alleged service each claims a commission. They (the Bradfords) further express their willingness to pay whatever commission is shown to have been earned by the person who did in fact perform the service, but they are quite naturally unwilling to expose themselves to the hazard of paying five commissions for one service. They therefore ask that all the claimants be impleaded, and that each may be required to plead and assert whatever claim he may have in the premises, in order that multiplicity of suits may be avoided. Northrup and Reese pleaded jointly, denying that the plaintiff negotiated the exchange between the Bradfords and Waltzen, and say that they themselves, and they alone, represented Bradford therein, and they alone are entitled to the commission. Kastlow and O'Donnell did not appear or answer. Pending the trial Reese also disclaimed any interest in the subject matter of the controversy. A jury was waived, and the cause tried to the court, which found the

plaintiff entitled to a commission of \$640 from the Bradfords, and dismissed the claim of Northrup. The defendants appeal.

When the tangled skein is unraveled, there is little material dispute of fact except such as exists between the Bradfords and Swaney over the amount of commission which was to be paid the latter, if any he earned. The general situation at the outset was substantially as follows: The Bradfords owned a section of land in Dickinson County, on which they placed a trading price of \$150 per acre. Waltzen owned about 600 acres of land in Guthrie County, on which he placed a trading price of \$95 per acre. One Price was a land agent at Superior, Iowa. Swaney and one Warren were land agents at Spirit Lake, Iowa. Northrup was a land agent at Des Moines, Iowa, as also was Reese, and Kastlow was a land agent at Yale, Iowa. One Martin was also a land agent, at Linden, Iowa. Northrup was the only agent originally coming in touch with the Bradfords upon the subject of securing an exchange of the Dickinson County land for the other property. These parties were acquainted, and on various occasions the Bradfords had paid Northrup commissions for his services in connection with land deals. The Bradfords had wide experience in handling lands on their own account. They did not list their lands with agents, and evidently were perfectly capable of caring for their own interests in such matters, and their chief, if not only, use for agents was in discovering persons desiring to buy, sell or exchange, reserving to themselves the conduct and consummation of the deal if one was made, and in such case they were willing to pay reasonable compensation for the help rendered them. Martin, at Linden, appears to have represented Waltzen, the owner of the Guthrie County land, and through him or otherwise, Kastlow was on the lookout for a customer for Waltzen. From Kastlow, Reese ascertained that a tract of land of this

description was being held for sale or exchange, but did not learn the identity of the land or its owner. Reese asked Northrup if he had anything which could be used in such a deal, and Northrup, having nothing to fill the requirement, went to the Bradfords, who he knew owned the section in Dickinson County. The Bradfords told him they would consider an exchange on the basis of \$150 per acre for their section and \$95 per acre for the land in Guthrie; for, while they did not know the identity of the latter property, they did know the general value of lands in the neighborhood where it was understood to be situated. They also agreed to pay Northrup a reasonable commission in case the exchange was effected. Northrup on the same day reported the situation to Reese, giving him a written description of the Dickinson County land. Reese then reported it to Kastlow, giving him the description of the land, and later, at the request of Martin, gave him a copy of such description and told him to go up and look at the property. Waltzen and Martin then went to Dickinson County, taking with them a letter of introduction from Kastlow to Price; also a similar letter to Swaney, with whom Kastlow had some sort of understanding for mutual help in their deals. On arriving there, Waltzen and Martin found Price unable to go to the land with them, and then they called on Swaney. Up to this time, Swaney never had any acquaintance or dealings with the Bradfords, and does not pretend that he was in any manner authorized to represent them or to negotiate a sale or exchange of their property. At the request of Martin or Waltzen, Swaney drove them out to the Bradford land. Swaney as a witness appears to say, in substance, that he was not informed or did not know that these parties had come there for the special purpose of examining this particular land, but it is perfectly evident that he was aware of the fact. Having examined the land, the party returned to town. It appears, however, that Swaney had not yet

extracted from Waltzen and Martin the name of the owner of the land, and, going to the county treasurer for information, was told that if he would call up Scott Bradford he would get the owner. He then called up Bradford on the telephone, and, without revealing the presence of Martin and Waltzen there, or the fact that they had already visited the land, told Bradford that he "had a man who owned land in central Iowa" which was clear of incumbrance, and who wanted to exchange it for land in northern Iowa, and that he thought a deal could be made. He swears that Bradford told him to go ahead and show the land. Nothing is shown to have been said in this conversation about the price to be put on the land in case of an exchange, but it appears that Waltzen and Martin had become aware of Bradford's figures before they visited Swaney. It is also claimed by Swaney that, in this same conversation, Bradford promised to pay him a commission of \$2 per acre in case the exchange was made; but this is denied by Bradford, who says that the subject of commission was not broached until the meeting of the parties the next day. After this conversation, Swaney told Waltzen that he had found the owner and was ready to negotiate the exchange, and Waltzen asked him to go down and see Bradford the next morning for the purpose of further negotiation. On the next day Swaney and Bradford met, and, as we understand the record, they went together to examine the Waltzen land. Later the exchange was completed, apparently in the absence of Swaney, who telegraphed back to Bradford not to close the deal unless he expected to pay him a commission of \$2 per acre. To this Bradford answered, denying having made any such agreement. It does appear that, while Swaney and Bradford were together on the day after Waltzen's trip to Spirit Lake, the matter of commissions was discussed, and Swaney mentioned \$2 per acre as a fair price, saying in substance that he would have to

share it with others; but Bradford immediately refused to consider that figure, and repudiated any responsibility for any obligation by Swaney to others. By this time, also, Bradford began to suspect that the finding of Waltzen as a customer was due wholly or in part to the agency of Northrup, in which case it was his view that at least one half of the commission would rightfully belong to him; and because of this situation he told Swaney that he must be satisfied with a half commission, or 50 cents per acre. This, he says, Swaney consented to, but expressed the thought that in such case Bradford should take care of the claims of Kastlow and Warren. These are all the material facts.

As we have before said, except upon the matter of an express agreement between Bradford and plaintiff for payment of commissions, there is no material dispute in the testimony, and upon examination of it it is very difficult to figure out any sound theory upon which Swaney is to be permitted to collect the entire commission, and Northrup is to be dismissed without compensation.

In the first place, the plaintiff sues up-  
 2. PLEADING: is- on a *quantum meruit* only; but, so far as  
 sue, proof and  
 variance: his proof is concerned, he asserts and seeks  
 pleading: to recover upon an express agreement to  
*quantum mer-* pay him for his services a commission of \$2  
*uit* and prov- per acre. If, however, this clear variance  
 ing express be waived, and we look into the merits of the case as de-  
 contract. veloped by the evidence, without technical adherence to the  
 form of the pleading, we still must say that the assertion of  
 a verbal agreement for a commission of \$2 per acre was not  
 fairly established by the testimony, and this, indeed, ap-  
 pears to have been the view of the trial court. There was  
 evidence, however, tending to show that a reasonable com-  
 mission on such transactions was \$1 per acre. This was  
 conceded by the Bradfords and sustained by the court.  
 This being found, and the Bradfords being ready and will-

ing to pay on that basis, the one question in the case was whether the commission was earned by Swaney and his contingent of followers, or by Northrup and his contingent, or in part by each.

That the opening for this exchange of lands was first brought to the attention of the Bradfords by Northrup is undisputed. It is also undisputed that Northrup was the first person to whom any kind of agency in that connection was given by the Bradfords. It is also shown in like manner that it was through Northrup, assisted by Reese, that knowledge of this opportunity was communicated to Waltzen and Martin, and that Waltzen and Martin, thus induced, went to Dickinson County for the express purpose of seeing the Bradford land. It is also confessedly true that, until after these men, accompanied by Swaney, had visited and examined the land, the latter had no agency in the transaction, nor the slightest claim upon or authority from the Bradfords. By the trick of suppressing the fact that Waltzen had already visited the land, and by representing Waltzen as *his* man, with land which he might be induced to put into such an exchange, he obtained from Bradford permission or authority to "show them the land."

Now let us suppose that Swaney's connection with the deal had ended here, and the Bradfords had taken over the transaction at that point and completed the exchange without further help from agents; it is very plain that upon the most elementary principles of the law of agency no court would for a moment recognize the claim of Swaney to a commission. It is a relation in which candor, frankness and fairness on the part of the agent are imperatively required, and no advantage gained by ignoring this fundamental obligation will be recognized either in law or in equity. The trip by Swaney on the next day from Spirit Lake to Linden and Des Moines was un-

3. PRINCIPAL AND  
AGENT: the  
relation: brok-  
erage con-  
tract: fraud  
and deception.

dertaken by him at the request of Waltzen, and not of the Bradfords. There he went through the form of introducing Waltzen and Bradford, and doubtless did what he could to see that the negotiations were not broken off or rendered abortive. Bradford appears to concede that Swaney did perform some service in this connection, for which he is willing to compensate him by an apportionment of the commission:

Having expressed ourselves as above set forth, we shall take little time for the statement of our conclusion. Swaney did not find nor in any proper sense procure Waltzen as his customer for the exchange of these lands. He did not represent the Bradfords in showing their land to Waltzen. If he is entitled to compensation at all, it is for such assistance only as he rendered in arranging the meeting of the parties at Linden or Des Moines, and in perfecting the terms of the exchange. The inception of the transaction and its development, up to the time when Swaney injected himself into it, were brought about by Northrup, and Swaney should not be permitted to cut him out of his compensation; and in failing so to find, the trial court erred. Had the court found that, under the peculiar circumstances of this case, neither Swaney nor Northrup had made a clear showing of his right to recover the entire commission, and had awarded one half to each, we should not be inclined to disturb its judgment. As it is, if the plaintiff and Northrup shall each, within 30 days after the filing of this opinion, file with the clerk of this court his consent to accept one half of the amount of the judgment entered below in satisfaction of his claim, said judgment will be affirmed; otherwise it will be reversed and the cause remanded for a new trial. The costs will be taxed two thirds to the plaintiff and one third to the appellants.—*Affirmed on condition.*

GAYNOR, C. J., PRESTON and STEVENS, JJ., concur.



AUGUST TETZLOFF, Appellee, v. GEORGE E. MAY, Administrator, et al., Appellants.

AUGUST HAVENER, Appellee, v. GEORGE E. MAY et al., Appellants.

**EXECUTORS AND ADMINISTRATORS:** Allowance to Surviving

- 1 **Wife—Annulment of Order—Estoppel.** Long delay upon the part of a creditor of an estate in attacking the propriety of an allowance to the widow for her support for the year following the death of her husband, may deprive the court of *any discretion* to set aside such allowance, even though the order of allowance has *some* appearance of having been obtained by undue advantage.

**JUDGMENT:** Conclusiveness—Matters Concluded. A judgment on

- 2 appeal from an order involving the *priority* of a creditor's claim and an allowance to a surviving widow for her year's support, is not an adjudication of the *propriety* of the order for allowance to the widow.

*Appeal from Floyd District Court.*—C. H. KELLEY, Judge.

DECEMBER 11, 1917.

APPEAL from an order in probate cancelling and setting aside allowance made to the widow for her support.—*Reversed and remanded.*

*F. & F. M. Lingenfelder*, for appellants.

*H. J. Fitzgerald*, for appellees.

1. **EXECUTORS AND ADMINISTRATORS:** allowance to surviving wife: annulment of order: estoppel. STEVENS, J.—This appeal presents a question growing out of a controversy twice previously before this court. *Tetzloff v. May*, 151 Iowa 441; *Tetzloff v. May*, 172 Iowa 617.

Pauline Feil, appellant herein, is the surviving widow

of C. C. Feil, deceased, and, on August 22, 1910, which was less than a year after the death of her husband,—which occurred February 14, 1910,—she filed in the office of the clerk of the district court an application for an allowance of \$500 for her support for one year. On September 20, 1910, August Tetzloff and August Havener, creditors of deceased, and George E. May, administrator of his estate, filed resistance to said application, on the ground that the estate of deceased was practically bankrupt, and that said widow had received life insurance in the sum of \$2,000. Subsequently, the exact date not appearing in the abstract, the court allowed appellant, upon said application, the sum of \$300. On November 30, 1909, August Tetzloff instituted an action against C. C. Feil to recover a money judgment, and levied a writ of attachment upon certain real estate owned by him. George E. May was appointed and qualified as administrator of the estate of C. C. Feil, and was substituted as defendant in said action. Thereafter, the widow, appellant herein, intervened in said cause, alleging that deceased left no personal property out of which her allowance could be paid, and prayed an order or judgment establishing her right to said allowance as superior to the lien, if any, created by said levy. Upon appeal (see *Tetzloff v. May*, 151 Iowa 441), this court held that the allowance to the widow for her support took precedence over the lien of plaintiff's attachment, and reversed the judgment of the lower court, which established and made the attachment prior to the allowance in favor of the widow.

Prior to the death of C. C. Feil, he and his wife executed a note for \$10,000 to a bank in Forest City, securing the payment thereof by a mortgage on said premises. The said mortgage was foreclosed after the decease of Mr. Feil, and said real estate sold; and the net proceeds arising therefrom, after satisfying the special execution issued thereon, amounting to \$926.60, were turned over to the clerk of the

district court of Floyd County. Thereafter, and on December 22, 1913, appellee filed an application in the office of the clerk of the district court, alleging that, on October 13, 1910, he recovered judgment in the district court of Floyd County, Iowa, against C. C. Feil for \$602.65, and the lien of said attachment was sustained and special execution ordered thereon; and prayed an order directing the clerk of the district court to turn over sufficient of said funds to pay said judgment, subject only to the widow's allowance and her distributive share therein. Objections were filed by appellant herein to the disposition sought to be made of the rents and profits derived from said real estate during the period of redemption. The record in this case does not contain the finding and judgment of the district court upon the hearing of said application, but same was modified by this court and cause remanded for order and decree in harmony with its opinion. The court held that the widow was entitled to one third of the rents accruing during the period of redemption from the mortgage sale, and that the widow's allowance should have preference over the claims of attaching creditors.

The opinion in *Tetzloff v. May*, supra, was filed November 24, 1915, and it is claimed by counsel for appellee that, on January 5th, following, the clerk of the district court paid what remained in his hands of the net proceeds of the sale of said real estate, after paying the widow her distributive share therein, to appellee upon his judgment. On January 25, 1916, the appellant filed a petition in the office of the clerk of the district court, reciting that the allowance previously made had not been paid to appellant, and praying an order of court directing the clerk to pay same out of the proceeds of the sale of said real estate which had the administrator filed a joint answer to said application, been turned over to him. Appellee August Havener and

TWO LAST LINES TRANSPOSED

praying that the allowance previously made to the widow be set aside; and on December 18, 1916, an order was entered by the court cancelling and setting aside said allowance. The ground upon which the court set same aside, as stated in its order, is that the allowance was made without full knowledge of the facts, and that, had it known of said life insurance, no allowance whatever would have been made said widow. This appeal is from the order of the district court setting aside and vacating said allowance and overruling appellant's application for an order to direct the clerk to pay same to her out of the funds above referred to.

Counsel for appellants argue that the  
2. JUDGMENT: court acted wholly without authority in  
conclusiveness: setting aside said allowance, for the reason  
matters con- that the right of appellants thereto was ad-  
cluded. judicated by this court in the cases cited supra. From a careful reading, however, of the record before us upon this appeal, and of the opinions of the court in said cases, which are cited by counsel for both appellants and appellees, we are unable to find that the question of the propriety of said allowance was in any way involved therein. The only question affecting the same which was involved in either of the cited cases related to the question of priority between the same and the lien of appellee's attachment.

As above stated, the application of appellant for an allowance, under Section 3314 of the Code, was filed August 22, 1910; and thereafter, appellee and others filed objections to same, on the ground that the estate of deceased was practically insolvent, and that \$2,000 life insurance upon the life of deceased had been paid to the widow.

For some reason not shown in the record, it appears that the objections filed to the application of appellant for said allowance were abandoned, or else some advantage was taken of appellee and the order for said allowance procured without the knowledge or opportunity of appellee.

to be heard thereon. The record, however, affirmatively shows that appellee knew of said allowance prior to the decision of this court upon the former appeals, but it does not appear that appellee, prior to the 11th of February, 1916, asked the court to modify or cancel said order on the ground that same had been obtained by fraud or by misleading the court. If appellee abandoned said objections, or neglected to insist thereon before the order was made, and permitted the same to stand without objection for more than 5 years after knowledge thereof, such conduct would, in effect, be little short of a consent that said order was properly made. If, on the other hand, the order was obtained by appellant by the fraudulent concealment of the facts stated in appellee's objection, the length of time for which same was known to appellee before he asked that same be set aside would indicate an intention on his part to condone such fraud. Instead of asking the court to set aside said allowance because he had been deprived of an opportunity to be heard upon his objections filed thereto, or because the order had been fraudulently obtained, he proceeds to litigate the question of priority between his attachment lien and said allowance.

In the application filed by him December 22, 1913, asking that the proceeds of the sale of real estate held by the court be turned over to him, he states, among other things:

"That plaintiff's said attachment is a lien on said property, or the proceeds thereof, subject only to said mortgage, the widow's allowance and her distributive share, and the same is a prior lien as against any other claims against said estate or against said property."

And, in his prayer in a supplemental petition filed on May 6, 1914, he says:

"Wherefore plaintiff asks that he have an order of court directing the clerk of said court to apply any and all proceeds from the sale of the aforesaid property in his hands, and also that any proceeds in the hands of said receiver

be applied in the payment and satisfaction of the plaintiff's attachment judgment lien, subject only to the aforesaid rights of Pauline Feil, as surviving widow, \* \* \*."

The only interest he had in the widow's allowance was the effect the payment thereof in preference to his judgment would have upon the fund in the hands of the clerk, to which alone he could look for the payment of his judgment.

By Section 3314 of the Code, the court is authorized, on the petition of the widow or other person interested, to review an allowance previously made to her, and increase or diminish the same, and make such orders in the premises as shall be right and proper. The contention of counsel for appellee is that the matter rested wholly in the discretion of the district court, and that same can be disturbed or set aside upon appeal only when it appears that the court abused its discretion in the matter. It is true that the court is clothed with large discretion in determining whether the allowance previously made to the widow should be modified or set aside; nevertheless, the judgment of the court thereon is subject to review by this court upon appeal.

The clerk of the district court appears to have turned over to appellee, on January 5, 1916, the proceeds left in his hands, after paying the widow her distributive share thereof; and the application to set aside and cancel the allowance of the widow was filed in response to her application for an order to direct the clerk to pay said allowance out of said funds; and the order cancelling and setting same aside was entered December 18, 1916, nearly a year after the funds had been paid to appellee.

It is apparent that appellant has incurred large expense for attorney fees and other necessary expenses in the trial of the several applications filed in the court below, and in the presentation of this and two former appeals to this court, in which the question of priority between the judg-

ment lien of appellee and the allowance for plaintiff was involved. The course of procedure and conduct of appellee as shown herein practically amounted to an implied consent upon his part to the allowance made; and, while the court recites in its order that the allowance would not have been made had its attention been called to the matters set up in appellee's objection thereto, yet it does not appear that said objection was on file when the order was made, and it is not now claimed that the widow or anyone representing her obtained the same by wilfully suppressing said fact, or that the court was misled by anything done by appellant or her attorneys, unless their failure to call the attention of the court to the objections which were not being urged amounts thereto.

In any event, appellee has elected for more than five years to treat the allowance as proper and valid, and, apparently, voluntarily abandoned the objections filed thereto before same was allowed. This court, in *Busby v. Busby*, 120 Iowa 536, held that the court abused its discretion in cancelling and setting aside an allowance, on the ground of fraud, after the same had been paid to the widow, the court saying:

"Under such circumstances, appellee is estopped by his own laches to make this complaint, even if fraud was committed, and he is, therefore, not entitled to the relief demanded."

We do not think that appellee should at this time, under the above facts, be heard to say that the allowance was improper and that same should be set aside for his convenience. We are constrained to hold that the court exceeded its proper discretion in setting aside and cancelling said allowance.

For the reasons above stated, the order and judgment of the district court cancelling the allowance of \$300 in favor of appellant for her year's support are reversed, and

this cause remanded to the district court for such further proceedings as may be proper and necessary therein.—*Reversed and remanded.*

GAYNOR, C. J.; WEAVER and PRESTON, JJ., concur.

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CHARLES B. ALT, Appellee, v. W. W. YOUNG et al.,  
Appellants.

**DEEDS: Construction—Rule in Shelley's Case—Life Estate Enlarged**

- 1 to Fee. A deed to grantee "and to her heirs \* \* \* to have and hold the same *during her natural life*, and at her death to descend to her heirs, the intention being to convey to the said (grantee) *a life estate* \* \* \* with reversion in her heirs at her death," conveys not a life estate but a fee, under the Rule in Shelley's Case. (See Sec. 2924-a, Code Supp., 1913.)

**JUDGMENT: Judgment as Bar—Decree Beyond Issues—Estoppel.**

- 2 Principle recognized that an estoppel may not be predicated on that part of a decree which assumes to adjudicate issues not litigated.

*Appeal from Johnson District Court.*—R. P. HOWELL,  
Judge.

APRIL 5, 1917.

REHEARING DENIED DECEMBER 14, 1917.

ACTION for specific performance. There was a decree for plaintiff, and defendants appeal.—*Affirmed.*

*Remley & Abrams* and *O. A. Byington*, for appellants.

*Henry Negus*, for appellee.

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|--|---|
| <ol style="list-style-type: none"> <li>1. DEEDS: construction: Rule in Shelley's Case: life estate enlarged to fee.</li> </ol> | <p>PRESTON, J.—The plaintiff contracted to convey to the defendants Young and Bowman the land in question, and to furnish an abstract showing a merchantable title. Said defendants refused to accept the title as shown by the abstract tendered; hence this</p> |
|--|---|



suit. Joseph C. and David W. Wray and Clara C. Custer are the brothers and sister of Elizabeth Ann Alt, to whom was given a life estate by the deed hereinafter referred to, and defendant Albert C. Oaks is the son of a sister of said Elizabeth's. Defendants filed a cross-petition, asking that their rights be determined and adjudicated. Elizabeth Ann Alt is the wife of plaintiff. They had but one child, who was born in 1891, before the deed in question was executed, and before the death of the grantor therein, her grandfather, and she is still living. Mrs. Alt conveyed all her interest in the land to the plaintiff, prior to the execution of the contract of sale to defendants Young and Bowman, and the daughter of plaintiff and Mrs. Alt conveyed her interest to plaintiff, the daughter's husband joining therein. On July 7, 1898, Carson B. Wray executed a deed to his daughter Elizabeth, wife of plaintiff, conveying the land in question. The deed conveys the following:

"Do hereby sell and convey unto said Elizabeth Ann Alt, and to her heirs, the following described premises: (description), and to have and to hold the same during her natural life, and at her death to descend to her heirs. The intention being to convey to the said Elizabeth Ann Alt a life estate in the above described property, with reversion in her heirs at her death."

2. JUDGMENT: judgment as  
bar: decree  
beyond is-  
sues: es-  
toppel.

This deed was placed in the hands of a sister of the grantee's as trustee. The trustee and the grantor died within a few hours of each other, and the deed was found among the papers of the trustee after the death of the trustee and the grantor. The grantor died March 1, 1899, and Mrs. Alt took possession of the land soon after her father's death. One of the defendants' witnesses testifies that the effect of the deed had been discussed before, and had all been settled. The deed had been delivered to Mrs. Alt by her brother Joseph, and, though she was in

possession of the land, the deed had not been delivered to her by anyone having authority. For the purpose of establishing that the deed was rightfully in the possession of Mrs. Alt, an action was brought by her in 1900. There appears to have been no dispute between the parties to that suit, the defendants therein, or some of them, consenting to the decree. The decree in that case, among other things, recites that the deed described in plaintiff's petition was placed in the hands of Catherine J. Wray in her lifetime by Carson B. Wray, in trust for the use and benefit of plaintiff, to be delivered to her by said trustee after the death of said Carson B. Wray; and but for her (the said trustee's) death before the death of the said Carson B. Wray, she would have been in duty bound, upon his death, to deliver said deed to the plaintiff. And it is found by the court that said deed would have vested, and did vest, in the plaintiff a life estate (in the premises in controversy), and that such title was vested on the 1st day of March, 1899, and that the plaintiff from that time became and was entitled to the possession of said land and all rents and profits and the enjoyment thereof, and it authorized the recording of the deed.

It seems to be conceded by all parties that the question in the case is whether the three deeds and the decree before referred to show a merchantable title in the plaintiff at the time the contract was executed between plaintiff and defendants Young and Bowman. One contention of appellee's is that the deed to Mrs. Alt by her father gives her the fee, because, as he says, the Rule in Shelley's Case applies.

1. Appellants claim that, by the decree just referred to, it was adjudicated that Mrs. Alt took only a life estate, and that the decree is a verity and may not be attacked collaterally, and that appellee is estopped by the decree in the former suit to now claim that Mrs. Alt is the owner of more than a life estate, as provided in the decree. To meet

this, appellee contends that the purpose of the original action involved only the question of the delivery of the deed; that he is not making a collateral attack, but simply claiming that the matter in controversy in the suit at bar was not in controversy in the former action; and that, therefore, the decree in no way affects the question in dispute,—and this because appellants plead the decree in the former action as a bar or estoppel in this case; and that, to be available as an estoppel, the matter in question in the present suit must necessarily have been decided; and that it will not be enough that it may have been. On this issue, all the pleadings in the original action were introduced in evidence, and evidence was introduced on behalf of plaintiff, over objection, as to conversations with plaintiff's attorneys in that case, tending to show that it was their understanding, and that the only matter discussed was as to the question of the delivery of the deed. On the other hand, some of the defendants in this case, who were the defendants in the former action, introduced evidence tending to show that their understanding was that the question of title was involved in the first action. But they also testify that they are not in this action claiming any right in the land, except that given by the deed to Mrs. Alt, if it gives them any right. As sustaining the claim that Mrs. Alt took by the deed a fee title, plaintiff cites *Woodford v. Glass*, 168 Iowa 299; *Daniels v. Dingman*, 140 Iowa 386; *Doyle v. Andis*, 127 Iowa 36; *Kepler v. Larson*, 131 Iowa 438; while appellants' contention at this point is that Mrs. Alt did not take the fee by the deed, but that, as in the *Westcott* case, a devise of property to a son to hold during his natural life, with rents and profits for such time, and provided that he should have no power to convey for a period longer than his life, and that at his death the property should descend to his heirs, creates a life estate, with a contingent remain-

der over to his heirs, vesting only at the death of the devisee (citing *Westcott v. Meeker*, 144 Iowa 311).

Plaintiff also contends that, by the deed to Mrs. Alt, the most that defendants could claim is that she took a life estate with remainder over, and that it was a vested remainder; and they say that, because Mrs. Alt then had a daughter, a person in being who would have an immediate right to the possession of the land should the life tenancy terminate, such person has a vested remainder (citing *Shafer v. Tereso*, 133 Iowa 342; *Archer v. Jacobs*, 125 Iowa 467; *Moore v. Littel*, 41 N. Y. 66; 2 Cooley's Blackstone 164, Note; 24 Am. & Eng. Encyc. of Law 388); and that courts favor the vesting of estates if it can be done without manifest violation of the intention of the donor (citing *Ross v. Ayhart*, 138 Iowa 117).

Plaintiff also says that, because the estate taken by Mrs. Alt's daughter was a vested remainder, by the conveyances by the daughter and Mrs. Alt, both the life estate and the remainder in fee met in the same person, plaintiff, without any intervening estate, and that the result is that the life estate is merged in the inheritance, and the owner's title becomes absolute.

We are inclined to adopt plaintiff's view, that Mrs. Alt took the fee, under the Rule in Shelley's Case as it stood at the time of this transaction, as stated in the four cases first cited; and that the decree in the first case adjudicated only the question of delivery; and that, therefore, the defendants' plea of estoppel is not sustained.

It is our conclusion that the trial court rightly decided the case, and the judgment is, therefore,—*Affirmed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

BARBER ASPHALT PAVING COMPANY, Petitioner, v. DISTRICT  
COURT OF POLK COUNTY et al., Respondents.

**MUNICIPAL CORPORATIONS:** Public Improvements—Assess-  
1 ments—When Delinquent—Appeal. Penalties for the nonpay-  
ment of assessments for the construction of street improvements  
are held in abeyance, pending appeal to determine the legality  
and correctness of such assessments.

**APPEAL AND ERROR:** Review, Scope of—Noneffective Judgments  
2 or Orders. Jurisdiction of the court to enter an order will not  
be considered on appeal when such order works no change what-  
ever in the rights of the parties.

*Certiorari to Polk District Court.*—CHARLES A. DUDLEY,  
Judge.

JUNE 20, 1917.

REHEARING DENIED DECEMBER 14, 1917.

ORIGINAL writ of certiorari sued out of this court to the  
district court of Polk County, whereby the legality of its  
action is challenged.—*Petition dismissed.*

*Read & Read*, for petitioners.

*Henry & Henry*, for respondents.

EVANS, J.—*Gilcrest & Co. v. City of Des*  
1. **MUNICIPAL** *Moines*, 161 N. W. 645, was a case appealed  
**CORPORATIONS:** public im-  
provements: from the Polk district court. In the district  
assessments: court, it was an appeal from the certain as-  
when delin-  
quent: appeal. sessments made by the city council of Des  
Moines. The decree of the district court on such appeal  
was affirmed here. The assessment was made by the city  
council, December 1, 1913; the decree of the district court  
was entered in July, 1915; and the affirmance was had  
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here on March 12, 1917. After the affirmance here, a *proceedendo* was issued to the district court. It appears from the briefs that the appellants undertook to pay the assessments confirmed against them, but were confronted with a demand by the county treasurer for penalties at 1 per cent a month from March 1, 1915. Such demand was made for the benefit of the plaintiff herein, as the party beneficially interested. The appellants in the original action, therefore, filed an application in the district court for a supplemental order, and the following supplemental order was entered by such court:

"It is hereby ordered and adjudged that said assessments shall draw interest at the rate of 6 per cent per annum from the date thereof, to wit, December 31, 1913, and shall be subject to the penalty of 1 per cent per month from March 12, 1917, until paid, and that, upon payment of said sums to the county treasurer by the said parties, their several assessments shall be discharged and satisfied."

The petitioner herein challenges the jurisdiction of the court to make such order in such original case. It challenges, also, the merits of the order as made. If the county treasurer wrongfully refused to discharge the assessment without payment of penalties, then the plaintiffs in the original case were entitled to a remedy by some method of procedure, and we may as well dispose first of the question of merit. As we understand the record, the order entered by the district court was in accord with the tender of the appellants in the original case. It is in strict accord with our construction of the statute, as set forth in *Rystad v. Buena Vista County Drain. Dist.*, 170 Iowa 178. We said in that case:

"We reach the further conclusion that, upon the record in this case, the taxes did not become delinquent on March 1, 1911, and were therefore not subject to penalty at that time. The landowner exercised his statutory right of appeal

from the assessment of the board of supervisors. The question thus presented was triable *de novo*. The right of appeal would be a barren right if, pending the appeal, penalties should be permitted to absorb the fruits of final success. The appeal is a part of the statutory method provided for determining the amount of assessments which should be levied upon the land. Pending such determination, the tax cannot become delinquent in the sense that it is subject to penalty."

See also *Young v. Young*, 179 Iowa 1259.

We held in the same case that the assessments should be deemed to draw interest from the original date, in order to maintain equality as between the various taxpayers. If

2. APPEAL AND  
ERROR: re-  
view, scope  
of: non-effec-  
tive judgments  
or orders.

the supplemental order had not been made by the district court, it would be no less the duty of the county treasurer to follow the rule of construction set forth in the *Rystad* case. The order of the district court, therefore, added nothing to the rights of the parties, and took nothing therefrom. Whether it be permitted to stand or whether it be annulled, the relative rights of the parties under the original decree would be precisely the same. The order has the merit, at least, of being advisory, and advice seems to have been needed by the county treasurer from some source, to prevent illegality on his part. We think, therefore, that the petitioner was in no manner aggrieved in a legal sense by the supplemental order, and we need not deal with the question of jurisdiction. We do not overlook that the petitioner was not, in strictness, entitled to a review of the merits of the order of the district court, except by appeal therefrom. Upon this record, however, the question of merit and that of jurisdiction are very closely related, and have both been presented by petitioner in argument. We have, therefore, disposed of the question

of merit as being necessarily decisive. In view of our conclusion thereon, this course is advantageous to both parties, and not prejudicial to either. The petition will be—*Dismissed*.

GAYNOR, C. J., LADD and SALINGER, JJ., concur.

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W. G. BIRDSALL, Appellee, v. PERRY GAS WORKS et al.,  
Appellants.

**CONTRACTS: Construction—Construction Leading to Impossibility**  
1 of Performance. The practical impossibility of complying with a contract, provided an asserted construction of an *ambiguous* clause is adopted, furnishes persuasive reason for rejecting such construction.

**PRINCIPLE APPLIED:** A contract provided that certain brick should be "of the best common brick, hard, \* \* \* thoroughly well burned, all picked for even color on both the inside and outside face." It was contended that the reference to color called for *absolute evenness of color*. The evidence showed that it was practically impossible to obtain such evenness of color in "common" brick. *Held*, the contention must be rejected—that the contract called for as near evenness of color as was possible.

**CONTRACTS: Breach—Estoppel to Plead.** One may not, expressly  
2 or impliedly, consent that a contractor, in the construction of a building, might use certain material which the contractor claimed was in compliance with the contract, and thereafter maintain a plea of breach of the contract by reason of the use of said material.

**APPEAL AND ERROR: Parties Who May Allege Error—Non-In-**  
3 **terested Party.** An appellant may not complain that damages asked by, and allowed to, him were apportioned to different non-complaining defendants.

**CONTRACTS: Breach—Failure to Perform by Stipulated Time—Jus-**  
4 **tification.** One who agrees to perform by a stipulated time, "*subject to causes beyond his control*," may justify a failure to so perform by a showing that, with due diligence on his part, a dealer who had a monopoly of a necessary article was the cause



of the delay, along with the delay of other independent contractors.

**CONTRACTS: Performance or Breach—Architect's Certificate of**  
**5 Performance—Waiver—Mechanics' Lien.** An owner who, in an action by a subcontractor to foreclose a mechanics' lien, fully adjudicates, with the principal contractor, his liability to such principal contractor, *without asserting the defense that the architect had never certified to the performance of the contract* as therein provided as a condition to payment, thereby precludes himself from asserting such lack of certification in abatement of the subcontractor's action, it appearing that said owner was owing the non-appealing principal contractor more than the amount due the subcontractor.

*Appeal from Dallas District Court.*—W. H. FAHEY, Judge.

FEBRUARY 14, 1917.

REHEARING DENIED DECEMBER 14, 1917.

SUIT by a subcontractor to foreclose a mechanics' lien. The original defendants in the case were the property owner and the principal contractor. There was a decree for plaintiff, and the defendant owner has appealed.—*Affirmed.*

*Read & Read*, for appellants.

*H. S. Dugan, Dingwell & Clarke*, and *White & Clarke*, for appellees.

EVANS, J.—1. The pleadings cover 50  
 1. **CONTRACTS:** construction: pages of the abstract, and we shall not attempt to set them out in any detail. The defendant Reed, operating under the trade name of Perry Gas Works, is the owner of the property, and the principal defendant. The Western Gas Construction Company is the principal contractor. It appears from the pleadings that, on June 26, 1913, the principal defendant, who will hereinafter be referred to as "the owner," entered into a contract with the Western Gas Con-

struction Company, hereinafter referred to as the principal contractor, for the construction of a gas plant at Perry, Iowa, for a consideration of somewhat more than \$13,000. On the same day, the principal contractor entered into a contract with the plaintiff for the performance of a part of its contract for an agreed consideration of somewhat more than \$4,600. That part of the contract undertaken by the plaintiff consisted in the main of the erection of the building proper. In the course of the performance of his contract, the plaintiff received, in round numbers, \$2,200. There is no dispute that he would be entitled to receive something more than \$2,400 in addition, unless he is precluded therefrom on some of the grounds indicated in the answer of the owner defendant. In the main, the claim for the owner defendant is that the plaintiff failed to perform his contract in respect to certain specifications set forth in the answer. These specifications are made the basis of a counterclaim against the plaintiff for \$1,700. The breach pleaded is based upon the contract between the owner and the principal contractor, and a cross-petition also was filed against the principal contractor for the same amount. There is no dispute that, subject to the rights of the plaintiff and to the counterclaim, there was due and owing to the principal contractor from the owner somewhat more than \$2,800. The specifications of breach of contract made by the defendant owner, both in the counterclaim against the plaintiff and in his cross-petition against the principal contractor, his codefendant, were as follows:

“(a) The brick were not selected for even color; (b) the work was not a neat struck joint; (c) the openings over the doors and windows were not carried through the walls; (d) the walls were not carried to the roof; (e) the job as a whole was not a good, workmanlike job; (f) the contract was not completed by November 10th, according to contract.”

In explanation of the specifications, it may be noted that the subcontract called for the erection of a brick building, and contained the following proviso:

"That the walls will be built of the best common brick, hard, square and thoroughly well burned, all picked for even color on both the inside and outside face; no soft or salmon brick to be used anywhere in the work; all to be finished inside and out with a neat struck joint."

The foregoing quotation from the contract furnishes the basis of Specifications "a" and "b." Upon these specifications, damages are claimed to the amount of \$1,000. A claim of \$600 of damages is based upon Specification "f." The contract provided for the completion of the contract on November 10th, and for liquidated damages of \$10 a day for the period of delay. These three specifications present the principal part of the defendant owner's claim, so far as the merits of the controversy are concerned.

As to the merits of these specifications, the question is largely one of fact, upon a record presenting much conflict in the testimony. As bearing upon these particular specifications, the contract between the owner and the principal contractor and that between the principal contractor and his subcontractor, the plaintiff, were in substantial accord.

Turning our first attention to Specifications "a" and "b," the trial court found substantial compliance by the plaintiff with the contract, and found further that, if the defendant had at any time a possible ground of complaint at this point, it had been waived by the conduct of the owner's agents while the contract was in course of performance. The trial court made his finding in writing. The following was his finding upon this branch of the case:

"The brick that were in fact used complied with this specification in all particulars, with the possible exception as to evenness of color; in fact, aside from color, it is doubtful if there is a better brick to be had in the entire state;

they are a shale brick, and were burned to a high degree of hardness, and were well made as to being square and regular. This conclusion I reach from an examination of the three brick which were offered in evidence upon the trial, and from these brick it appears that, in burning, the excessive heat causes a whiteness to appear in spots upon the face of the brick. Whether this is permanent or will disappear with use is not made clear from the testimony. The consulting engineer, Mr. Miller, in one of his letters refers to the fact that possibly in time this whiteness will disappear. Were it not for this whiteness, the brick would be of even color, being red. When the evidence that was offered in this cause is considered, it appears great disagreement exists between contractors and builders and brick makers, not only as to what is even-colored brick, but what are hard brick, and what are common brick; and if all of the testimony offered be true, or anywhere near true, it can be readily understood why a contractor would have difficulty in complying with a specification such as the one in the contract in question. Samples of brick from various yards were offered in evidence upon the trial, all claimed to be hard, common brick. Some were sand brick, an examination of which would lead the uneducated to conclude at a glance that they were not hard brick, and should not be so considered; but yet men who should know have testified that they are hard brick, and would comply with the specification in question. Other witnesses classify brick, as to common brick, as including pressed brick and face brick,—in fact it seems from some of the testimony as though most any quality of brick could be required under a specification such as the one in the contract in question. I call attention to this disagreement between brick men as showing the difficulty the court has in interpreting the specifications, for the purpose of ascertaining what the plaintiff had in fact agreed to furnish. That plaintiff agreed to furnish the best quality

of common brick is conceded; that they must be hard and square and thoroughly burned is also conceded. The brick furnished complied with these requirements. It is only the part 'picked for evenness of color on inside and outside face' that is questioned. Should the court hold this to mean that there must be absolute evenness of color? If such be the case, then the court should supply, in lieu of the expression used, the expression: All brick to be of even color on inside and outside face. This I think is an unreasonable construction, in view of the character of brick being used. Defendant was building a gas plant for the manufacture of gas; he was specifying the use of common brick; and the preponderance of the evidence shows that it is difficult, if not impossible, to get evenness of color in common brick, so the expression is used that they are to be picked to produce evenness of color; that is, I think the reasonable construction would be that, in view of the character of the brick to be used, that they should be selected with a view of obtaining as near evenness of color as is possible. It is known of all men, of course, that brick are of different colors, and to avoid the possibility of the use of different colored brick, the clause in controversy was inserted in the specifications, thereby preventing the use of different colored brick in the construction of the inside and outside face. A number of witnesses were offered on the part of the plaintiff who testified that the brick were of even color for common brick. Against that, defendant offered several witnesses who testified that the brick were not of even color. It is impossible for the court to harmonize this testimony, for all of the witnesses offered on either side are men who should know about building material, and about what the requirements of the specifications mean. Under this situation of the record, I am led to conclude that the brick that were in fact used are a substantial compliance with the specifications. And if this be not so, I am very

2. CONTRACTS :  
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much inclined to believe that defendant has waived his right to complain of said brick. The defendant Gas Company is a going company, and in the management and conduct of its business, it has a manager at Perry, one Mr. Ingle, who was present at the building frequently during its construction, and who was making frequent reports to John A. Reed, the defendant. He knew that the brick in question were being used, and I think it only a fair conclusion to say that thereby the defendant, John A. Reed, knew the brick in question were being used. The consulting engineer, Thomas D. Miller, saw the brick before they were placed in the wall, and, while he made some complaint about the same not being of even color, he did not forbid the use of said brick, but on the contrary said, and so notified the defendant Construction Company, that the brick would undoubtedly be acceptable if given a stain. It also appears from the testimony of the plaintiff that he was informed by Mr. Ingle that Mr. Reed desired the opinion of Proudfoot & Bird, and accordingly their opinion was taken, and they approved of the use of the brick in a letter to Mr. Reed, a copy of which letter was furnished to Mr. Birdsall; and at no time from the time of the conversation had with Thomas D. Miller, before the walls were constructed, was Mr. Birdsall advised by anyone acting for the defendant Gas Company that the brick he was using would not be accepted. While it is no doubt true that it was the duty of Birdsall to select brick that did comply with his contract, but his having selected a brick which he claimed as being in compliance with his contract, the defendant should not be permitted to stand by and permit the use of such brick and make no complaint thereof until the building had been completed and the machinery installed and the defendant in possession and in operation of such plant. This to me seems very inequitable and un-

reasonable. I do not overlook the fact that defendant denies the knowledge, and denies the authority on the part of Miller and on the part of Ingle, and on the part of Proudfoot & Bird, but such a conclusion is not supported by the circumstances."

The foregoing is a fair analysis of the evidence bearing upon these specifications. On August 4th, before the laying of the wall had begun, Mr. Miller, the consulting engineer, wrote as follows to the principal contractor:

"I had an opportunity to inspect a carload of brick that was on the ground for the building. These bricks were excellent in quality, but it will prove difficult to select face brick on account of these bricks having been burnt with gas and are streaked, nearly all of them showing two white streaks across the face of the brick, about an inch wide. I am submitting this question to Mr. Reed, asking him to express himself in regard to same. I understand that this brick will bleach out in the course of a couple of years, and become practically uniform color. This I am not certain of, and would not accept the brick on that supposition. I believe that this matter could be satisfactorily disposed of if the contractor would give a red stain to the wall, after finished, in order to give it a uniform color."

On August 8th, he wrote again to the principal contractor, in reply to a letter of August 5th, as follows:

"If a coat of red stain should become necessary to make the brick offered acceptable, it will have to be at the contractor's expense."

The architects of the building wrote to the owner as follows:

"Mr. W. G. Birdsall, of Perry, Iowa, has asked us to give you our opinion of the Shackelford brick. We think you cannot have a better brick unless you buy a paver, and a paver is not as satisfactory for building purposes."

The contents of all these letters were made known to the plaintiff and made the basis of an insistence by the principal contractor that he begin the construction of the wall at once. On August 25th, Miller wrote to the principal contractor as follows:

"I am just in receipt of yours of the 23d through Mr. Sweeney. I have expressed myself to Mr. Sweeney fully in regard to the brick work. I was in hopes of seeing some of the brick in the wall when I got here today, feeling very much as you do that the effect is going to be very satisfactory; but I have told Mr. Sweeney that he should warn Mr. Birdsall that any delay that he may indulge in on account of the brick will be held against him on account of demurrage resulting from his delay. I have no expression from Mr. Reed as to the brick, and, as Mr. Birdsall says this is the best he can do, he apparently is going ahead with the work as soon as the bars arrive."

It does appear from the evidence that Reed did object, both to Miller and to his architects, as to the color of the bricks in question, but this fact was not brought to the attention of the plaintiff in any way.

The question as to the "even color" of these bricks was, in its very nature, a rather indefinite one. This much, at least, appears from the record. Many witnesses of experience in the subject testified that these bricks were of even color, and other witnesses of equal experience testified to the contrary. It was a reasonable course on the part of the plaintiff to exhibit his bricks before beginning his wall, and to ask for an expression thereon. The letters of Mr. Miller which appear in evidence are strongly corroborative of the claim of the plaintiff that he assented to their use as complying with the contract, subject to the possibility that a little staining might be necessary. We think the conclusions of the trial court should be sustained at this point.



3. **APPEAL AND ERROR:** parties who may allege error: non-interested party.

As to Specifications "c" and "d," the trial court allowed damages to the amount of \$50 on each item, as against the principal contractor, and one of such items as against the plaintiff. Unless it should be found that the decree was erroneous in other respects, the appellant has no interest in the question whether both items should have been allowed against the plaintiff instead of one. The appellant is fully protected by the allowance made as against the principal contractor.

4. **CONTRACTS:** breach: failure to perform by stipulated time: justification.

Specification "f" presents the only other considerable item. There was a delay in the completion of the contract. A qualified possession of the building was given to the owner sometime in December, but the contract was not fully completed until sometime in January. The contract called for liquidated damages of \$10 a day, and there is evidence tending to show that this was approximately the rate of damage that the owner sustained by reason of the delay. The plaintiff pleaded a justification for the delay, in that it resulted from causes over which he had no control. The plaintiff's contract called for a completion of his work by October 8, 1913. Section 1 of his contract, however, contained the following proviso:

"Subject as to time of completion to strikes, fires, freight blockades, and any other cause beyond his control."

The contract between the owner and the principal contractor contained a like provision. The contract called for the use of a certain specified make of roofing. This roofing, so provided for, was made by one manufacturer only. The plaintiff immediately ordered the necessary roofing from such manufacturer through its appropriate channels. His order was accepted on July 24, 1913, for immediate delivery. The evidence is abundant that he used all diligence of importunity after he failed to receive the same within a

reasonable time following the order. He did not receive the same until the latter part of October or early November. In order to enable an independent contractor to perform his part of the work, the plaintiff covered the building with a temporary roof, and had the same ready for such independent contractor on October 9th. Such contractor, however, delayed his coming for a considerable period after that date, and this delay contributed substantially to the final delay in the completion of the job. We think that the evidence fairly sustains the plaintiff's claim that the delay did result from causes over which he had no control. So far, therefore, as the merits of the controversy are concerned, we think the finding of the trial court must be sustained in its entirety.

5. CONTRACTS :  
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2. There is another question, however, which has its importance, and which is put forward by the appellant as decisive. The contract between the appellant and his principal contractor provided that the certificate of Miller, the consulting engineer, should be made conclusive of all matters of dispute, either as to the construction of the contract or the amount due thereunder. It appears also that no certificate was ever made by Miller, and none was ever requested by either party. It is urged that the plaintiff cannot maintain his action without first obtaining a certificate from Miller in support of such action. The question is complicated somewhat by the fact that such proviso for a certificate was not contained in the contract between the plaintiff and the principal contractor. It is properly contended by the appellant that he was entitled to a performance of the contract entered into between him and his principal contractor, and that his property could not be subjected to a mechanics' lien in violation of such contract. On the other hand, the plaintiff was entitled to maintain his action at least against the principal con-

tractor, regardless of the contract between the principal contractor and the owner. If the plaintiff's action had been dismissed on this ground as against the defendant owner, the dismissal would have been in abatement only. It would not have settled the merits of the controversy. The trial court found that this provision was waived by the conduct of the defendant owner, in that, in the correspondence had by and on behalf of the plaintiff with the owner, the refusal to pay was never based upon such ground, but was based specifically upon other grounds. The trial court found also that the owner invited the plaintiff to file a lien and bring an action in order to determine the controversy between them which was indicated in the correspondence along the lines of the specifications which we have set forth in the preceding paragraph. Without passing on the soundness of the trial court's reasoning at this point, we think the record discloses another quite conclusive reason why this contention cannot be sustained. The plaintiff brought his action against both defendants, namely, the owner and the principal contractor. The owner not only filed a counterclaim against the plaintiff for damages of \$1,700 for his failure to comply with the provisions of the contract, but he also filed a cross-petition against his codefendant, the principal contractor, claiming the same damages. The principal contractor answered this cross-petition, denying the same and asking for a recovery of the balance due it from the owner of the property over and above the amount of such lien which might be found in favor of the plaintiff. In the issue thus made between the two defendants, the initiative was taken by the defendant owner. No question was raised by either defendant as between themselves concerning the absence of a certificate by the consulting engineer. The issue was fully tried between the two defendants. The trial court found that the defendant owner was indebted to the principal contractor in a sum somewhat over

struction Company, hereinafter referred to as the principal contractor, for the construction of a gas plant at Perry, Iowa, for a consideration of somewhat more than \$13,000. On the same day, the principal contractor entered into a contract with the plaintiff for the performance of a part of its contract for an agreed consideration of somewhat more than \$4,600. That part of the contract undertaken by the plaintiff consisted in the main of the erection of the building proper. In the course of the performance of his contract, the plaintiff received, in round numbers, \$2,200. There is no dispute that he would be entitled to receive something more than \$2,400 in addition, unless he is precluded therefrom on some of the grounds indicated in the answer of the owner defendant. In the main, the claim for the owner defendant is that the plaintiff failed to perform his contract in respect to certain specifications set forth in the answer. These specifications are made the basis of a counterclaim against the plaintiff for \$1,700. The breach pleaded is based upon the contract between the owner and the principal contractor, and a cross-petition also was filed against the principal contractor for the same amount. There is no dispute that, subject to the rights of the plaintiff and to the counterclaim, there was due and owing to the principal contractor from the owner somewhat more than \$2,800. The specifications of breach of contract made by the defendant owner, both in the counterclaim against the plaintiff and in his cross-petition against the principal contractor, his codefendant, were as follows:

“(a) The brick were not selected for even color; (b) the work was not a neat struck joint; (c) the openings over the doors and windows were not carried through the walls; (d) the walls were not carried to the roof; (e) the job as a whole was not a good, workmanlike job; (f) the contract was not completed by November 10th, according to contract.”

In explanation of the specifications, it may be noted that the subcontract called for the erection of a brick building, and contained the following proviso:

"That the walls will be built of the best common brick, hard, square and thoroughly well burned, all picked for even color on both the inside and outside face; no soft or salmon brick to be used anywhere in the work; all to be finished inside and out with a neat struck joint."

The foregoing quotation from the contract furnishes the basis of Specifications "a" and "b." Upon these specifications, damages are claimed to the amount of \$1,000. A claim of \$600 of damages is based upon Specification "f." The contract provided for the completion of the contract on November 10th, and for liquidated damages of \$10 a day for the period of delay. These three specifications present the principal part of the defendant owner's claim, so far as the merits of the controversy are concerned.

As to the merits of these specifications, the question is largely one of fact, upon a record presenting much conflict in the testimony. As bearing upon these particular specifications, the contract between the owner and the principal contractor and that between the principal contractor and his subcontractor, the plaintiff, were in substantial accord.

Turning our first attention to Specifications "a" and "b," the trial court found substantial compliance by the plaintiff with the contract, and found further that, if the defendant had at any time a possible ground of complaint at this point, it had been waived by the conduct of the owner's agents while the contract was in course of performance. The trial court made his finding in writing. The following was his finding upon this branch of the case:

"The brick that were in fact used complied with this specification in all particulars, with the possible exception as to evenness of color; in fact, aside from color, it is doubtful if there is a better brick to be had in the entire state;

no remaining interest in a mere abatement of plaintiff's petition.

The decree entered below is, therefore,—*Affirmed*.

LADD, WEAVER and PRESTON, JJ., concur.

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CITY OF DES MOINES, Appellee, v. IOWA TELEPHONE COMPANY,  
Appellant.

**TELEGRAPHS AND TELEPHONES: Establishment, Maintenance,**

- 1 **Etc.—Free Legislative Grant—Power of Municipality to Collect Rental.** The fee title in trust possessed by a city in its streets, plus the statutory right in the city to "care, supervise and control" its streets, give the city no such proprietary interest in its streets as will support an action by the city to recover the reasonable rental value of that part of the streets occupied by the poles, fixtures, etc., of a telephone company which received its franchise grant, unburdened with any financial exaction, direct from an act of the state legislature. (Sections 2158-2160, Code, 1897.)

WEAVER and PRESTON, JJ., dissent.

**STATUTES: Construction—Expressio Unius Est Exclusio Alterius.**

- 2 Principle recognized that the express mention of one thing implies the exclusion of another. So held under a statute granting to telephone companies the right to occupy streets, etc., with their poles, etc., provided compensation be made to private parties injured thereby, it being held that this express mention of private parties excluded public municipalities.

**MUNICIPAL CORPORATIONS: Streets, Etc.—Reserved Legisla-**

- 3 **tive Power.** Principle recognized that the plenary power of the general assembly over the highways of the state includes the power to arbitrarily grant to a public service corporation a free franchise right in the streets of a municipality. (Section 751, Code, 1897; Art. 3, Section 30, Const.; Section 48, Par. 5, Code, 1897.)

**CONSTITUTIONAL LAW: Impairment of Contracts—Legislative**

- 4 **Grant of Franchise in Streets.** Principle recognized that a legislative grant of a franchise in public streets may not be added to by the imposition by the municipality of additional burdens. (Art. 1, Section 21, Const.)

*Appeal from Polk District Court.*—LAWRENCE DeGRAFF,  
Judge.

APRIL 5, 1917.

REHEARING DENIED DECEMBER 14, 1917.

ACTION to recover rental fees for the space occupied by defendant with its poles and wires in the streets of the city of Des Moines under an ordinance passed by the city on December 30, 1912. The petition is in five counts, and seeks to recover the sum of \$1 for each pole and \$1 for each mile of wire in the streets for the years 1910, 1911, 1912, 1913, and for part of the year 1914. The defendant denied generally, and pleaded that, as successor to the Central Union Telephone Company, it acquired the right in perpetuity to maintain its wires and poles in the streets of the city free of charge. It also pleaded a former adjudication, and an estoppel on the part of the city by its conduct and laches from maintaining this action. It also questioned the power of the city to assess and collect rentals for the use of its streets. On these issues, the case was submitted to the jury, on the theory that, without reference to the ordinance, the city was entitled to recover the reasonable value of the space occupied by the defendant for the years in question. The jury returned a verdict for plaintiff in the sum of \$71,658.49, and from a judgment rendered thereon, defendant appeals.—*Reversed.*

*Parker, Parrish & Miller*, for appellant.

*H. W. Byers, Guy A. Miller and Thos. Watters, Jr.*, for appellee.

1. TELEGRAPHS AND TELEPHONES: establishment, maintenance, etc.: free legislative grant: power of municipality to collect rental.

DEEMER, J.—I. The Central Union Telephone Company was a corporation organized under the laws of the state of Illinois, and, sometime in the year 1882, it constructed a telephone exchange in the city of Des Moines, erecting its poles, wires, and other apparatus upon the streets, alleys, and

public places of said city. It also erected exchanges in Davenport, Keokuk, Dubuque, and other cities in the state, and constructed and used long distance lines connecting said exchanges.

About September 1, 1896, the Central Company sold to the Iowa Telephone Company, a corporation organized under the laws of this state, all its tangible property in this state, and also assigned and transferred to said company all its rights and franchises to operate its said exchanges and toll lines. After taking over the property, the Iowa Telephone Company improved and extended the same, and has maintained and used the same for the transmission of messages down until the present. Its business is both state and interstate in character. At the time this action was commenced, it had 13,991 poles and 27,385.7 miles of wire within the city of Des Moines.

On December 30, 1912, the city council of Des Moines passed an ordinance requiring every person or corporation to pay a rental fee of \$1 for each and every telegraph or telephone pole used, possessed, or maintained by it upon any of the parks, streets, or alleys of the city, and \$1 per mile of line owned or used by any telegraph or telephone company. This ordinance became effective January 11, 1913.

This action was brought in October of the year 1913, and the first count of the petition is based upon the ordinance just quoted. The other counts were for the reasonable rental value of the space occupied by the defendant company of the streets, alleys, and public grounds of the city with its poles, wires, etc. The trial court eliminated the ordinance, and submitted the question to the jury as to the reasonable rental value of the space occupied by defendant.

Defendant claims that it was authorized by an act of the legislature to use the streets and alleys of the city, and entitled to such use without being subject to any charge for rentals. The act upon which it relies reads as follows:



"Any person or company may construct a telegraph or telephone line along the public highways of this state, or across the rivers or over any lands belonging to the state or to any private individual, and may erect the necessary fixtures therefor; *provided*, that when any highway along which said line has been constructed shall be changed, said person or company shall, upon ninety days' notice in writing, remove said line to said highway as established. Said notice contemplated herein may be served on any agent or operator in the employ of said person or company. Such fixtures must not be so constructed as to incommode the public in the use of any highway or the navigation of any stream; nor shall they be set up on the private grounds of any individual without paying him a just equivalent for the damages he thereby sustains." McClain's Annotated Code, 1888, Volume 1, p. 553; Sections 1324, 1325, Code, 1873, as amended by the Acts of the Nineteenth General Assembly, Chapter 104.

This statute has not been substantially changed, and now appears as Section 2158 of the Code. The controversy turns largely upon this section, although to a complete understanding of the case it may be well to say that, on or about July 6, 1891, the city granted a franchise to the Central Union Company, whereby it reserved the use of twenty phones free of charge for city business. This ordinance also provided that:

"The rights and privileges hereby granted may at all times be subject to such ordinances or regulations of a police nature as the city council of said city may be authorized to impose and shall see fit to adopt, and said city shall have the right to attach to the top cross arm of said telephone company's poles and fixtures, its fire alarm and police wires; provided that such attachments shall be made and maintained by said city so as not to interfere with the proper use and operation of said telephone company's plant,

and said attachments shall be made under the direction of said company's local manager. And any power of the city regarding the placing of wires and fixtures underground is hereby reserved to be exercised hereafter as the city council may deem necessary."

On April 6, 1903, the city passed another ordinance, requiring telephone, telegraph and other wires within certain districts to be placed underground, and also regulating the erection of aerial poles outside of said district. Again, on December 30, 1912, the council passed another regulatory ordinance regarding the planting and placing of poles, the laying of conduits, the stretching of wires, and fixing the rental charge, which we have hitherto mentioned. Under this ordinance, all telephone companies were required to file with the city engineer, between the 1st days of January and April of each year, a list of all the poles and wires occupying space in the streets of the city. The defendant complied with this last provision, but has failed to pay the rentals. As already stated, the case was not tried on the theory that recovery could be had under this or any other ordinance, the sole basis of liability being predicated upon the thought that, as the city had the fee title to its streets, and power from the legislature to control the use thereof, it had the right to recover from defendant the reasonable rental value for the use of the space in the streets used and occupied by the defendant, during the five years next preceding the bringing of the action.

The defendant vigorously challenges this contention, and asserts that it and its predecessors had the right, under the legislative grant of authority, to use and occupy the streets and alleys of the city without securing the consent of the city, and without being liable to it for the use thereof. It also contends that the city had no power or authority from the legislature to impose a rental for the use of the streets with its poles and wires, and that the legislature,

having plenary power, granted to it the right to use the city streets without compensation, and required no reimbursement to anyone save owners of private property.

Again, it contends that the legislative grant, after the acceptance thereof by the defendant and its predecessors, and the investment of large sums on the strength thereof, became a grant, and that the city could not thereafter impose any other conditions or provisions upon the exercise of the power conferred. It concedes the right of the city to exercise its police power, which neither the legislature, or its creation, the municipality, could bargain away, and it also concedes that it is liable to taxation on its property under the law; but it denies the right to exact license fees, save as an exercise of the police power, and denies the right of the city, in the absence of express authority, to impose a license or tax. Having acted under a grant from the state, it denies the right of the city to take away the grant or to impose any conditions thereon, in the absence of express legislative authority, and claims that no such authority has been given, even if it were within the power of the legislature to do so.

On the other hand, the city contends that it owns its streets, alleys, and public grounds, the same as any private owner; that the legislature, by the act in question, gave nothing but a mere permissive right, which was at all times subject to such exactions as the city might see fit to impose for the use of its property, and, in the absence of any express authority from the legislature, and without any ordinance, it is entitled to recover the reasonable value of the use of its property.

While something is said regarding the reserved power of the state under its Constitution and laws, but little attention is given to this matter in argument, and that question is foreclosed by the recent decision of *State ex rel. Sharer v. Iowa Telephone Co.*, 175 Iowa 607, wherein it is

held that the additional legislation is simply regulatory in character, and was not intended to and did not apply to companies which took advantage of the section of the Code heretofore quoted.

Whilst it is broadly contended that there are statutes authorizing the city to exact a rental or a license fee for the use of the streets and alleys by telephone, telegraph, or other poles, we find no statute which expressly or by necessary implication grants this power; and, as the case was not submitted by the trial court on this theory, any further discussion of the matter is aside the mark.

Reduced to its last analysis, the proposition is this: The city owns the fee to its streets, alleys, and public places, and is entitled to compensation for the use thereof to the same extent as any private party would be under like circumstances; and without any ordinance or express grant from the legislature, it may recover compensation for this use. This, defendant denies, and it also says that, even conceding the right, the legislature, having complete and plenary power over all the streets and highways of the state, may grant the use thereof to a public utility without making any compensation to the city, and that, as it granted the right to telephone and telegraph companies, without any compensation to be paid except to private owners, it intended to and did grant the use free of charge.

It will be noticed in the first place that the act in question does provide compensation to private owners. This in itself is sufficient warrant for saying that no compensation should be paid for the use of streets and alleys for crossing the rivers, or over any of the lands belonging to the state. Again, there can be no doubt, under our previous decisions, that, under the legislative grant, the defendant and its predecessors had the unlimited right to use the public streets and alleys of the town with its poles,

2. STATUTES:  
construction:  
*expressio*  
*unius est*  
*exclusio*  
*alterius.*

wires, and apparatus, and that this right continued until revoked by the state, in the exercise of its reserved powers. See *Shaver* case, *supra*; *Chamberlain v. Iowa Telephone Co.*, 119 Iowa 619; *State v. Nebraska Telephone Co.*, 127 Iowa 194. It is true that none of these cases make any pronouncement upon the right of the city to exact a license or rental fee, but they do hold that the defendant had something more than a permissive right or license to use the streets and alleys of a city.

It is conceded, as it must be, that a city exercises but a delegated power, and has no authority save as it is expressly conferred or necessarily implied from the powers granted; and it is further to be noticed that, under our law, the legislature may control the streets and alleys of a city. The principal (the state in this case) not only has all the powers delegated to its agent, the city, but complete and plenary powers over all matters which it may delegate to its subordinate; so that it was within the power of the legislature, if it were so disposed, to grant the use of streets and alleys in towns and cities to telephone and telegraph companies, rent free. This, we think, it did in this case.

II. Aside from this, however, while the fee title to streets and alleys in the cities and towns of this state, aside from some yet acting under special charters, is in the city, it is held by it in trust for the public. *City of Clinton v. Cedar Rapids & M. R. R. Co.*, 24 Iowa 455; *Chicago, N. & S. W. R. Co. v. Mayor of Newton*, 36 Iowa 299; *City of Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa 338; *Stanley v. City of Davenport*, 54 Iowa 463; *East Boyer Telephone Co. v. Incorporated Town of Vail*, (Iowa) 129 N. W. 298. In the *City of Clinton* case, *supra*, this court said:

3. MUNICIPAL  
CORPORATIONS:  
streets, etc.:  
reserved legis-  
lative power.

"The fee of the streets, it is conceded, is in the city, in trust for the public. By virtue of these charter provisions and this ownership of the fee, the city claims that it has the *exclusive control* of the streets, and therefore it may consent to or prohibit, as by its common council it shall deem best for the public interest, the use of its streets for railway purposes, and that the courts cannot interfere with or control the decision of the common council respecting this matter, whatever that decision may be. If these were all the provisions of the law applicable to this subject, the position of the city might, and I think would be, well taken. But there are two other statutes which have a material bearing upon this subject, and which are relied on by the defendant to support the claim which it makes of a right (subject to reasonable police and other regulations) to use such portions of the public streets of the city as are necessary to enable it to construct the road in question. The first of these statutes is, 'An act granting to railroad companies the right of way.' Rev. 218, Art. 3, passed in A. D. 1853. The other statute is the act of 1860 (Laws, 1860, p. 40), so often previously referred to in this opinion. \* \* \*

The city holds the fee, but in trust for the public, not the people of the city alone, but the general public as well. To enable it to protect this trust property from invasions, to enable it the better to discharge various municipal duties proper, such as providing sewerage, digging public cisterns, laying down pipes therein, etc., and perhaps to compensate it for the burdens arising from making improvements and repairs, *the fee, the soil* of the streets, is in the corporation, but the *use* in the public. \* \* \*

But if the statute of 1853 does give to railroad companies the right to occupy streets and highways longitudinally, as that opinion holds, I fail to find any such qualification of the right as makes it dependent upon 'obtaining the right of way from the corporation holding the fee.' As to a highway in the coun-

try, or a street in a city, where the fee is in the adjoining owner, I am not prepared to say that to lay a railroad down upon it is not an additional burden for which such proprietor is entitled to compensation. This is the doctrine of the two New York cases cited in this connection, and of subsequent decisions in the same state and elsewhere. *Wager v. Railroad Co.*, 25 N. Y. 526; *Ford v. Railroad Co.*, 14 Wis. 609. But it is a mistake to suppose that, where the fee of the streets is in the city, in trust for the public, the city is constitutionally and necessarily entitled to compensation, the same as a private proprietor holding the fee. The legislature might provide for such compensation, but is not bound to do so. It will be observed that the statement in the *Millburn* case as to the necessity of obtaining the right of way of the 'corporation holding the fee,' is because such corporation owns the fee, and, therefore, is entitled to compensation, and not because, by virtue of charter, powers, and authority, it has the right to give or refuse its consent. The constitutional provision is that 'Private property shall not be taken for public use without just compensation to the owner.' Art. 1, Sec. 18. The streets of the city are not the private property of the corporation in such a sense that the legislature cannot, so far as regards the corporation, authorize the same to be used for any public purpose for which it may see fit, unless it makes compensation to the city for such use. Since the decision in the *Millburn* case, the Court of Appeals of New York have decided this very point, in the case of the *People v. Kerr* (27 N. Y. 188). In that case, it appeared that the fee of the streets of New York City was vested in the corporation in trust for the public. It was held by the court that the city held this fee in trust for the public use of all of the people of the state, and not as the corporate property of the city.

"The legislature authorized a street railway to be laid down upon certain streets in New York City without the

consent of the city, and without providing for compensation to the city or the adjacent lot owners. The Court of Appeals, upon full consideration, decided that this might constitutionally be done, for the reason that the interest of the city in its streets was *publici juris*, and under the unqualified control of the legislature. On this point, Emmott, J., said: 'The title (in the streets) thus vested in the city of New York is as directly under the power and control of the legislature, for any public purposes, as any property held directly by the state, or any public body or officers, and its application cannot be challenged by a corporation (the city) which, in respect to such property at least, is a mere agent of the sovereign power of the people.' Wright, J., said, and the court concurred therein: 'I am clearly of the opinion that the city corporation has no property in the streets of a character to be protected by the constitutional limitation on the right of eminent domain.'

"The true view is this: Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the state, and the corporation could not prevent it. We know of no limitation on this right, so far as the corporations themselves are concerned. They are, so to phrase it, the mere *tenants at will* of the legislature. This plenary power on the part of the legislature over public corporations, saving vested rights of property and of creditors, is a doctrine so well settled that it is unnecessary to refer to more than a few cases asserting it. \* \* \* But while the corporation exists, and has been allowed to acquire



*private* property, such property is doubtless protected by the constitutional provision, the same as the private property of the citizen. The distinction is just here. A city, by its constituent act, may be authorized to acquire property for a market house, a public hall, or the like. Of this property the city cannot be deprived by legislative act, except it be taken for public use, and if so taken, the city is entitled to compensation. But its property in its public streets is not of this nature. The city cannot alien it nor use it for other than legitimate purposes. Over the use of property acquired by the exercise of the right of eminent domain, or dedicated under the statutes to public use, where the soil, the fee, passes from the dedicator, the legislature, so far as regards the rights of public corporations, possesses an unlimited control. Private citizens owning a contiguous property may have rights in or to the use and enjoyment of such public property, over which the power of the legislature is not boundless and supreme. But we are required to consider only the rights of public corporations, and these rights they hold at the absolute will and pleasure of the legislature, as the representative of the public. The pertinency of these general observations will appear in the view which will be hereafter expressed respecting the immediate question before the court.

"The English authorities cited by the counsel for the city, to the effect that the king cannot force a new charter upon a corporation, have no application in this country to the power of the legislature. The latter may incorporate a place without its consent, and without its consent add to, qualify, abridge, or even abolish, its municipal powers. The only limitation in this state on the power of the legislature is as to the *mode*. It must, in certain cases, act by general, and not by local or special laws. Const., Art. 3, Sec. 30. The state, by its legislature, must, in the nature of

things, be deemed to have control over its highways and its means of communication. It cannot be doubted that it is competent for the legislature to pass a law to the effect that any highway in the country, and any street in a city, may be used by any railroad company without the consent of the adjoining proprietors, in the case of the highway, and without the consent of the city, in the case of the street.

\* \* \* If the fee of the highway is in the adjoining owner, he may be entitled to compensation for the additional servitude to which his soil is thereby subjected. But that which gives him the right, if it exists, to compensation in such a case, is the provision of the Constitution (Art. 1, Sec. 18) protective of private property. Even in such case it remains yet to be decided in this state whether the dedication to the public, where the fee is retained, ought not to be held to cede to the legislature, as the representative of the public, the right to regulate as it sees fit the public use. Upon this point, it is not necessary for the court to express any definite opinion. But where the fee of the street is in the public, or in the city corporation in trust for the public,—for the city holds the fee not for itself or its inhabitant alone, but for the general public, equally and as well,—the legislature may authorize the street to be used by a railroad company without the consent of the city, and without compensation to the city. The reason for this has been stated: viz., that the streets of the city are not its 'private property' in such a sense as to entitle it as of right, despite legislative declaration to the contrary, to compensation for this additional public use. This point, as we have before seen, is expressly ruled in the *People v. Kerr*, above referred to, and of its correctness there can, it seems, be no doubt.

"And the decision in the *City of Des Moines v. Hall* (ante) is perfectly consistent with this view. There the city, as the holder of the legal title, of the fee, brought its

action against a private trespasser upon the soil of the street. Such an action can, of course, be maintained by the city, though its ownership of the soil is qualified, as respects the public, by the purposes for which it is held. But it is different where the city, a derivative and subordinate authority, sets up rights as against the legislature, as the sovereign representative of the general public, for whose use the streets are dedicated."

See also *State v. Davenport & St. P. R. Co.*, 47 Iowa 507; *Stange v. City of Dubuque*, 62 Iowa 303; *East Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 511. As the city holds its title in trust, and is not entitled to compensation for the use of its streets where permission or authority is granted by the legislature itself, it is clear that it is not entitled to compensation for the use of its streets.

It should also be noted that the grant in this case was to a public service corporation, and not to an individual for purely private uses, and it seems to be generally held that the location of telegraph and telephone poles upon a highway or a street within a city is not an additional servitude, of which either the public or a private individual may complain. It may be true that, if an individual without legislative authority uses or occupies the streets, alleys, or public grounds of a city for purely private purposes, he may be held liable for the use thereof, and surely he may, under our own law, be charged for the rental value. But this is not so as to a corporation engaged in public business, acting under legislative permission or grant which has never been revoked. See, as sustaining these views, *Michigan Tel. Co. v. City of Benton Harbor*, (Mich.) 80 N. W. 387; *City of Texarkana v. Southwestern Tel. & Tel. Co.*, (Texas) 106 S. W. 915. The trial court instructed:

"You are instructed that, under the statutes of this state, cities and towns have the power to authorize and regulate telephone wires and the poles and other supports there-

of by general and uniform regulation, and the court has construed the power of the plaintiff city under the authority vested in it by the state legislature to assert and charge a reasonable rental value for the use of its streets, avenues, alleys, and other public places under the control of the said city, for the space occupied by the said defendant in the use of said streets, alleys, and other public places, as shown by the testimony."

We are unable to find any statute which authorizes a city to charge a reasonable rental value for the use of its streets, avenues, alleys, etc., and none is called to our attention, save Section 775, Code, 1897, which reads in part as follows:

"Cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway and other electric wires, and the poles and other supports thereof, by general and uniform regulation."

Assuming that this gave the power, the city has never exercised it, and, under the holding in *City of Muscatine v. Keokuk N. L. P. Co.*, 45 Iowa 185, the city not having exercised the power, the instruction quoted was erroneous.

III The act of the legislature constituted a grant, and this grant, as we have seen, amounted to a contract, which could not be changed except, perhaps, by the legislature itself under its reserved power. Surely, the city could not add anything thereto.

*New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674; *Louisville v. Cumberland Tel. & Tel. Co.*, 224 U. S. 649; *Russell v. Sebastian*, 233 U. S. 195 (126 Pac. 875); *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58.

IV. Counsel for appellee rely upon a line of cases of which *City of St. Louis v. Western Union Telephone Co.*, 148 U. S. 92 (149 U. S. 465) is typical. That case differs

4. CONSTITUTIONAL LAW: impairment of contracts: legislative grant of franchise in streets.

very essentially from the instant one. In that case it appeared that, under the organic law of Missouri, it gave to the city of St. Louis very enlarged control over public property and property deeded to public uses within territorial limits, and the telegraph company in that case received no right from the state legislature whatever. It claimed a right to occupy the streets of the city under a congressional enactment, giving it the right to construct, maintain, and operate lines of telegraph along any military or post roads of the United States, then or thereafter declared such by act of Congress; and Rev. St., Sec. 3964, declares that all letter carrier routes established in any city or town are post roads. In the *St. Louis* case, the legislature did not attempt to grant any franchise or license to the telegraph company, and it appears from the opinion that it had no authority to do so, because of the organic law of the city of St. Louis. Speaking to these points, the Supreme Court of the United States said:

"In the opinion heretofore announced, it was said: 'We do not understand it to be questioned by counsel for the defendant that, under the Constitution and laws of Missouri, the city of St. Louis has the full control of its streets in this respect and represents the public in relation thereto.' A petition for a rehearing has been filed, in which it is claimed that the court misunderstood the position of counsel; and, further, that in fact the city of St. Louis has no such control. Leave having been given therefor, briefs on the question whether such control exists have been filed by both sides, that of the telegraph company being quite full and elaborate. We see no reason to change the views expressed as to the power of the city of St. Louis in this matter. Control over the streets resides somewhere. As the legislative power of a state is vested in the legislature, generally that body has the supreme control, and it delegates to municipal corporations such measure thereof as it deems

best. The city of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the legislature, but it framed its own charter under express authority from the people of the state, given in the Constitution. Sections 20 and 21 of Article 9 of the Constitution of 1875 of the state of Missouri authorized the election of thirteen freeholders to prepare a charter to be submitted to the qualified voters of the city, which, when ratified by them, was to 'become the organic law of the city.' Section 22 provided for amendments, to be made at intervals of not less than two years, and upon the approval of three fifths of the voters. Sections 23 and 25 required the charter and amendments to always be in harmony with and subject to the Constitution and laws of Missouri, and gave to the general assembly the same power over this city, notwithstanding the provisions of this article, as was had over other cities. In pursuance of these provisions of the Constitution, a charter was prepared and adopted, and is, therefore, the 'organic law' of the city of St. Louis, and the powers granted by it, so far as they are in harmony with the Constitution and laws of the state, and have not been set aside by any act of the general assembly, are the powers vested in the city. And this charter is an organic act, so defined in the Constitution, and is to be construed as organic acts are construed. The city is in a very just sense an '*imperium in imperio*.' Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter. \* \* \* Obviously, the intent and scope of this charter are to vest in the city a very enlarged control over public property and property devoted to public uses within the territorial limits. It is given power to open and establish streets, to improve them as it sees fit, and to regulate their use, paying for all this out of its own funds. The word 'regulate' is one of broad import. It is the word used in the Federal Constitution to

define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used. If it should see fit to construct an expensive boulevard in the city, and then limit the use to vehicles of a certain kind, or exact a toll from all who use it, would that be other than a regulation of use? And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something toward the expense it has been to in opening and improving the street. Unless, therefore, the telegraph company has some superior right which excludes it from subjection to this control on the part of the city over the streets, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the grant of power to regulate the use. That the company gets no such right from the general government is shown by the opinion heretofore delivered, nor has it any such from the state. \* \* \* Neither have we found in the various decisions of the courts of Missouri, to which our attention has been called, any denial of the power of the city in this respect." *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465, at 467.

Again, in the same case, the court said:

"And, first, with reference to the ruling that this charge was a privilege or license tax. To determine this question, we must refer to the language of the ordinance itself, and by that we find that the charge is imposed for the privilege of using the streets, alleys, and public places, and is graduated by the amount of such use. Clearly, this is no privilege or license tax. The amount to be paid is not gradu-

ated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. 'A tax is a demand of sovereignty; a toll is a demand of proprietorship.' \* \* \* We do not understand it to be questioned by counsel for the defendant that, under the Constitution and laws of Missouri, the city of St. Louis has the control of its streets, and in this respect represents the public in relation thereto. \* \* \*

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a state. 'It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the Federal government to a corporation, state or national, to construct interstate roads or lines of travel, transportation or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon the property of a public nature belonging to a state. It would not be claimed, for instance, that, under a franchise from Congress to construct and operate an interstate railroad, the grantee thereof could enter upon the statehouse grounds of the state, and construct its depot



there, without paying the value of the property thus appropriated. Although the statehouse grounds be property devoted to public uses, it is property devoted to the public uses of the state, and property whose ownership and control are in the state, and it is not within the competency of the national government to dispossess the state of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the state. This rule extends to streets and highways: they are the public property of the state. While for purposes of travel and common use they are open to the citizens of every state alike, and no state can by its legislation deprive the citizens of another state of such common use, yet, when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another state, or a corporation of the national government, it is within the competency of the state, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may, if it chooses, exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated." *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 97.

It is very clear that the general government could not grant to a public utility the right to use the property of a state or other municipality or of an individual without compensation. The grant was nothing more than a license or permissive right to use the post roads; but, as the government had no title to or control over streets, alleys, or public grounds of a city, it could not make any grant thereof which would be of any validity. In the case at bar, the

grant was directly by the legislature, which, as we have seen, had plenary power over the streets and alleys of any and all the cities and towns in the state. It is well in this connection to note that it was finally held that no recovery could be had from the telegraph company for the use of the streets, for the reason that the company was occupying these streets under a prior grant from the city itself, which made no provision for rentals; and no such charge could be made without a violation of the terms of that grant. See *City of St. Louis v. Western Union Tel. Co.*, 63 Fed. 68. *Western Union Tel. Co. v. City of Richmond*, 224 U. S. 160, also relied upon by appellee, is like the *St. Louis* case, in that the telegraph company was there relying upon the same act of Congress. It was also assumed in the *Richmond* case that the city had the same power as in the *St. Louis* case. There was no legislative grant in the *Richmond* case.

That a grant from a city, or the legislature itself, when accepted and acted upon by a telegraph or telephone company, is a contract, and that this contract is entitled to protection, is affirmed by the Supreme Court of the United States in *Boise Artesian Hot and Cold Water Co. v. Boise City*, 230 U. S. 84; *City of Springfield v. Postal Telegraph-Cable Co.*, (Ill.) 97 N. E. 672. In the latter case, the Postal Company had no franchise either from the state or city, and the state statute provided that no telegraph or telephone company should have the right to occupy the streets of a city without the consent of the municipal authorities. In these circumstances, it was held that the city had power to exact a pole rental as a condition precedent to the right to occupy its streets. In *Southwestern Tel. & Tel. Co. v. City of Dallas*, (Texas) 174 S. W. 636, the telephone company had no grant either from the state or city, and the state Constitution prohibited the city from granting such franchises; and it was held that a telephone company occupying the streets of the city without authority was a mere

licensee, and that the city might require payment of a charge as a condition precedent to its right to remain in and on the streets. The case nearest in point of any relied upon by appellee is the *City of Memphis v. Postal Telegraph-Cable Co.*, 145 Fed. 602, from the circuit court of appeals for the western district of Tennessee. In that case, there was a legislative grant; but the court, in construing it, held that, in view of prior statutes giving to the city of Memphis entire control of its streets, the grant was subject to this control, and that the city might, notwithstanding the grant, collect a pole and wire rental tax. Speaking to this point, the court said:

"It is seen by the act of 1879 'the entire control' of the streets was granted by the legislature to the city of Memphis. And we think that, for reasons hereafter noted, this grant of power included the power to demand and receive compensation for facilities afforded for a use and occupation not enjoyed by the general public. But it is claimed by the defendant that this grant of authority was superseded and rendered null, so far as telegraph and telephone companies are concerned, by the act of 1885, p. 120, c. 66, the first section of which provides that any such company 'may construct, operate and maintain such telegraph, telephone, or other lines necessary for the speedy transmission of intelligence along and over the public highways and streets of the cities and towns of this state, or across and under the waters and over any lands or public works belonging to this state.' Our attention is called to the fact that in the prior statute (Milliken & V. Code, Sec. 1535), relating to the same subject, such companies were granted this privilege 'free of charge' as expressed therein, while in the act of 1885 these words were omitted. It is contended by the city that the legislature, by the act of 1885, which is a general statute, did not intend to resume the power of

control of its streets which it had given to the city of Memphis by the act of 1869-70, and that the general law operates only as a permission to exercise in the streets of Memphis the franchises granted to telegraph companies subject to the control which it had already granted to the city. We think that this contention should be sustained, first, upon the ground of the familiar rule of construction that a statute general in its terms will not repeal by implication a particular statute relating to some particular matter or locality, unless the intention of the legislature to repeal the special act shall plainly appear. We had occasion to consider this subject with special attention in *Guthrie v. Sparks*, 131 Fed. 443 (65 C. C. A. 427). \* \* \*

"In Sutherland on Statutory Construction (2d Ed.) Sec. 275, it is said that: 'Unless there is a plain indication of an intent that the general act shall repeal the other, it will continue to have effect, and the general words with which it conflicts will be restrained and modified accordingly.' This statement has a peculiar adaptation to the case before us. Again, there are certain special reasons for thinking that the legislature could not have intended to displace the 'entire control' of the streets which it had committed to the city. No one doubts, we suppose, that the power to charge a telegraph company with a proportion of the cost of making and keeping in repair and policing a street of the city was lodged somewhere. And if so, no place was so appropriate for lodging it as in the city itself. It alone was obliged to bear the whole cost of maintenance. The share of the cost of maintenance for public use belonged to the city. The share due from the telegraph company for its special use was also due to the city, for the latter was carrying it, and its treasury should be reimbursed. It was a local matter, and could be most conveniently attended to by the officials of the municipality who would be best informed of the circumstances, and, by all analogies, the proper persons to

assess and collect the charge. It would belong to no other public fund. It was, therefore, perfectly reasonable that the city should possess the authority to make and collect such a charge, and rather unreasonable that it should be committed to any other depository of governmental authority. And there is no machinery provided by statute for the levy and collection of such charges by the state, and there was none when the legislature passed the act of 1885. These seem to us strong reasons for believing that the legislature had no intention of reserving to the state the power to charge the telegraph company for its proportion of the cost of maintaining the streets of the city of Memphis, but rather that it intended to leave that matter with the authority to which it had granted the power of control possessed by the state. The grant of 'entire control' seems even a more absolute delegation of power than the power 'to regulate,' which was held, in *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92 (13 Sup. Ct. 485, 37 L. Ed. 380), and 149 U. S. 465 (13 Sup. Ct. 990, 37 L. Ed. 810), to authorize the city of St. Louis to assess and collect a like charge for the use of the streets for the maintenance of the structures of a telegraph company. Indeed, that case, if we are right in thinking that the Tennessee Act of 1885 did not deprive the city of the control of its streets in this regard, is ample authority for holding that it had power to levy and collect the charges in question, the reasonableness of them not being now disputed; and the case of *Postal Telegraph Co. v. Baltimore*, 79 Md. 502 (29 Atl. 819, 24 L. R. A. 161), affirmed by the Supreme Court of the United States in 156 U. S. 210 (15 Sup. Ct. 356, 39 L. Ed. 399), is directly in point.

"It is argued that this charge is a tax, and that the city of Memphis is not empowered to levy a tax not specified in its charter. But although such charges as these are sometimes called 'taxes,' they are not such as are generally meant in constitutions and statutes by that term. But by

whatever name called, the power to impose them was given to the city by the grant of 'entire control' over its streets. If there is a burden imposed upon abutting owners by the structures of the telegraph company, that is a matter between those parties, and is irrelevant to the subject of the present controversy. \* \* \*

"The fifth ground of demurrer is that the charge sought to be collected is 'in violation of the Constitution of Tennessee and of the United States.' But what provision of either of those instruments this charge infringed is not pointed out, and we are unable to apprehend what it may be, unless it is that a supposed contract was created between the state and the telegraph company by the Act of 1885 and the action of the telegraph company thereunder, which is impaired by the city of Memphis in imposing this charge. But, for the reasons stated, we think that upon the proper construction of the Act of 1885 the state did not propose to contract for an immunity to the telegraph company for charges of this character. As this appeal brings here only the questions raised by the demurrer, we deal with nothing else."

The legislation of the state of Tennessee upon the subject was as follows:

"In Section 1 of an act entitled 'An act to reduce the charter of Memphis, and the several acts amendatory thereof, into one act, and to revise the same' (Chapter 26, p. 225, Acts Tenn. 1869-70), it is provided, among other things, 'that the city council may do all things as a natural person.' Section 46 (page 235) of said act provided that the general council of the city of Memphis shall have power 'to close up, transfer, or sell any street, alley or public easement, and shall have and exercise complete and perfect control over all the streets, squares and other property of the city, whether lying within or without the limits of the city.' The Act of 1869-70 enumerated all the rights, pow-

ers, and privileges and property rights belonging to the city of Memphis prior to the act of 1879. By Section 1, c. 10, p. 13, of the Acts of 1879, the Act of 1869-70, just quoted, was repealed, and Section 4, c. 10, p. 14, Acts 1879, expressly provided that: 'The public buildings, squares, promenades, wharf, streets, alleys, parks and fire-engines \* \* \* and all other property, real and personal, hitherto used by such corporation for municipal purposes are hereby transferred to the custody and control of the state to remain public property, as it has always been, for the uses to which said property has hitherto been applied.' \* \* \*

The legislature of Tennessee of 1879 passed an act transferring this same property which it had withdrawn from the city of Memphis by Chapter 10 of said acts back to the board of fire and police commissioners of that city—using almost the identical language that was used in Section 4, c. 10, p. 14, of said acts—and conferred upon the said board of commissioners of the city of Memphis substantially the same rights and powers and control over its streets, alleys, and public easements. See Section 3, c. 11, p. 16, Acts Tenn. 1879. It appears from this legislation that the charter of the city of Memphis, under which it was operating at the time the defendant company entered within its limits and began the erection of its poles, as well as at the time the ordinance was adopted authorizing the collection of the pole rental sued for in this case, vested the city council or board of commissioners with the power 'to close up, transfer, or sell any street, alley or public easement, and to have and exercise complete and perfect control over all the streets, squares and other property of the city, whether lying within or without the limits of the city,' and 'that the city council may do all other things as a natural person.' " \* \* \*

"The legislature of Tennessee (1849-50) enacted the

original law granting rights of way to telegraph companies. Chapter 111, p. 303, Acts Tenn. 1849-50. This law remained practically unchanged until the adoption of the Code of Tennessee (1858). Section 1316 and subsequent sections, Title 8, c. 9, of the said Code of Tennessee, provides, in substance, that any person or company may construct a telegraph line along the public highways or streets of this state, or across the rivers, or over any lands belonging to the state, free of charge, and over the lands of private individuals, as therein provided, and may erect the necessary fixtures therefor. Said fixtures not to be constructed so as to obstruct any highway, street, or navigable stream; nor shall they be set up upon the lands of an individual, unless by contract, without paying such damages as the party sustained. In consideration of the right of way over the public property so conceded, every telegraph company, in case of war, insurrection or civil commotion of any kind, or for the arrest of criminals, was to give immediate dispatch, at the usual rate of charge, to any message connected therewith of any officer of this state or of the United States. It was made a misdemeanor for any employe of such company to refuse to give immediate dispatch to such message. These sections of the Code were repealed by the legislature of 1885, and the following statute enacted:

“Any person or corporation organized by virtue of the laws of this state, or any other state of the United States, or by virtue of the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence, the equivalent thereof, which may hereafter be invented or discovered, may construct, operate, and maintain such telegraph, telephone, or other lines necessary for the speedy transmission of intelligence, along and over the public highways and streets of the cities and towns of this state, or across and under the waters and over any lands and public



works belonging to this state, and on and over the lands of private individuals, and upon, along and parallel to any of the railroads or turnpikes of this state, and on and over the bridges, trestles or structures of said railroads: provided that the ordinary use of such public highways, streets, works, railroads, bridges, trestles or structures and turnpikes be not thereby obstructed, or the navigation of said waters impeded, and that just damages shall be paid to the owners of such lands, railroads and turnpikes, by reason of the occupation of such lands, railroads and turnpikes, by said telegraph or telephone corporations. \* \* \*

“Sec. 5. In consideration of the right of way over the public property herein conceded, every telegraph or telephone corporation shall, in the case of war, insurrection, or civil commotion of any kind, and for the arrest of criminals, give immediate dispatch at the usual rates of charge, to any message connected therewith of any officer of the state, or of the United States.’ Acts Tenn. 1885, p. 120, c. 66.”

It will be observed that this case turns upon a question of statutory construction, the whole matter being summed up in a single statement that, as the legislature had expressly granted to the city the absolute and entire control of its streets and alleys, and given it the same power with reference thereto as an individual, a grant by it to a telegraph company of a right to the use of the streets of a city, subject to the control of the city, was nothing more than a permissive right, and that the city had the right to exact pole and wire rental taxes.

The case is not controlling, for the reason that no such grant of power to the municipalities of this state has ever been given by our legislature, and we have heretofore held that the grant made by the legislature to telegraph and telephone companies is a contract which gave the com-

panies certain rights in and to the public highways and streets of a town or city. Moreover, as already pointed out, when the cities and towns of this state have the fee title to their streets and alleys, it is in trust for the public, and they have no such proprietary rights as that they may demand compensation for any public use which the legislature may see fit to grant. This is pointed out in other parts of this opinion. See, also, in the same connection, *Anhalt v. Waterloo, C. F. & N. R. Co.*, 166 Iowa 479; *East Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 511. Moreover, the courts of the country have generally placed an entirely different construction upon legislation similar to that used in the *City of Memphis* case. See *City of Texarkana v. Southwestern Tel. & Tel. Co.*, (Texas) 106 S. W. 915; *Michigan Tel. Co. v. City of Benton Harbor*, (Mich.) 80 N. W. 387; *City of Wichita v. Old Colony Trust Co.*, 132 Fed. 641; *City of Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa 338.

We are not to be understood as holding that a municipality may not, *under express legislative authority*, impose a license fee, or that it may not exercise its police power over telegraph and telephone companies, or that these companies are not subject to taxation, both by the state and the city; but the ordinance in question does not impose a license and is not an exercise of the police power, and it is not the imposition of a tax, for such companies are otherwise taxed for state, city and county purposes.

It is clearly a revenue measure, and there seems to be no express legislative power for such an ordinance. Indeed, it is well to note that the decision last referred to is somewhat wide of the mark, for the reason that this case was not submitted on the theory of the validity of the ordinance, but solely upon the basis of an implied promise to pay reasonable rental value for space occupied by defendant's poles and wires. *Wisconsin Tel. Co. v. City of*

Milwaukee, (Wis.) 104 N. W. 1009 (1 L. R. A. [N. S.] 581), is an instructive one on all the propositions here involved. To conclude a discussion already too long, we reach the conclusion that under no theory is the city entitled to recover from the telephone company the rental value of its streets used by said company with its poles and wires.

Under our previous decisions, the defendant was granted, by a legislative body having authority to do so, the right to use these streets without compensation to the city; and, aside from any question regarding the power of the city to exact license fees, pass regulatory acts in virtue of its police power, or to tax the company's property, it has no right to recover for the use and occupation of its streets, against a public service corporation such as a telegraph, telephone or railway company, which had been given express legislative authority to use the streets and highways.

Every proposition involved has heretofore been decided by this court, and we have no disposition to change the rule heretofore announced. The difficulties here presented and the supposed injustice resulting are not due to the courts, but to the legislature, and primarily to the people themselves. In the early history of every city and state, in this age of scientific development and discovery, new and important devices intended for the use and benefit of the people are eagerly sought after and generally encouraged. In their infancy, these utilities seem to need the fostering care of the state, or of its municipalities. The people of both the state and its instrumentalities are anxious to secure the advantage of these improvements, and so they offer all sorts of inducements, and grant them most favorable franchises, in order that they may keep up with the times. They have little concern about the future; and so, in order to secure immediate benefits, they use their powers most liberally, and grant favors and bonuses without stint. Oftentimes, too, this has been necessary, in order to induce the

investment of capital. This has happened with reference to railroads, telephones and telegraphs, waterworks, and various other utilities which might be mentioned. The writer well remembers the advent of the telephone, and has watched its growth. First it was purely a local affair; then short lines connected some of the towns; and finally it spread over the entire country, so that it is now possible for one in New York to talk with another in San Francisco. In the early days, every town wanted an exchange; next it wanted toll lines connecting its exchange with other exchanges in neighboring towns. Every one wanted a phone. At this stage, the legislature was appealed to, and no one thought at that time of charging for the use of poles or wires upon either public highways or streets. The main thing was to secure them, and to get capital wherewith to procure them. No one, it seems, could foresee the tremendous development of this industry; and so the legislature passed the act giving to telephone companies the right to construct their poles and wires over and along every highway and street in the state, in order to encourage their development. Capital was invested on this basis, and the business has become very large. Now it appears that these grants and franchises were valuable, and the use of the streets and public highways is thought to be worth something. In this situation, attempt is being made to collect rentals for the use thereof. It is a clear case of hindsight, and not foresight; but our courts are confined to a definition of rights under the original grants, save as these may be modified under the reserved power of the state. There has been no exercise of this reserved power in such a manner as to affect defendant's rights under its original grant. Of course, neither the city nor the state bartered away its police power, or the power of proper regulation and control of wires and poles in the interest of public safety. The right of taxation exists, and so does the power of eminent domain; but the right to

claim a rental for the use of the streets has not been recognized, nor is there any express authority to collect it.

The trial court was in error in its instructions, and the judgment must be and it is—*Reversed*.

The foregoing opinion was prepared by Justice Deemer, and submitted before his death, and is now adopted by the court. The following Justices concur: GAYNOR, C. J., LADD, EVANS, and SALINGER, JJ.

WEAVER and PRESTON, JJ., dissent.

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COUNTY OF POCAHONTAS et al., Appellees, v. KATZ-CRAIG CONTRACTING COMPANY, Appellant.

**CONTRACTS: Construction—Ambiguous Contract—Evidence to Aid**

1. **Construction.** Extraneous evidence is admissible to show the sense in which one party to an ambiguous contract understood its terms, and that the other party had knowledge of such understanding. (Section 4617, Code, 1897.)

**PRINCIPLE APPLIED:** After a public ditch had been partly excavated, the plans were changed. The contractor had already done some of the work, and been paid the sum of \$1,750. When the changes were made, the contractor mailed to the supervisors a proposition relative to the price to be paid in view of the changes, and requested that, if his proposition were accepted, he be sent a copy of the resolution of acceptance. The proposition would bear the construction (1) that the contractor was to have a stated sum *in addition to the \$1,750 already paid*, or (2) that he was to have the stated sum *less the \$1,750 already paid*. The auditor, in transmitting to the contractor a copy of the resolution accepting his offer, stated, in substance, that the board's understanding of the contractor's offer was according to the second construction. Such was, in fact, the view of the board, but it does not appear affirmatively that the board *instructed* the auditor to so state to the contractor.

*Held*, the letter was admissible as bearing on the issue whether the contractor had reason to know that the board was construing his offer in a sense different than he was construing it.

**EVIDENCE: Presumptions—Official Acts—County Auditor as Clerk**

- 2 **to Supervisors.** Whether a presumption, favorable to public interest, may be indulged that a county auditor, in business correspondence, is to be construed as acting for the board, is a question of fact.
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respondence relative to matters then pending before the board of supervisors, was acting at the direction of the board, *quære*.

**PAYMENTS: Recovery of Payments—Excess Payments by Public Officers—Mistake.** Payments made to a contractor for the construction of a public drainage improvement in excess of the amount due under the contract may be recovered, especially when an element of mistake of fact enters into such payment.

**PRINCIPLE APPLIED:** The sum of \$4,425 was to be paid a contractor for excavating a public drainage improvement. As the work progressed, the engineer made estimates, and the same were paid by the county auditor, to the extent of some \$1,758, without the knowledge or authority of the board of supervisors. On the completion of the work, the board allowed the final payment, but did so without knowing of the \$1,758 payments.

*Held*, the excess payments were recoverable.

*Appeal from Pocahontas District Court.—D. F. COYLE, Judge.*

DECEMBER 14, 1917.

ACTION to recover an alleged overpayment on a contract for the excavation of a drainage ditch. Verdict for the plaintiff by direction of the court, for the full amount claimed. Defendant appeals.—*Affirmed*.

*Robert Healy*, for appellant.

*F. C. Gilchrist and J. M. Berry*, for appellees.

STEVENS, J.—I. On April 8, 1908, the board of supervisors of Pocahontas County entered into a contract with defendants for the construction and excavation of a drainage ditch in Drainage District No. 29 in said county, for an agreed consideration of \$31,700. On January 31, 1910, after a portion of the work covered by said contract had been performed by the defendant, it developed that certain changes and alterations were neces-

1. CONTRACTS :  
construction :  
ambiguous  
contract : evi-  
dence to aid  
construction.

sary in some of the ditches to be dug as a part of said drainage system, and the original contract was modified as hereinafter stated.

On January 31, 1910, the defendant wrote a letter to the board of supervisors of Pocahontas County as follows, to wit:

"Omaha, Nebraska, Jan. 31, 1910.

"Board of Supervisors, Pocahontas County, Iowa.

"Gentlemen:

"Concerning our contract in Drainage District No. 29, dated April 8, 1908, we now offer to have the same set aside by mutual agreement, on the following basis, to wit:

"1. We will complete Section 10 as described in our contract according to plans, specifications and contract within 30 working days after the frost is sufficiently out of the ground in the spring of 1910 to permit work.

"2. You shall pay us in the manner set forth in the contract the sum of \$4,425 as compensation for the work now already done by us in the district and for the completion of said Section 10 according to Paragraph 1 of this letter.

"3. You may accept this proposition at any time on or before February 15, 1910, in which event you shall pass resolution accordingly and post in the United States mail addressed to us at 851 Brandeis Bldg., Omaha, Nebr., notifying us of your acceptance.

"4. The making of this offer by us or the consideration of it by you shall not be deemed to be a waiver of any rights now had by either party; but we reserve the right to withdraw this offer at any time before its acceptance.

"Yours truly,

"Katz-Craig Constructing Co.

"By J. B. Katz, Secy."

Subsequently, and on February 11th, the board of supervisors passed a resolution accepting the offer of defend-

ant contained in said letter, the material portion of which is as follows, to wit:

"Therefore be it Resolved: That the report of said engineer so filed this day and the plans, changes, alterations and enlargements recommended by him seem to be expedient and meet with the approval of this board and the same are hereby approved; that all persons whose lands will be taken by such changes shall be given notice as provided by the law as it appears in Section 1989-a3 of the Supplement to the Code of Iowa as now amended; that the county auditor is hereby directed to cause notice to be given in this matter as by law provided; that the proposition and offer of the Katz-Craig Contracting Co. dated January 31, 1910, and filed this day with the auditor is hereby accepted; that notice of this acceptance together with a copy of this resolution be mailed to said company according to the terms of such offer; and that the report of the commissioners appointed to classify the lands benefited by the location and construction of such drainage district filed on December 1, 1909, and the apportionment therein made be and the same are hereby annulled and set aside."

Payments made to defendant previous to January 31, 1910, are as follows:

August 27, 1909 .....	\$ 499.68
September 23, 1909 .....	631.01
January 19, 1910 .....	618.48
Total .....	\$1,749.17

Subsequent payments were made as follows:

March 7, 1910 .....	\$ 528.00
May 20, 1910 .....	1,254.84
July 30, 1910 .....	2,675.83
Total .....	\$4,458.67

—making the total amount received by defendant for the work done in said drainage district, \$6,207.84.



Plaintiff alleged in its petition that, by oversight, mistake, or on account of the fraud of the defendant, it was paid \$1,782.84 over and above the amount due, and plaintiff now seeks to recover this overpayment. As instructed by the resolution of the board, the county auditor testified that, on February 12, 1910, he forwarded to defendant by mail a certified copy of the resolution accepting its offer, enclosing therewith a letter signed by him as follows:

"February 12, 1910.

"Katz-Craig Contracting Co., 851 Brandeis Bldg., Omaha, Neb.

"Gentlemen: On yesterday by resolution the board of supervisors of Pocahontas County, Iowa, accepted the offer which you made to it at Omaha dated January 31, 1910, which offer was submitted through Mr. F. C. Gilchrist, attorney, and which has reference to your contracts in Drainage District No. 29. A copy of such resolution, duly certified, is enclosed herewith and made a part hereof. I am now giving you this notice and sending you this resolution in order to comply with Paragraph 3 of the offer.

"You have already drawn in warrants about \$1,749.17, so that there will still be due you when you complete the work in Section 10 the further sum of \$2,675.83, thus making the \$4,425 named in the offer so accepted. This is the understanding the board has of the terms of your offer. I think it is correct."

The real controversy in this case arises out of the different interpretations placed by the respective parties upon defendant's letter of January 31st. The interpretation placed thereon by the plaintiff in its pleadings and in the trial below was that defendant offered to complete the excavation of the ditches required by the enlarged and altered plan of the engineer for \$4,425, which sum was also to be in full for all work performed by defendant in said district prior to as well as after January 31st, the date of defend-

ant's written offer. On the other hand, it is contended by appellant that its offer of January 31st is plain and unambiguous, and will bear no other construction than an offer to complete the improvement as changed, according to the plans and specifications of the original contract, for \$4,425; but that payments already made were earned and paid for services under the original contract, wholly without reference to the contract as modified. Appellant treats the original contract as substantially abrogated and abandoned, and the offer of January 31st and the acceptance thereof by the board of supervisors as the real contract between the parties. It is clear, however, that the effect of the new arrangement was to modify the original contract only in the particulars stated in the letter of January 31st.

The offer of January 31st refers specifically to the plans and specifications for the improvement, and the contract then in force between the parties. No evidence of the dimensions of the excavations to be made by defendant, of the number of yards of earth to be removed, the character of the particular work, nor the manner in which same was to be done, was offered upon the trial.

It is apparent, however, from the record that the excavation required by the original contract was much more extensive than that covered by the contract as modified. Counsel for defendant objected to the offer of the auditor's letter of February 12th, and particularly to the last paragraph thereof, on the ground that same was incompetent, immaterial, and irrelevant; that same sought to contradict and vary the records of the board of supervisors; that same was written after the contract between the parties had been consummated by the acceptance of defendant's offer by the board; that the interpretation and understanding of the county auditor were in no sense binding upon the defendant; and that same was merely a voluntary, unauthorized statement on the part of the county auditor.

In its letter of January 31st, defendant reserved the right to withdraw its offer at any time before acceptance, and requested that a copy of the resolution accepting same be forwarded by mail to it at its office in Omaha, Nebraska. The resolution of the board directed the county auditor to notify defendant of the acceptance of its offer, and to forward to it a copy thereof. The county auditor stated in his letter to defendant that he was enclosing the copy of the resolution and notifying it of the acceptance of its offer, upon the order of the board of supervisors. The receipt of this letter by defendant was notice that the writer thereof was carrying out the directions of the board. It was apparent therefrom that the auditor was also complying with the request of defendant that notice be sent it of the acceptance of its offer. The resolution, it is true, made no reference to the matters contained in the last paragraph of the auditor's letter; but he was the clerk, and kept the records of the proceedings of the board of supervisors in drainage matters, and, as a matter of common knowledge, usually attends the meetings thereof. His official duties require him to draw all warrants on the drainage funds, give notice in drainage proceedings, and to perform other duties in relation thereto; all of which was, of course, known to the defendant.

It may be conceded that the county auditor could in no way vary or alter the terms of the contract between the parties hereto, and the letter in question was not admissible for that purpose, nor was it at all material what interpretation he personally placed upon the contract; but, in our opinion, the portion of the letter above referred to was material and competent, and throws much light upon the meaning of the contract under consideration.

Courts, in the interpretation of contracts, will always give consideration to the interpretation placed thereon by

the parties, and such interpretation is often controlling. The evidence, without conflict, shows that the county auditor deposited the letter in question in the United States mail, properly addressed to defendant at Omaha, Nebraska, and in the absence of evidence to the contrary it will be presumed that same was received by it in due course of mail. That it was in fact received is shown by the registry return receipt offered in evidence by plaintiff. Upon receipt of the above letter, defendant knew that the county auditor, who was the official clerk of the board of supervisors, and who kept the record of its proceedings in drainage matters, was seeking to inform it of the interpretation placed upon its offer, and the understanding the board of supervisors had thereof. The question presented is not whether the defendant was bound by the alleged interpretation of the contract by the county auditor, but whether the letter, under the circumstances, was sufficient to require the defendant to take notice of the information therein contained.

As above stated, defendant, in its offer of January 31st, specifically reserved the right to withdraw its offer at any time before acceptance, and, if same were accepted by the board of supervisors, defendant requested acceptance by resolution and notification thereof by mail, so that the notice of the county auditor to defendant was a part of the transaction, and related directly to the final consummation of the contract.

By Section 4617 of the Code it is provided that:

"When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it."

Probably this section is intended more particularly to apply to executed contracts than to matters which have misled one of the parties into making same, but in the case at bar the terms of the modification of the original contract

were fully and explicitly stated in defendant's offer, and only the formal acceptance thereof by the board of supervisors was necessary to make the same a binding obligation upon the parties.

Defendant's letter of January 31st requested, as above stated, that it be notified of the action taken by the board of supervisors, and the resolution of the board, copy of which was forwarded to defendant, directed the auditor to notify it of the acceptance of its offer and to forward to it a certified copy of the resolution; so that it may fairly be stated that the county auditor, in writing the letter, was observing both the request of the defendant and the order of the board of supervisors.

The letter was sufficient notice to the defendant that the board understood its offer in an entirely different sense from that which defendant now contends is the meaning thereof, and was thereby induced to accept same. Defendant must have known this fact before it entered upon the work under the contract as modified. The specific provision of Section 4617 is that, under such circumstances, the contract is to be interpreted so as to give effect to the sense in which defendant had reason to believe the board of supervisors understood it. Defendant owed the duty to the other party of acting in good faith, and, before it entered upon the work, it knew that the board of supervisors had erroneously interpreted and understood its offer, or at least had such notice thereof as imposed upon it the duty of making inquiry in regard thereto. Defendant could not go ahead upon its own theory and understanding of its offer, with notice that the other party understood the contract in an entirely different sense from that intended, and, after the work had been completed, for the first time advise the board that it was mistaken in its understanding of the contract. *Field v. Eastert Bldg. & Loan Assn.*, 117 Iowa 185; *Cedar Rapids Nat.*

*Bank v. Carlson*, 156 Iowa 343; *Prouty v. Tallman*, 65 Iowa 354; *Ubbinga v. Farmers' Sav. Bank*, 108 Iowa 221.

Section 4617 applies only when there is some ambiguity in the contract. An unambiguous writing cannot be varied by parol; and, where there is no doubt in the meaning of the parties, there is no room or necessity for construction. It is contended by counsel for defendant that everything that had been done, and the payments made under the old contract, were to be abandoned, and the work completed under the new contract for \$4,425; but defendant's letter proposed the sum named "as compensation for the work now already done by us in the district, and for the completion of said Section 10 according to Paragraph 1 of this letter." The work already done was under the original contract, and the offer must be held to have included some part thereof in the price fixed. Defendant insists that this provision of the contract was not intended to apply to work already done for which payment had been made, but it does not so state, and the contract is ambiguous in this respect: it is not clearly stated what work already done was to be included in the price fixed by the new contract. The letter offered in evidence throws light upon this question.

It is improbable that defendant would, with reason to suppose that the board of supervisors understood the offer and contract in a sense not intended, have entered upon and completed the work without calling the attention of the board thereto. Good-faith dealing with the board required it to do so. The contract was susceptible to the meaning placed thereon by the board, and defendant knew that it had so construed it.

The warrants drawn by the county auditor were without the knowledge of the board, and the payments made were in excess of the amount to which defendant was, under the contract, entitled. The interpretation now placed upon

the contract by defendant would enable it to retain these excess payments, but it acquiesced in the construction of the contract now contended for by plaintiff, with full notice that the board understood it in a different sense; and the sense in which the board understood same must prevail. The letter was admissible.

II. It is also contended by counsel for defendant that the payments made to the defendant were voluntary and cannot be recovered. The general rule that payments made in excess of the amount due, where no fraud or misrepresentation is shown, or by reason of a wrong construction of the terms of a contract, and not under a mistake of fact, cannot be recovered, is not applicable to this case. Each member of the board of supervisors testified that he did not know of the payments to the defendant of \$528 on March 7th and \$1,258.84 on May 20, 1910, at the time the board accepted the work and ordered the warrant of July 30, 1910, for the balance due by the engineer's estimates for \$2,675.83, to be drawn; and the auditor testified, in substance, that same were made on estimates of the engineer, without the knowledge or authority of the board of supervisors. The auditor, in drawing the warrants in favor of the defendant, was acting as a public officer, and the funds upon which the same were drawn belonged to the drainage district, but were collected by the county treasurer under the statute, and paid out only upon warrants drawn by the county auditor. Payments thus made are not voluntary in the sense that payments made by one individual to another may be, and plaintiffs were not estopped thereby to maintain this action. *State v. Young*, 134 Iowa 505; *Dubuque County v. Fitzpatrick*, 144 Iowa 86; *Heath v. Albrook*, 123 Iowa 559; *Adair County v. Johnston*, 160 Iowa 683; *Humboldt County v. Ward Bros.*, 163 Iowa 510.

3. PAYMENTS:  
recovery of  
payments: ex-  
cess pay-  
ments by pub-  
lic officers:  
mistake.

III. Appellant also complains of the admission of certain testimony. In view, however, of what is said above, the admission thereof, if erroneous, was in no sense prejudicial.

As we find no error in the record, the judgment of the lower court is—*Affirmed*.

GAYNOR, C. J., WEAVER and PRESTON, JJ., concur.

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MARY B. GUTHRIE, Appellant, v. EDGAR T. WINTERS et al.,  
Appellees.

**LANDLORD AND TENANT: Rent—Action—Mortgagees—Inter-**

1 **vention.** A mortgagee who claims that his unrecorded mortgage is prior in right both to a landlord's claim for rent and to a mortgage clause in the unrecorded lease, may intervene in the action for rent and contest the sufficiency of the alleged levy which the landlord claims was made under the writ.

**APPEAL AND ERROR: Review, Scope of—Matters Inhering in**

2 **Judgment.** An appellee who stands on the judgment appealed from must submit to review of any finding that inheres in such judgment, even though, in the rendition of such judgment, the trial court radically departed from the pleadings before it.

**LANDLORD AND TENANT: Rent—Action—Levy—Insufficiency.**

3 The act of an officer, under a landlord's writ of attachment, in posting notices of a levy on the locked doors at the front and rear of a house, after looking at the property through the windows, does not constitute a valid levy on the contents of the house.

**LANDLORD AND TENANT: Rent—Action—Attachment—Priori-**

4 **ties.** The right of a landlord under a mortgage clause in an unrecorded lease is, in the absence of any valid levy or seizure thereunder, inferior to the right of a prior unrecorded mortgage.

*Appeal from Polk District Court.*—HUGH BRENNAN, Judge.

JUNE 20, 1917.

REHEARING DENIED DECEMBER 14, 1917.



LANDLORD'S attachment. Parties intervened, claiming their mortgages were superior to the lien for rent. Interveners defeated in justice court. A reversal by the district court on writ of error is appealed from.—*Affirmed*.

*Brown & Missildine*, for appellant.

*Miller & Wallingford*, *Oliver H. Miller*, and *Graeser & Meyer*, for appellees.

SALINGER, J.—I. The appellant, Mary  
1. LANDLORD AND  
TENANT: rent: B. Guthrie, leased to the defendants Edgar  
action: mort- T. Winters and Mrs. Edgar T. Winters cer-  
gages: inter- tain premises, by written lease, of date Jan-  
vention. uary 24, 1913, to run from January 25th that year to Sep-  
tember 25th thereof. It gives justices of the peace jurisdic-  
tion up to \$300. In addition to the landlord's lien given by  
statute, the lease gives a lien upon all personal property  
owned by lessees kept or used on the premises during the  
term of the lease, whether such property is exempt from exe-  
cution or not. The W. H. Lehman Company claims that de-  
fendant Mrs. Winters gave it a purchase money chattel mort-  
gage upon a piano kept on the leased premises,—gave same  
before the lease was entered into and before the piano was  
put into the leased premises,—and that such mortgage re-  
mains largely unpaid. The intervener Jacobs also claims  
that he has an unpaid mortgage on property now on the  
leased premises, also given before the lease was made. As  
we understand it, the Jacobs mortgage has not been re-  
corded, but he claims the lessor had knowledge of the  
execution of the mortgage before the lease was made. The  
Lehman mortgage was recorded, but subsequent to the  
time at which the lessor sued out a landlord's attachment  
to recover \$144 rent, and after there was done what lessor  
claims is a levy of such attachment on the property which  
Lehman claims under its said mortgage. The justice of

the peace in whose court the suit for rent was instituted, found for the lessor and against the interveners. A writ of error to the district court was sued out, and there the judgment of the justice of the peace was reversed. The district court made this order:

"I find for the interveners and against the attachment for rent, and that judgment be entered accordingly. The lower court reversed."

This is the order from which appeal was taken to the Supreme Court. There is a dispute over what is here to be reviewed. We will settle the dispute by limiting our consideration to such findings of the district court as the record shows, either directly or by necessary inference, were made, and complaint of which is presented to us for review according to the rules of this court.

In thus reviewing, there must be kept in mind that, throughout, appellant raises no question that the mortgages which the interveners assert, exist, and that, as to terms, time of making and time of recording the one that was recorded, the facts are as the interveners claim. In other words, the only attempt to avoid the mortgages is a claim that, because of the mortgage clause in her lease, lessor has the standing of a purchaser, and had no notice of the mortgage given to either intervener. With this in mind, one complaint made is that the district court erred in finding the interveners had sufficient right in the property to attack the sufficiency of a levy made under the landlord's attachment procured by lessor. The justice of the peace found against the interveners. The district court reverses this, without any statement of why it is done. We should not presume it would have thus reversed and found for the interveners and against the attachment for rent if it had not found that the interveners had some interest in the controversy, and therefore the right to complain of what the

lessor had obtained in justice court. So the first question we have is whether, though the mortgages of the interveners might, in some states of evidence, not be prior to the mortgage clause in the lease, they have the right to attack the levy lessor claims to have made. At the time the claimed levy was made, the Lehman Company had not recorded its mortgage, and that of Jacobs has never been recorded. But when these parties gave notice of their claim, in connection with filing, and filed their petitions of intervention, they advised the lessor of their mortgages as effectively as a record of the mortgages could. Assume that the lessor, on account of the mortgage clause in her lease, has the standing of a purchaser in the application of the recording act. Yet it will be conceded that, if no levy had been made until after the lessor had been advised of the existence of these other mortgages, the holder of these mortgages would have the right to attack a levy thereafter made. If that be so, they certainly have the right to assert, when or after giving notice of the existence of their mortgages, that a levy claimed to have been made upon the property covered by their mortgages was in truth no levy at all. One may intervene who has an interest in the subject matter of the litigation adverse to other parties thereto. Code, 1897, Section 3594. And see *Cooper v. Mohler*, 104 Iowa 301. These interveners had such interest; for, if their claim that there was in law no levy were sustained, it would work that no levy could be made except one made after the lessor was advised of mortgages held by interveners made before the lease was. The effect would be to establish their mortgages to be prior to that of the lessor. It needs no further argument to demonstrate that the trial court did not err in finding that interveners had sufficient right in the property to attack the sufficiency of the alleged levy under writ of attachment. See *Arnold v. Hewitt*, 128 Iowa 671.

2. APPEAL AND  
ERROR: re-  
view, scope  
of: matters  
inhering in  
judgment.

II. The remaining question presented is whether the district court found that the mortgage clause in the lease created a lien which is prior to that of unrecorded chattel mortgages earlier in date than the mortgage of the lessor, of which unrecorded mortgages the lessor had no notice, and whether, if such finding was made, same is erroneous. The appellee insists the district court had no such question, because review on its part is limited to what is presented by the petition and affidavit for writ of error, and that same present no such question. Assume that is the state of that petition. Concede that the court should not have gone beyond what is presented in that application for its action. But the district court did not confine itself to stating that the justice had committed some specified error, and remanding, but reversed all the justice had done, found against the attachment for rent that the justice had effectuated, found for interveners, and entered judgment accordingly. This is a decision on the merits of the entire controversy. It may be, as appellee says, that this went beyond what had been tendered for decision. But since appellee is claiming under that judgment, it must submit to review of any finding that inheres in such judgment. And, of course, that a judgment was unauthorized has nothing to do with the question of what is found by it. Whatever complaint appellant might make, appellee may not take advantage of this judgment and seek to maintain it, and at the same time insist that, because it should not have had it, we may not determine whether it was right to grant it.

3. LANDLORD AND  
TENANT: rent:  
action: levy:  
insufficiency.

We are unable to escape from the conclusion that the court found of necessity that the lien of interveners' mortgages was prior and superior to that of the mortgage asserted by the lessor, appellant. But we are of opinion that, in so finding, the court did not err. The appellant

does not complain because the district court tried the case on the merits. That court had before it the following situation: The Lehman Company and Jacobs had unrecorded chattel mortgages upon certain property belonging to the Winters, part belonging to both and part to the wife alone. The Winters leased premises of the plaintiff by written lease. That lease contained a mortgage upon the same property. It, too, was not recorded. After the lease was made, the property covered by the unrecorded mortgages of Lehman and Jacobs was put upon the leased premises. Thereafter, the plaintiff instituted a suit for rent. In that suit, the lessor was notified that Lehman and Jacobs had said mortgages. If we assume for appellant that, if the mortgaged property had been levied upon under landlord's attachment before the lessor was notified of said two unrecorded mortgages, a mortgage effectuated by her lease would have been prior to the others; and priority had to be settled by determining whether any levy was made before such notice was received. If we must hold that there was no such levy, then it follows that the district court did not err in finding that the Lehman and Jacobs mortgages were prior to the mortgage of the lessor. We have the evidence that the court had before it on that question. It is this:

The constable who made the alleged levy made affidavit that he had endeavored to find the defendants, for the purpose of serving notice of levy and attachment and original notice; that he has been unable to find either of them within the state, and that their whereabouts are unknown to him. He made return that he served the writ of attachment by tacking notices on the doors of the premises leased. In addition, he testified to the conclusion that he "made levy under landlord's writ of attachment," under orders from an attorney for the plaintiff. Coming to his facts, as disclosed by his testimony, what he did was to go around the house, look into a window, see furniture, including a piano and

other household goods, try the doors, and, finding them locked, tack notices of levy on front and back doors; and then comes the further conclusion that he "took possession of house and contents." The attorney who was with him also states that the constable "took possession of house and contents;" but his facts are that he directed the constable to levy, told him not to put padlocks in the doors because the place was the home of the defendant; that he and the constable went around the house, looked into the window, saw furniture, a piano and other household goods within the house; and that the constable tacked notices of levy of attachment on the back and front doors. We cannot be governed by the conclusions of these witnesses. They disclose fully that the conclusion is not sustained by the facts. There was no levy of the writ of landlord's attachment. See *Peppers v. Harris*, 145 Iowa 635; *Bickler v. Kendall*, 60 Iowa 703; *Hibbard, Spencer, Bartlett & Co. v. Zenor*, 75 Iowa 471; and *Rix & Stafford v. Silknitter*, 57 Iowa 262.

So finding, the whole matter resolves to this: A landlord desires to keep possession of property subjected to his lien for rent. His adversary has a mortgage upon the same property, superior to the lien for rent. It would seem that, in such situation, the court must necessarily find that, as between the interveners, holders of the mortgage, and the landlord, there must be judgment for the intervener, and a denial of the right to subject said property to the claim for rent. That is what the district court did, and we are of opinion that its action was right, and that, therefore, its judgment must be—*Affirmed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.

4. LANDLORD AND  
TENANT: rent:  
action: attach-  
ment: prior-  
ities.

LENNOX FURNACE COMPANY, Appellee, v. WROT IRON HEATER  
COMPANY, Appellant.

**TRADE-MARKS AND TRADE NAMES: Unfair Competition—**

- 1 **Fraudulent Duplication of Article.** The manufacture and sale, in competition with a prior manufacturer, of an unpatented article of the same size, form, shape, material, and functional parts as that of such prior manufacturer, do not necessarily constitute unfair competition, even as to one who, by prior manufacturing and making, has acquired a valuable reputation and good will therein; but such duplication will constitute such unfair competition and become enjoined, provided the duplication is *fraudulent* because so executed, advertised, and marketed as to deceive ordinarily prudent persons into believing *that the duplicated article is that of such prior manufacturer.*

**PRINCIPLE APPLIED:** The Lennox Furnace Company had, for 15 years, manufactured and, through advertising agencies and dealers, sold, under the name of "Torrid Zone," an all steel furnace. The furnace body was made of steel; was cylindrical; had an oval top, a certain size and shape of radiator, a cast-iron front, an oval door,—upon which appeared the words "Torrid Zone," along with the statement that it was made in Marshalltown, Iowa,—and a rope ornamental border. The expense attending the development of this type of furnace had been large; but an extensive market had been built up in numerous states, and the form, style, pattern, name, reputation, and good will of said furnace had become valuable to said company.

Near the close of this 15-year period, the Wrot Iron Heating Company was organized. It employed one of plaintiff's old pattern makers, and instructed him to secure parts of plaintiff's furnace and to make patterns so exact that they would fit plaintiff's "Torrid Zone." The patterns so made and the parts manufactured therefrom did fit the "Torrid Zone" furnace within 1-1000 of an inch. The result was a furnace with a body made of steel, cylindrical, and of the same diameter as a "Torrid Zone," with an oval top, the same size and shape of radiator as the "Torrid Zone," a cast iron front, an oval door, upon which appeared the words, "Type A Wrought Steel Furnace," and a plate, showing that the furnace was made by the Wrot Iron Heater Company, of Des Moines, Iowa. The rope border was omitted.

In addition, the defendant employed one of plaintiff's old employees, who was familiar with the character, kinds, and qualities of plaintiff's furnaces, and thereby secured knowledge of the plaintiff's agencies, customers, price lists, and terms of sale. It also secured from one of plaintiff's agents a photograph of a "Torrid Zone" furnace, and therefrom made a cut, and used it upon its advertising matter, under the name of "Type A Wrought Steel Furnace." Defendant's advertising matter practically duplicated plaintiff's price list. The defendant then carried on extensive propaganda among plaintiff's dealers, agencies, and customers, they being told that defendant's furnace was a duplicate of plaintiff's "Torrid Zone;" that it sold for less money; that defendant's furnace could be sold without people's knowing the difference between it and a "Torrid Zone;" that a dealer could take off the front of a "Torrid Zone" and replace it with the front of defendant's furnace, and no one would detect the change. Some of plaintiff's dealers were told that, unless they handled defendant's furnaces, defendant would sell them to competitors, who would be able to deceive their customers into the belief that the customer was getting a "Torrid Zone." Defendant attempted to induce some of plaintiff's employees to quit plaintiff and to sell defendant's furnaces, defendant explaining to the agent how the "Torrid Zone" could be remodeled with defendant's fittings so that no one would detect the change.

Defendant's conduct resulted in great confusion and disturbance of plaintiff's business, and greatly injured plaintiff's reputation and trade.

*Held*, defendant's duplication of plaintiff's furnace, *plus* its conduct in placing the same upon the market, constituted unfair competition, and defendant should be enjoined from selling such duplication in plaintiff's already-acquired territory.

**INJUNCTION: Scope of Relief—Competition.** An injunctive order prohibiting certain unfair competition "*in all other localities in which the plaintiff is advertising and selling*" a certain type of furnace, if subject to the vice of being indefinite and uncertain, is cured, under the record, by striking out the words, "advertising and."

*Appeal from Polk District Court.*—C. A. DUDLEY, Judge.

DECEMBER 16, 1916.

REHEARING DENIED DECEMBER 14, 1917.



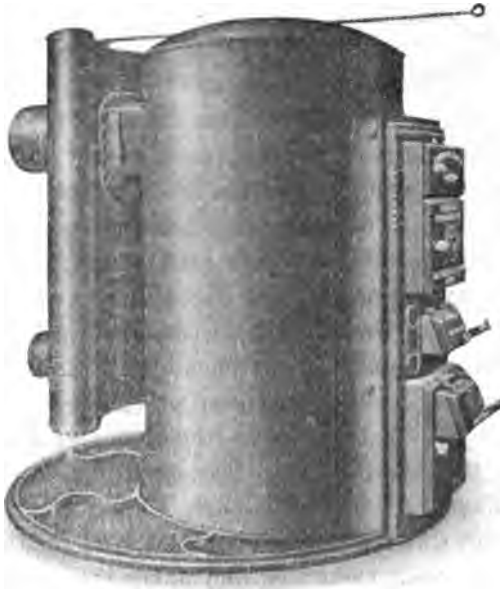
THIS is an action in equity, to restrain defendant from carrying on unfair trade and from continuing unfair competition, as plaintiff alleges. In the action, an application for a temporary writ of injunction was made, and a hearing had thereon. This appeal is from an order of the district court granting a temporary restraining order. The defendant appeals.—*Affirmed.*

*Orwig & Bair and Parker, Parrish & Miller, for appellant.*

*Clark, Byers & Hutchinson and R. P. Thompson, for appellee.*

PRESTON, J.—Upon the hearing of the application for a temporary writ, witnesses were produced and testimony taken in open court by both sides; and, although the hearing was not on the merits, the record is full and complete. The following is a cut of plaintiff's furnace.

1. TRADE-MARKS  
AND TRADE  
NAMES: UN-  
fair competi-  
tion: fraudu-  
lent duplica-  
tion of article.



And the following, which plaintiff alleges is, in some particulars, an exact duplicate of its furnace, is a cut of defendant's furnace.

### Type "A" Ideal Wrot Steel Furnaces

A BETTER STEEL FURNACE FOR LESS MONEY



Plaintiff alleged in the petition that it is a corporation engaged in business at Marshalltown, Iowa; that it manufactures an all steel furnace, under the name of the "Torrid Zone;" that it has been engaged in the manufacture and sale of such furnace since about 1901; that it has been selling, by advertising and through agencies and dealers, an all steel furnace of a distinctive type, under the name of "Torrid Zone" aforesaid, and, by the expenditure of large sums of money and years of effort, had acquired a large trade in its furnaces in the states of Iowa, Ohio, Wisconsin, Michigan, Kansas, Texas, Minnesota, Pennsylvania, Indiana, Illinois, Missouri, Oklahoma, Nebraska, North Dakota and South Dakota, and trade with jobbing interests at Denver, Colorado, and along the Pacific coast;

that plaintiff had built up a business with an average annual output of something like 5,000 furnaces; that the defendant, by unfair methods, commenced in about the year 1916, was seeking to take from the plaintiff its trade and the reputation of its furnace, and in furtherance of said effort was interfering with plaintiff's agencies and dealers, and was putting upon the market a furnace that was an imitation of plaintiff's furnace, and so constructed and put together and dressed up that it could be and was being taken and purchased for plaintiff's furnace; that such conduct, together with other unfair methods, amounted to unfair competition; that plaintiff had built up a large trade and established a valuable good will and reputation for said "Torrid Zone" furnace; that the form, style and pattern of said furnace, as well as the reputation and name and the type and construction thereof, have become and are now a valuable property right of the plaintiff's.

Many of the allegations of plaintiff's petition are admitted in the answer. At the conclusion of the hearing, the trial court granted a temporary writ, in which it was found that the allegations of plaintiff's petition and amendments were true, and ordered:

"It is therefore ordered that the defendant, the Wrot Iron Heater Company, be, and it is hereby, strictly enjoined and restrained from the manufacture for sale, or sale, or the advertising for sale, of its Type 'A' furnace in its present form, or any furnace of any other name, which is an imitation or duplication of plaintiff's Torrid Zone furnace; and from the manufacture for sale or sale of a steel-riveted furnace, which is a facsimile of the Torrid Zone furnace made by the plaintiff; and from making for sale, advertising, selling, or offering to sell, furnaces which are imitations of plaintiff's Torrid Zone furnace; and from interfering with the trade and agencies of the plaintiff, all of which acts, conduct, and things, the defendant is re-

strained and enjoined from doing in the states of Iowa, Ohio, Wisconsin, Michigan, Kansas, Texas, Minnesota, Pennsylvania, Indiana, Illinois, Missouri, Oklahoma, Nebraska, North Dakota, South Dakota, Colorado, California, Oregon, Washington, and in all other localities in which the plaintiff is advertising and selling its Torrid Zone furnace."

After the order was made, application was made to the trial court for a reargument, which was granted, and an answer was filed and the application again fully argued. There is some confusion in the dates in the abstract and additional abstract; but, as we understand it, the original order was modified on the reargument, the court stating that, upon the authority of *Sartor v. Schaden*, 125 Iowa 696:

"It is now apparent that the conclusion which I stated as to the breadth of the injunction should be modified, and the injunction will issue as determined in the original opinion and apply in all cases wherein the plaintiff is doing business,—that is, is selling its furnaces. This does not interfere with the right of the defendant to sell its furnaces in localities in which the plaintiff is not doing business."

We may refer to some of the more important facts shown by the record, many of which are not disputed. As to others, there is more or less conflict. From an examination of the record, we are satisfied with the findings of the trial court. It is not our purpose to go into the evidence in detail. The bodies of plaintiff's Torrid Zone and defendant's Type "A" furnaces, cuts of which have been before set out, are made of steel, and formed by hydraulic or other pressure. The fronts are cast, and are formed from patterns. Some of plaintiff's witnesses say that, prior to the time plaintiff commenced to make the Torrid Zone, there were being manufactured sheet metal or steel-bodied fur-

naces, cylindrical in form, having the same diameter as plaintiff's furnace, and with an ordinary rounded or dome-shaped form for a head, but not of the exact size of plaintiff's furnaces; that there was on the market what one of said witnesses called standard size heads, which were kept in stock and could be bought by anyone; that the bodies and heads of plaintiff's furnaces were different from the bodies and heads on the market, in that there was more or less variation between the standard sizes and those manufactured by plaintiff, depending on the size of the furnace; that the heads of plaintiff's furnaces were dished more than some and less than others, but not exactly the same as any he knew about.

There is testimony that some of the distinctive features of plaintiff's Torrid Zone furnace are as before stated; that the body and the front which is placed upon it have certain proportions different from the ordinary furnace, different from any other except the Torrid Zone, and that the ornamentation is different; that there is a difference between the radiator of plaintiff's furnace and other furnaces. Without going further into specific matters claimed as distinctive features, we may say that the general make-up and outline and dress of the furnace are distinctive.

The evidence shows that, since 1901, plaintiff has sold a large number of the Torrid Zone furnaces, and at this time is averaging 4,000 or 5,000 a year; that the furnaces are sold through advertising and by dealers and agencies throughout the country, and especially in the states before mentioned. That, during the years since 1901, plaintiff has built up a large trade in these states, and established a valuable good will and reputation for its furnace. The form, style, and pattern of the furnace, as well as the reputation, name, and type of construction, have become and are now a valuable property right of the plaintiff's. Prior to 1915, plaintiff manufactured at its factory, for the man-

ager of defendant company, a number of steel furnaces. Thereafter, and prior to the first day of January, 1915, the said manager, Mr. Howard, promoted and organized the defendant company, and after its organization, employed and took into its service one of the former employes of the plaintiff, who was in a position to familiarize himself with the character, kinds and quality of the furnaces being sold by the plaintiff and with the price lists therefor, also with the plaintiff's agencies and customers throughout the several states before referred to; that through said employe the defendant company acquired knowledge and information with respect to the plaintiff's business, its agencies throughout the country, its customers, and the names of dealers who were selling plaintiff's furnaces, as well as information with respect to terms and conditions under which plaintiff was selling its furnaces, and secured from said employe price lists and other similar information about the business of the plaintiff; that it also secured from one of the agents of the plaintiff photographs of plaintiff's Torrid Zone furnace, and, with these photographs and the catalogue of the plaintiff, it had printed a large number of folders for advertising purposes, in which folder there appeared, under the name of "Type 'A' Wrought Steel Furnace," an exact duplicate of plaintiff's Torrid Zone furnace; in fact, the cut in the folder was made from the photograph of plaintiff's furnace, just referred to. In this folder there also appeared a substantial duplicate of plaintiff's price list. Defendant employed one Tumpach, who for many years was the pattern maker for the plaintiff company, to make patterns for defendant's Type "A" furnace, defendant instructing Tumpach to secure parts of the Lennox Torrid Zone furnace, and from such parts to make patterns like the Lennox patterns, in so far as to insure that the parts would fit the corresponding sizes of Lennox Torrid Zone fur-

naces. The defendant company then, with the folders and catalogue before referred to, began an extensive advertising campaign, not only through the mails, but by traveling salesmen and agents, among the dealers and agencies of the plaintiff, using the lists and other information secured from the former employe of the plaintiff. These traveling salesmen and agents of the defendant represented and stated to plaintiff's dealers and agents that they were manufacturing and putting out a duplicate of plaintiff's Torrid Zone furnace, which could be sold for less money, and which the ordinary buyer would not be able to tell from the plaintiff's Torrid Zone furnace, in many instances suggesting to plaintiff's dealers and agents that their customers would buy defendant's Type "A" furnace and never know that they were not getting a Torrid Zone. It was also suggested to plaintiff's dealers that, if they had on hand Torrid Zone furnaces, and did not want to handle two lines, they could simply change the doors and make them all Type "A" furnaces. In its advertising matter, it claimed that its parts would fit the parts of the Torrid Zone within 1/1000 of an inch. These methods soon resulted in great confusion and disturbance of plaintiff's business with its dealers and agencies, and interfered with plaintiff's trade, the reputation of its Torrid Zone furnace, and the good will of its business throughout the territory before referred to: hence this action. Other facts may be referred to later in the opinion, in the discussion of different points.

Appellant has assigned errors. The first is that the court erred in enjoining defendant from the manufacture for sale, or sale, or advertising for sale, of its Type "A" furnace, in the following particulars: (a) Defendant's Type "A" furnace was like the plaintiff's Torrid Zone furnace only in that it was cylindrical in form, with an oval top, a similar front and radiator, and made of the same material, and it was not similar to the plaintiff's

furnace in respect to dress, markings, or other indicia of origin; (b) there was nothing about the shape, style, dress or markings of the defendant's Type "A" furnace that would tend to or did cause purchasers to buy the same believing that it was a furnace manufactured by the plaintiff.

It is also contended that the court therein erred for the reason that the evidence did not show that defendant was intending to manufacture for sale, sell, or advertise for sale, any furnace which was an imitation, duplication, or facsimile of the plaintiff's said furnace; that the defendant had the right to sell to the trade and agencies of the plaintiff any article of commerce, so long as the doing of the same did not constitute unfair competition, and, further, that the testimony failed to show that the plaintiff had acquired a trade and reputation for its said furnace throughout the states mentioned.

The trial court found against the defendant on these several propositions, and, as stated, we are satisfied with the trial court's finding. It is also assigned as error that the court erred in enjoining defendant from doing the things mentioned "in all other localities in which the plaintiff is advertising and selling its Torrid Zone furnace," for the reason that the same was indefinite and uncertain, and because the evidence did not show in what, if any, other places or territory the plaintiff had acquired a reputation for its goods.

1. It should have been stated that plaintiff, having adopted for the name of its furnace the words "Torrid Zone," placed the same on the door of the furnace; also the statement that the furnace was made by the Lennox Furnace Company, of Marshalltown, Iowa. Defendant placed the name it had adopted for its furnace on the doors thereof, and also placed a plate on the furnace showing that it was manufactured by the Wrot Iron Heater Company.



of Des Moines, Iowa. There is a rope border around the front of plaintiff's furnace. This, of course, was a mere ornamentation. Defendant, in the manufacture of its furnace, eliminated the rope border.

Appellant states the proposition in this way: That the question is whether or not the defendant is engaged in unfair trade because it makes and sells, in the same market in which the plaintiff is doing business, a furnace which is made of the same material as plaintiff's furnace, is circular or cylindrical in form, as is the plaintiff's furnace, has the same diameter as the plaintiff's furnace, has an oval door, as has the plaintiff's furnace, has a radiator of the same shape and size as the plaintiff's furnace, and has a cast-iron front, including the doors, like plaintiff's furnace. Their legal proposition at this point is that the plaintiff could not secure a monopoly in the shape, size, or style of its furnace, or the material out of which it was manufactured, and thereby enjoin the defendant from manufacturing and selling in competition with plaintiff a furnace of the same shape, size, style, and material, and that the manufacture and sale of an article of the same size, form, shape, and material as that of a prior manufacturer, in competition with him, does not constitute unfair trade; that unfair trade consists of conduct tending to pass off one person's merchandise or business as that of another; and they say that one may not monopolize the functional parts of an unpatented article. On these propositions they cite our own case of *Motor Accessories Mfg. Co. v. Motor Co.*, 167 Iowa 202; *Rathbone Sard & Co. v. Champion Steel Range Co.*, 189 Fed. 26; *Goodyear Co. v. Goodyear Rubber Co.*, 128 U. S. 598; *Howe Scale Co. v. Wyckoff*, 198 U. S. 118; and other cases.

Appellee concedes that it would have little cause for complaint if appellant had done no more than copy and imitate the parts of appellee's furnace, or even the com-

pleted furnace, and had done all this only for the legitimate purpose of getting for its own use a furnace like the Torrid Zone. But they contend that the defendant has gone far beyond this; that it pirated appellee's patterns, and selected one of appellee's former pattern makers to make patterns as near like the Torrid Zone parts as possible; that it secured from appellee's former employes confidential lists and information about its dealers; that it secured original photographs of the Torrid Zone furnaces, and used them in preparing its printed advertising matter and cuts; that it sought to take from appellee its business and the reputation of its furnaces, by urging upon appellee's dealers the fact that there was no difference in the furnaces, and that, unless appellee's dealers handled their furnace, they would sell it to their competitors, who would, in turn, be able to deceive their customers into believing that they were getting the Torrid Zone furnace; and many other similar acts, none of which can be explained, as plaintiff says, upon any theory of business integrity and fair dealing.

Appellee contends that the vital question is whether appellant has imitated appellee's furnace as to the similar distinctive features, and as to the shape and form and the manner in which the several parts were put together, and then imitated its furnace so as to make it look like appellee's finished furnace, and then, by the other means pursued, which have been enumerated in part at least, attempted to sell its furnace on the reputation of the plaintiff, and attempted to deceive buyers of furnaces into believing that, in the purchase of appellant's furnace, they were buying appellee's.

It is not the mere fact of imitation alone that makes out a case, but the fact of imitation, and perhaps unnecessary imitation, with all the other things shown in the record, that makes out a case of unfair competition. Some of the cases refer to the matter of unnecessary imitation, and

say that by this is meant imitation which is not necessary in order to make the article in the form in which it is commonly made and known, nor to make the article perform the service for which it is manufactured.

Appellee contends, also, that, while one may have a right to imitate certain features of the goods of another, or of the dress or package in which such goods are sold, he cannot do these things so as to deceive buyers of such goods into thinking that they are buying wares of the other party,—citing *Billiken Co. v. Baker & Bennett Co.*, 174 Fed. 829, 831; *Globe-Wernicke Co. v. Brown & Besley*, (C. C. A.) 121 Fed. 90, 92; *Avery & Sons v. Meikle & Co.*, 81 Ky. 73, 94, 95; *National Biscuit Co. v. Ohio Baking Co.*, 127 Fed. 160, 161; *Chapin-Sacks Mfg. Co. v. Hendler Creamery Co.*, 231 Fed. 550, 555 (1916); *Moxie Co. v. Daoust*, (C. C. A.) 206 Fed. 434.

The law is reasonably well settled as to what constitutes unfair trade and competition, and we do not feel justified in reviewing the cases. We shall attempt to state the rules and cite some of the cases. It is largely a question of fact.

In *Motor Accessories Co. v. Motor Co.*, supra, some of the discussion was in regard to trade names and trade-marks; but unfair competition was defined, and we can do no better than to quote. It was there said:

“The disposition of this case does not involve the question of trade names or trade-marks, nor the rights which obtain to patented articles. In the presentation of this case, the plaintiffs rely solely upon the rules heretofore laid down governing unfair business competition, and the determination of this case involves the application of these principles to the facts as we find them in this record. What is unfair competition is a mixed question of law and fact,

and has been variously defined and applied by the courts. It consists in the conduct of a trade or business in such a manner that there is an expressed or implied representation that the goods or business of the one man are the goods and business of another (see 28 Am. & Eng. Encyc. 345, [2d Ed.]), and applies in cases where one simulates the particular device or symbol employed by another in such a way as to deceive the ordinarily prudent person, thereby leading him to believe, by the marks thus simulated, that the goods are the goods of another, and thus practicing a fraud upon the person whose goods he simulates, and upon the general public dealing in those goods. The ground of the action of unfair competition is fraud, and this may be shown by direct testimony, or by facts and circumstances, or inferred from the manner in which the business is carried on. This doctrine is applied in cases where one has established a business under a particular name, or by the use of certain marks or symbols, so that it has become known, in the trade generally, as designating the goods of that person. Courts of equity will enjoin one who fraudulently assumes the same name, device, or symbol for the purpose of stealing away from the other the business so established, and thereby depriving him of the profit which flows from the business. The object of the law is to protect the property rights of a person from invasion by one who fraudulently, by the use of the same devices, symbols, or name, seeks to and does take from him the custom, good will, and the business by him established and maintained. There is no practical way, other than by prohibition, to prevent the filching of trade established by one in an article, through a name, symbol, or mark, than by prohibiting the use of the trade name or mark. Even where the name, symbol, or device used is not one that can be protected as a trade name or mark, equity will protect one in the use of it, where it has, by long use, obtained a

secondary meaning, as designating the goods of one particular person, and where, by the use of it, the public has come to know his goods by that name or symbol. He thereby acquires a property in it which is of value, and which another cannot wrongfully simulate and so deprive him of the benefits of its use."

See, also, *Dover Stamping Machine Co. v. Fellows*, (Mass.) 40 N. E. 105, where it is said that there is no unfair competition apart from the infringement of a patent or trade-mark, unless the competing person so makes or marks his goods or conducts his business that purchasers of ordinary caution and prudence, and not those who are exceptionally dull, are likely to be misled into the belief that his goods are the goods of somebody else. And it is argued by appellant that in the instant case there is no excuse for a reasonably prudent buyer's purchasing defendant's furnace thinking that he is buying one manufactured by plaintiff; but we think otherwise. It is not alone the similarity in appearance, but all the circumstances must be taken into account, the methods and representations and other things shown by the record. See, also, on proposition last referred to, *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Warren Featherbone Co. v. American Featherbone Co.*, (C. C. A.) 141 Fed. 513; *Geo. G. Fox & Co. v. Hathaway*, (Mass.) 85 N. E. 417; *Yale & Towne Mfg. Co. v. Alder*, (C. C. A.) 154 Fed. 37.

We shall refer to some of appellee's propositions and cite some of its cases without comment. They contend that the simulation or imitation of an article of a prior manufacturer in such a manner as is likely to cause confusion in the mind of the ordinary or usual buyer as to its origin, constitutes unfair competition (citing 38 Cyc. 756, 767, 773); that the evil is done when the instrumentality of fraud is put into the hands of the dealer, especially where

the article complained of is sold to the local dealer at a lower price than the former, thus, by giving him a greater profit from selling the new article, furnishing an incentive and inducement to fraud and unfair methods in disposing of it,—citing *Forster Mfg. Co. v. Cutter-Tower Co.*, (Mass.) 97 N. E. 749; *Notaseme Hosiery Co. v. Strauss*, 201 Fed. 99 (240 U. S. 249); *N. K. Fairbank Co. v. Luckel*, 102 Fed. 327.

Cases are cited to the point that it is not necessary to prove the wrongful intent by direct testimony; that in these cases the fraudulent intent is often inferred from the facts,—citing, among other cases, *Wolf Bros. & Co. v. Hamilton-Brown Shoe Co.*, 206 Fed. 611, 616; *Hartzler v. Goshen Churn & Ladder Co.*, (Ind.) 104 N. E. 34, 39; Nims on Unfair Competition, Section 30.

Appellees state that they claim no exclusive right to manufacture and sell an article that is strictly mechanical and functional in every feature, and concede that in such case it would be necessary to secure a patent, and appellee says that they do not claim the exclusive right to manufacture an article in a particular form or shape which is not made or known in any other form or shape, as illustrated in some of the cases cited by appellant, among them *Warren Featherbone Co. v. American Featherbone Co.*, supra. Further, appellee admits defendant's contention that, to be entitled to injunctive relief, it must show that it has established a market for its Torrid Zone furnace; otherwise it could have no reputation or good will, with respect to that particular furnace, for which it claims protection; and they claim that they have so shown as to the states named. The trial court so found, and we are of opinion that the evidence justifies such a finding.

A number of circumstances are shown in the record, tending to show fraudulent conduct on the part of defendant

in the manufacture and sale of its furnace in competition with plaintiff's. We shall refer to only a few of these. One witness testifies that a representative of defendant company called upon him in the spring of 1916, and that he heard defendant's representative say that his prices on the furnace and repairs were lower, and that, from what defendant's representative was saying:

"It sounded like he was selling it on the same merits as the Torrid Zone furnace. He had a cut there that was like the one in the Torrid Zone catalogue. We were looking at it, and he saw we were kind of puzzled over it to see what the difference was, and he said in a kind of joking way that they stole or infringed that. He also said that the furnace company had some old employes of the Lennox people with them."

Another witness, a salesman in the employ of plaintiff company, testified that defendant's manager tried to get him to quit plaintiff, and go out and sell defendant's furnaces at lower prices than the plaintiff was getting for theirs, saying that he could quote any customer 10 per cent below the Lennox cost, and, further:

"He said I could tell them they were interchangeable—that the castings would interchange with any on the Lennox Torrid Zone furnace. He said, where we had some Lennox furnaces on the floor,—Torrid Zones,—we could change the name—the name plate—on them and put his right over it, and sell them just as though they were the Wrot Iron Heater Company's."

Another witness testifies that defendant's manager gave him a cut of their furnace, and, as the witness puts it:

"He went on to explain to me, as near as I can tell it, that their furnaces were so near like the Torrid Zone furnace that the ordinary man could not tell the difference.

\* \* \* While, he says, you would not be selling the

Lennox furnace, you would be making more profit. He figured that on an ordinary job of heating there was \$17 more profit on this furnace than on our own, and also explained that the different parts of this would fit the Lennox furnace, and explained why he could sell it cheaper. The cut looks like the Torrid Zone furnace I had on the floor. I must say that I cannot see any difference in them at all."

He also says that defendant's manager, Howard, told him that the Type "A" furnace "could be sold just the same, and the ordinary man couldn't tell the difference."

Another witness testified that one of defendant's salesmen called upon him in the early summer of 1916, and told him that defendant's Type "A" furnace was in all respects like the Torrid Zone: the parts could be interchanged, and it could be substituted for the Torrid Zone in placing it on the market, and it was in all respects the same thing; the repairs on one furnace would fit the other.

"He also offered to put my name on it in place of the Torrid Zone name, or their name, whichever the case might be. What he did claim was that his furnace was identical with it in respect of construction; so near like the other furnace that an ordinary customer could not discern the difference between them. He said that they could be substituted for the Torrid Zone furnace; that they were so near like the Torrid Zone furnace that the ordinary person could not tell any difference in them. He said that the parts were absolutely interchangeable; that you could take off the door of the Wrot Iron furnace and put it on the Torrid Zone furnace and that it would fit absolutely; and that, if you had a Torrid Zone furnace and wanted to call that a Wrot Iron, all you would have to do would be to change the doors on them."

Other witnesses gave similar testimony. It may not be amiss to refer to some of the findings and conclusions



of the trial court. The court found in its opinion, among other things, that:

"It is not shown that the necessary and essential functional parts of a steel-riveted furnace are only combined in a furnace constructed as and having the form of the Torrid Zone, nor that the functional characteristics of the Torrid Zone furnace, speaking now of the form and construction of the furnace, are the necessary functional characteristics in form and construction of steel-riveted furnaces. The parts of steel-riveted furnaces are not so necessarily common that they have become standardized, though by design the parts of the Ideal made by the defendant are made to interchange with those of the Torrid Zone to within the thousandth part of an inch. These parts so interchangeable between the furnaces are not shown to be interchangeable with any other steel-riveted furnace, unless such furnace is an imitation of the Torrid Zone furnace, and by virtue of these facts the conclusion is irresistible that imitation or simulation has been made purposely to compete with and supplant the Torrid Zone. \* \* \*

"The evidence does not sustain the contention of defendant that a steel-riveted furnace can only be constructed and have the form of that of the Torrid Zone. \* \* \* Plaintiff has been in business a number of years, and considering its large trade in different states in the furnace Torrid Zone, and in its present form, the plaintiff has gained for itself an excellent reputation as to this particular furnace, and consequently there has come to the plaintiff a certain good will predicated upon both the character and form of this furnace. Now a word or phrase aside from its common use and meaning may by continued use come to have, when applied to articles of manufacture and trade, a secondary meaning which will belong to the person who has developed or applied it; and if this secondary meaning has become established in the public mind, so that the

goods of the one who appropriates and uses the word or phrase have become known and recognized by the public under such word or phrase, the use of the word or phrase will be protected. Appropriation and use furnish, therefore, the secondary meaning of the name, device, or symbol, which is a property right and which has or may have protection. \* \* \* The furnace may not have special particulars to be characterized as distinctive, but, as a steel-riveted furnace as a whole, may have a distinctive 'get up,' 'form,' 'construction,' adopted by the plaintiff for the purpose of distinguishing its furnace from that of other manufacturers. \* \* \* A study of the exhibits shows that, if the doors of the two furnaces were ajar or were off, the public would not be able to detect any difference between the two furnaces."

In the trial court's opinion after reargument, the court said:

"Upon reconsideration of the question, I adhere to the original opinion, except as hereinafter stated, and for the following, among other, reasons:

"(1) Because the Torrid Zone furnace, the furnace manufactured by the plaintiff, in its *ensemble* is specific, not generic.

"(2) To secure commercial success it is not essential that the physical construction and visual appearance of the Ideal furnace should comply exactly with that of the Torrid Zone.

"(3) The construction of the Ideal furnace as an exact duplicate of the Torrid Zone is designed to misrepresent and mislead as to the origin of the Ideal furnace.

"(4) The construction of the Ideal furnace as an exact duplicate of the Torrid Zone is calculated to mislead as to its origin, and is likely to produce confusion and deceive the ordinary purchaser.

"(5) Because the construction of the Ideal furnace

is of such similarity to the Torrid Zone furnace as that one may readily be mistaken for the other."

We have not attempted to set out all the circumstances relied upon by appellee which they claim tend to show unfair competition, but enough has been referred to as to the methods of defendant to show unfair competition, and that the order of the district court granting a temporary injunction was justified.

2. INJUNCTION:  
scope of re-  
lief: competi-  
tion.

2. One other point should be noticed briefly, though the points already decided are the ones most seriously argued. Appellant, in its reply brief, states that the vital question in the case is whether, under the circumstances shown in the case, the defendant is guilty of unfair competition. A further suggestion in regard to the scope of the writ as provided in the order as to the states named appellant argues in its reply brief: that plaintiff alleged in its petition that it had established a market in certain states. The argument is that plaintiff failed to show that it had established a market in these states; that its testimony only went to the fact that it had done business in these states; and they say that there are innumerable markets for furnaces in each state, and that plaintiff was only entitled to relief, if at all, in the particular markets in which it had established a reputation. But it seems to us that this clause, to wit, "in all other localities in which the plaintiff is advertising and selling its Torrid Zone furnace," was cured by the modified order as made by the trial judge, and, as we shall show later, appellee claims no more for the order or under it.

The further argument is that the provision of the order is indefinite and uncertain. As to the scope of the order, counsel for appellee say that the question raised by counsel for appellant is not involved in this case, for the reason that the question was not raised in the pleadings, in the

argument, or in the reargument of the case before the trial judge, and that appellant nowhere made any claim that appellee was attempting to restrain them from unfair competition in any state where appellee was not in fact doing business. We assume that counsel for appellee mean that the question as to the scope of the temporary injunction authorized by the order was not raised by the appellant. But the order was made at the end of all the proceedings. The plaintiff alleged that defendant was selling furnaces in territory previously occupied by plaintiff, and asked an injunction as to such territory. Counsel for appellee concede that there can be no unfair competition where there is no competition, and say they are not trying to restrain defendant from selling any furnace it may please and wherever it may please, so long as, in doing so, it does not engage in unfair competition with the appellee.

Counsel for appellee point out certain language in the case of *Chapin-Sacks Mfg. Co. v. Hendler Creamery Co.*, 231 Fed. 550, at 555, a case cited by appellant, wherein the language of the decree was quite similar to the language complained of in the first order of the trial court in this case. That language was:

"Decree will be entered which will so restrain defendants in their ways of advertising, marketing, and selling their cream in Annapolis, in Laurel, and in any other places in which the plaintiff, prior to the institution of this suit, was selling its cream, as will remove all reasonable danger of defendant's cream being sold as plaintiff's, or under the reputation acquired by plaintiff."

Counsel for appellee state that they have never claimed the right to restrict the appellant from selling its Type "A" furnace, or any other furnace similar to appellee's Torrid Zone furnace, in any territory in which appellee has not engaged in business: in other words, where appellee has established no reputation for its furnace. They argue

that it would be impossible to make the injunction more specific, for the reason that no one can tell at this time just what new territory appellee may occupy in the future. They say that appellee's business is rapidly growing, and, if it should later enter into some new territory, as it probably will, it should be entitled to the protection of this injunction there the same as in the territory in which it is now engaged in business; provided, of course, the defendant shall not have already established a trade and reputation for its Type "A" furnace in that particular territory, wherever it may be. We may remark here that, as to such new territory, the trial court may conclude on final hearing that the decree should be left open for a further hearing. But, as stated, we think the first order made for the temporary writ was modified.

As before stated, the trial court, after reargument of the case, modified the first order, and referred to the case of *Sartor v. Schaden*, 125 Iowa 696, at 704 and 702, on the question of trade-marks and unfair competition, and quoted the following language from that opinion at the pages given, as follows:

"One is of necessity geographical and covers the entire limits of the jurisdiction of the sovereignty granting the right; and the other is of necessity local, not founded upon any authority or right from the state, but based upon usage in the particular locality or localities in which the party is doing or seeks to do business."

And:

"The use of the word in other states or in other parts of this state by persons who did not compete with plaintiff is not controlling on the issue of unfair competition, \* \* \* and in many cases, if not in most, this competition is of necessity local."

And the court, in its modified order, stated that, under

this authority, it was apparent that the conclusion stated as to the breadth of the injunction should be modified; and then said, in the modified order:

"An injunction will issue as determined in the original opinion, and apply in all cases wherein the plaintiff is doing business,—that is, is selling its furnaces. This does not interfere with the right of the defendant to sell its furnaces in localities in which the plaintiff is not doing business."

We do not see why this does not meet the appellant's objection to the language of the first order before set out, which it is alleged is indefinite and uncertain.

It is our conclusion that the order appealed from was and is sustained by the evidence and the law, and it is, therefore,—*Affirmed*.

DEEMER, WEAVER, and EVANS, JJ., concur.

#### SUPPLEMENTAL OPINION.

The writer of the opinion, and of this, believes the opinion is right, but is directed by the other justices to say that, this being a review of a mere interlocutory order, we are not now settling finally whether, on final hearing, defendant shall be enjoined from manufacturing or selling in any territory. In the meantime, the order below will stand as written. As so modified, the petition for rehearing is overruled.

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M. E. MONSON, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

**RAILROADS: Negligence—Defective Crossing—Notice.** A railway company will be presumed to have had notice of the condition of its crossing, which had remained in the same condition for several years.

**EVIDENCE: Opinion Evidence—Value—Injured Automobile.** An owner of an automobile, with some fair knowledge of its value prior to injury, may testify to its value in a described injured condition.

**RAILROADS: Accident at Crossing—Ownership of Train—Evidence.** Evidence reviewed, and held sufficient to justify a finding by the jury that the train in question was owned and operated by the defendant company.

**APPEAL AND ERROR: Harmless Error—Belated Objection to Incompetent Testimony.** Permitting objectionable testimony to go into the record without objection precludes basing reversible error on the subsequent reception, over objection, of substantially the same testimony.

**RAILROADS: Accident at Crossing—Sufficiency of Crossing—"Convenient" Crossing—Instructions.** It is not error for the trial court to instruct that, before plaintiff can recover, he must show that defendant's crossing was not "safe and convenient," the statute requiring the maintenance of a "good, sufficient, and safe" crossing.

**RAILROADS: Accident at Crossing—Negligent Operation of Train—Evidence—Sufficiency.** Evidence reviewed, and held sufficient to carry to the jury the question whether defendant was negligent in running its train against and over an automobile stalled upon a railway track.

**RAILROADS: Accident at Crossing—Duty in Maintenance of Crossings—Evidence.** It is the duty of a railway company to maintain reasonably safe crossings where the tracks intersect highways, and just what construction on the part of the company will satisfy these requirements is ordinarily a question for the jury, in view of all the circumstances. So held where a crossing was planked diagonally, on account of the sharp angle at which the track cut the public highway.

**RAILROADS: Accident at Crossing—Liability Irrespective of Plaintiff's Negligence—Last Clear Chance.** An instruction that, if a train crew, by the exercise of reasonable vigilance, could have discovered that an automobile was stalled on the track at a public crossing, in time to have prevented a collision, and failed so to do, the defendant company would be liable, even though the plaintiff may have been negligent in getting his

car in such a position, is not prejudicially erroneous, when the record conclusively shows that the train crew did actually see the plaintiff in his position of peril in time to have avoided the injury.

**NEGLIGENCE: Contributory Negligence—When Plaintiff's Negligence is Inoperative.** The negligence of one in causing his automobile to become hopelessly stalled upon a railroad track at a public highway crossing becomes immaterial if the crew of an approaching train did see, or in the exercise of reasonable diligence ought to have seen, the plight of the machine and avoided a collision, and did not do so.

*Appeal from Wright District Court.*—C. E. ALBROOK,  
Judge.

OCTOBER 28, 1916.

REHEARING DENIED DECEMBER 14, 1917.

THIS is an action at law to recover damages from the defendant for its alleged negligence in striking and injuring plaintiff's automobile. There was a trial to a jury, and a verdict and judgment in favor of plaintiff in the sum of \$800. The defendant appeals.—*Affirmed.*

*F. W. Sargent, Ladd & Rogers, and Robert J. Banister, for appellant.*

*Sylvester Flynn, for appellee.*

PRESTON, J.—The issues and claim, as stated by plaintiff, are substantially this:

On July 12, 1912, the plaintiff, accompanied by his wife and Mrs. Berg, undertook to make a trip by automobile from Elmore, Minnesota, to Manson, Iowa. The route selected passed through Goldfield and Eagle Grove. The automobile was a 4-cylinder, 40-horse power, 5-passenger Marion touring car, then in good condition and working well. It had been used less than one year, and was worth \$1,250.



At all times mentioned, the Chicago, Rock Island & Pacific Railway Company was a duly organized corporation, engaged in owning and operating a railway system, one line of which extended through Goldfield, Iowa. About three fourths of a mile northwest of Goldfield, the public highway, extending east and west, is intersected by the defendant's right of way and railroad track, which cross the highway diagonally from southeast to northwest.

It is alleged that the defendant was negligent in the construction and maintenance of its crossing over that public highway, and in the operation of its train on that occasion; that the crossing was insufficient in the following respect: it was not properly planked. The crossing was composed of six planks, laid lengthwise and resting upon the ties supporting the two 5-inch steel rails. The west plank of that crossing was properly placed just outside of the west rail. The first plank east of the west rail was placed 15 inches farther south than the north end of the west plank. The third plank was placed 15 inches farther south than the one adjoining it on the west, and lacked 30 inches of being in line with the north end of the west plank in this crossing. The fourth plank was set 15 inches farther south than was the one adjoining it on the west, and lacked 45 inches of being in line with the north end of the west plank in the crossing. The fifth plank was set 15 inches farther south than was the plank just west of it, and lacked 5 feet of being in line with the north end of the west plank in that crossing. The sixth plank was just east of the east rail, and was set a number of inches farther south than was the one on the west side of that rail. An unplanked space or hole about 5 inches deep was left between the rails in the north end of that crossing. The part of the roadbed just east of the unplanked portion of the crossing was graded and filled

1. RAILROADS:  
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for a distance of about 3 feet east of the east rail, and from that point slanted downward, and ended in an open ditch, which extended along the grade. This ditch was about  $2\frac{1}{2}$  feet deep, and formed a hole in the approach to that part of the crossing. The west rail was  $3\frac{1}{4}$  inches higher than the east one. The crossing was higher than the road west of it. The crossing had been in this condition for years prior to this accident, and the defendant was charged with implied notice of it.

The plaintiff had never seen this crossing before, and knew nothing concerning it. When he got within a short distance of the crossing, plaintiff stopped his machine in the beaten path and near the south line of the road. He looked and listened. There was no train in sight. He then started his car toward the track; he noticed the south end of the west plank, and turned to the north and started straight east over the crossing. The front wheel on the north side of his car ran into the unplanked space or hole in the north end of the crossing, and struck the east rail with such force that it swerved the car out of its course and turned it toward the northeast. The front wheel went over the east rail and into the ditch just east of the unplanked part of the crossing. The hind wheel on the north side of the car caught in the hole between the rails. The front wheel on that side caught in the hole or ditch in the approach. There the car stuck, and Mr. Monson was unable to move it either backward or forward, or to extricate it from that position. They heard a train approaching. Plaintiff undertook to detach the tail lamp for the purpose of flagging the train. In jerking this light from the machine, it went out.

The side light on the north side of the machine was then burning brightly, and could be plainly seen in approaching from the northwest for over half a mile. To flag the train, the women waved scarfs and screamed.

Plaintiff took hold of the top of the side light and moved it backward and forward as far as the bracket would permit.

The defendant's train consisted of a locomotive, a number of cars loaded with gravel, and a way car. The crew in charge of this train saw the light on or near this crossing, when the train came over the hill about three fourths of a mile from the crossing. Thereafter, the train slowed down, and came almost to a stop when about 100 yards from the crossing. The train then came forward, struck the automobile, hurled it from the track, and damaged it.

The plaintiff alleges that the defendant was negligent in the operation of the train in that, with full knowledge of the dangerous character of said crossing, the defendant's agents, employees, and representatives in charge of said train, saw and knew, or by the exercise of reasonable diligence should have seen and known, in time to have stopped said train and to have avoided striking said automobile, that the automobile was then caught in a place of danger on the public crossing, and would be destroyed unless the train was stopped before striking said automobile, and that they failed to stop said train in time to avoid collision with said car. As a direct result of the defendant's negligence in running its train over said car, after the latter was caught on said defectively constructed crossing, plaintiff sustained damages.

The defendant filed a general denial, and also specially pleaded contributory negligence on the part of the plaintiff, and, in defense, contended that the crossing was properly planked with a good and sufficient roadway; that the drainage ditch was necessary, and was covered for a width of 24 feet, which constituted a part of a good, sufficient, and safe crossing; that the plaintiff drove upon said crossing at night without any headlights, and, instead of keeping in the road, drove off the road to the north and into the ditch;

that the accident occurred without any negligence on the part of the defendant, and was caused by plaintiff's own careless driving.

Defendant further contended that the train which ran into the plaintiff's automobile was a gravel train of the St. Paul & Kansas City Short Line Railroad Company, which was hauling gravel over the defendant's line of road for use in ballasting the track of the St. Paul & Kansas City Short Line Railroad Company south of Iowa Falls, and therefore that the defendant company was not responsible for the negligence, if any, of the employees on the said train.

There was a conflict in the evidence as to whether the headlights on plaintiff's automobile were lighted; but, as we understand it, there is no dispute in the evidence of the fact that the oil side lamps were burning. There was evidence on behalf of plaintiff tending to show that it was getting dark, or was dark, when plaintiff reached the crossing in question; that at Renwick plaintiff stopped, obtained oil, and filled the rear lamp; that the lamps were then lighted, but were not turned on full strength; about half a mile north of this crossing, plaintiff met two men, of whom he inquired the way to Goldfield; soon after leaving them, plaintiff stopped, and turned up his Presto lights; when he approached the crossing, plaintiff thought he heard a train whistle, and stopped some distance west of the crossing, got out of his car, and looked in both directions; finding no train within sight or hearing distance, he started to drive toward the crossing; the railroad crossing is about one foot higher than the road west of it; the plank portion of the crossing was  $9\frac{1}{2}$  feet wide; the traveled track immediately east of the crossing was  $10\frac{1}{2}$  feet; there was a hole about  $2\frac{1}{2}$  feet deep at the east of the crossing and a short distance from the east rail; it was about 2 feet from the north side of the traveled track to the end of the cul-

vert; the hole begins at the north end of the culvert and runs northwesterly, parallel with the grade; it is an open ditch for carrying surface water to the culvert; it is 4 feet from the east rail at the north of the railroad crossing to the point where the roadbed begins to slope towards the open ditch, and 7 feet from the east rail to the bottom of the ditch; the ditch was overgrown with weeds; the planks composing the crossing before referred to were 16 feet long, 4 inches thick, and beveled at each end; the north end of the fifth plank was between 5 and 6 feet farther south than was the north end of the first plank on the west side of the crossing; this left an unplanked, three-cornered space or hole 5 inches deep between the rails in the north end of the crossing. When plaintiff stopped his machine to look for a train, he was about 4 rods west of the crossing, and well to the south of the traveled part of the road, and knew nothing in regard to the construction of the crossing. Approaching the crossing, plaintiff was sitting on the right-hand side of his car, which was running at about 6 miles an hour; he saw the south end of the west plank, and, thinking he was too far south, he turned the car about 3 feet to the north, and undertook to drive straight east over the north part of the crossing; going up the incline caused the lights on the automobile to be thrown up, so that they did not light the crossing; the front wheel on the north side of the machine ran into the unplanked part of the crossing, and struck the east rail with sufficient force to throw the car out of line, raising the wheel over the rail, and plunging it into the ditch. The hind wheel on the north side of the car caught in the hole between the rails; the axles were on the ground. Plaintiff and those with him tried to extricate the car from its position, but were unable to do so. The north side light was burning brightly, and could be plainly seen from the direction in which the train was coming, and it

was in fact seen by the trainmen, as plaintiff claims, when the train came over the hill, three quarters of a mile from the crossing. Plaintiff's claim is that, after seeing the light, the trainmen slowed the train down almost to a stop, but made no further effort to avoid the collision. There is evidence that, for several minutes after the car was caught on the crossing, the train was first seen approaching. Plaintiff and those with him testified that they were "hollering" to get the crew to stop the train before it reached the crossing; the women waved their scarfs, and plaintiff tried to flag the train by movements of the side light. There is evidence that the employees in charge of the train saw the light and heard the "hollering" in time to stop the train and avoid the accident. The train was running about 8 miles an hour when it struck the automobile, and stopped within the length of the train.

The engineer in charge of the train testified, in part, as follows:

"There was nothing to obstruct my view from the time I came over the hill until we got down to the crossing. There was nothing to prevent my seeing the light just as soon as the fireman saw it. I don't know whether I saw it as soon as he did or not. He said nothing to me about the light near the crossing until I discovered it myself. Just as soon as I came on the crossing and struck the automobile, I applied the air. When we struck the automobile, it sounded like tearing up the crossing plank,—kind of a roaring noise. That was the first I heard. That was the first thing I did toward stopping the train. We stopped within the length of the train, after applying the air. We were hauling an average load for that engine. The engine was capable of handling the train. There is no reason why I could not have stopped that train within its length before we reached the crossing, if I had applied the emergency. No effort was made to stop it. \* \* \* I heard them

yelling when the automobile was hit. At that time, the train was making as much noise as it ever does. When I saw the light near the track from where I was sitting, I could not tell whether it was right over the rail or a little east of the rail. I have been railroading 18 years, and have known of farmers standing at a crossing without moving at that hour of night, while we were going three quarters of a mile. There is not an instance of that kind that I can now recall."

He testifies also that he saw no one on the crossing waving; that he heard yelling and hollering when the pilot hit the automobile, and that this was the first notice he had of anything wrong at the crossing; that he knew there was a public crossing there; thinks he did not see the light at the crossing as soon as he came over the hill, but would judge he saw it about 100 yards away; that the fireman didn't say anything to him about the light, but that he discovered it himself. The evidence of both plaintiff and defendant gives the value of the car at from \$1,000 to \$1,200, immediately before the accident. The value of the automobile in its wrecked condition was placed by plaintiff's witnesses at from nothing to \$125. The defendant offered no evidence on the value of the car in its wrecked condition.

Witness Givens testified that he had followed the automobile repair business for nearly 5 years, and that he saw plaintiff's car about seven o'clock the next morning after the accident; that he took it to the garage and took it apart. He testified that the cash market value of plaintiff's car in the condition he found it after the accident at Goldfield, Iowa, was \$100, and that it was worth \$1,200, immediately before. He also testified without objection that it would cost in the neighborhood of \$800 to repair the car, which would include the work and material, both.

There is evidence relied upon by defendant, tending to show that plaintiff arrived in the vicinity of Goldfield at about 9:30 P. M., as some witnesses put it—others 10:30; and that it was dark, and there was no moon; that, approaching the crossing, the wagon road comes down a long hill from the northwest, parallel with the railroad, and makes a turn to the east, crossing the track.

There is evidence contradicting plaintiff's testimony as to just how plaintiff got his car into the ditch. There is evidence tending to show that the crossing in question was built in the customary way; that the plaintiff's car was stalled on the track about a minute before the train appeared, and that the headlight of the train was visible before the automobile was struck; that the trainmen saw the light at the crossing before they got to it, but that it appeared to be clear of the track; that it appeared like some farmers going across the highway; that it remained stationary. We have not attempted to set out the evidence at length, but only the general tendency of it. As to the disputed questions of fact, it was, of course, for the jury to determine.

1. The first two errors assigned relate to the ruling of the court in receiving evidence over objection of defendant as to the value of the automobile immediately before the accident and immediately after. The question is argued at considerable length, but we think there is no merit in the contention at this point. There was evidence of a number of other witnesses as to the value both before and after, and as to the cost to rebuild or repair the machine. The defendant introduced no evidence as to the value afterwards. Plaintiff was owner of the car, had purchased it, and his testimony shows some familiarity with the value of such a car before it was injured. After it was wrecked, doubtless it had no market value, strictly speaking, so that the question is somewhat akin to cases where a man
2. EVIDENCE:  
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or his wife is permitted to testify to the value of clothing and household goods which have no market value. The character of the injuries to the machine was described. It is true that plaintiff, as a witness, said at first that he did not know the value of the machine in its wrecked condition, but afterwards said he did know. Witnesses become confused sometimes when asked if they know the value of such an article when asked in that way, instead of being asked if they are acquainted with values so as to have an opinion. It is a matter of opinion. Jurors are not required to take the estimate as to value of any of the witnesses, but may use their own judgment. *Converse v. Morse*, 149 Iowa 454, 456. The weight of the evidence is for the jury. The rule as to competency of witnesses on questions of value is liberally construed. *City Nat. Bank v. Jordan*, 139 Iowa 499, 504. We think that, under the record, there was no prejudicial error at this point.

3. RAILROADS :  
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of train :  
evidence.

2. By motion for a directed verdict, and by a requested instruction which was refused, the defendant sought to raise the question that it was not liable, because the persons in charge of the train were not its employees, but the employees of another company. The requested instruction is as follows: "The employees of the train in question being employees of another company, the defendant is not liable for any acts of theirs in the operation of said train." The court gave no specific instruction covering this point, but did instruct the jury, substantially, that, before plaintiff could recover, he must show that plaintiff was injured by the negligence of defendant's employees. This thought is covered by Instructions 4, 6, and 6-B. The evidence on this point, which was brought out for the first time by defendant in its evidence, was substantially this: Defendant's witness Kite was the party in charge of the train for the company. When asked on cross-examination how long he

had been working for the Rock Island Company, he answered: "Since May." This would be May, 1912, which would be before the accident. The conductor, when asked if he was in the employ of the Rock Island Railway at the time of the accident, answered: "The St. Paul and Kansas City Division of the Rock Island, I suppose." The engineer testified that the St. Paul and Kansas City Short Line is under the control of the Rock Island, and said that, as near as he understood it, this road was taken over by the Rock Island, and that they were running over this line since May 22d. We think the evidence was sufficient to warrant the jury in finding, as it must have found under the instructions, that it was defendant's train, and the employees were those of defendant, and that there is no dispute in the evidence on this point. There is nothing in the record to show what the St. Paul and Kansas City Short Line is, or that there is or ever was a railway corporation of that name. There is nothing to show that it was a lessee of the Rock Island, or what relation is sustained to that company, other than that the evidence seems to show that it was a part of the Rock Island system.

• It is contended by appellee that, under Section 3629, Code, 1897, any defense showing matters of justification, excuse, discharge, or release, and any defense which admits the facts of the adverse pleading, but by some other method seeks to avoid their legal effect, must be specially pleaded, and they contend that defendant filed no pleading raising any such issue or such a defense. They contend also that, even if it be true that the train which struck plaintiff's machine belonged to another railroad company, this would not release the defendant from liability. They cite Code Section 2039, which is as follows:

"All the duties and liabilities imposed by law upon corporations owning or operating railways shall apply to all lessees or other persons owning or operating such railways

as fully as if they were expressly named herein, and any action which might be brought or penalty enforced against any such corporation by virtue of any provisions of law may be brought or enforced against such lessees or other persons."

On the proposition that a railway company is liable for the negligent operation of trains over its lines by its lessees or by other persons using the railroad with defendant's permission, they cite the following cases: *Illinois Cent. R. Co. v. Barron*, 5 Wall. 90 (18 L. Ed. 591); *Chicago, M. & St. P. R. Co. v. McCarthy*, 20 Ill. 385; *Railroad Co. v. Brown*, 17 Wall. 445 (21 L. Ed. 675); *Bower v. B. & S. W. R. Co.*, 42 Iowa 546; *DeLashmutt v. Chicago, B. & Q. R. Co.*, 148 Iowa 556; 60 Am. & Eng. R. R. Cases, Ann. 15; *North Carolina R. Co. v. Zachary*, 232 U. S. 248 (58 L. Ed. 591); *Illinois Cent. R. Co. v. Sheegog*, 215 U. S. 308, 317, 319 (54 L. Ed. 208, 212); *West Chicago Street R. Co. v. Horne*, 197 Ill. 250 (64 N. E. 331); *Pennsylvania Co. v. Ellett*, 132 Ill. 654 (24 N. E. 559); *Chicago, B. & Q. R. Co. v. Willard*, 220 U. S. 413, 421 (55 L. Ed. 521, 523); *Heron v. St. Paul M. & M. R. Co.*, 68 Minn. 542 (71 N. W. 706); *St. Louis, Iron Mt. & So. R. Co. v. Chappell*, 102 S. W. 893 (10 L. R. A. [N. S.] 1175).

There are cases holding to the contrary. But we do not deem it necessary to determine the question of pleading or the last-named question in this case, because, as already stated, the evidence shows that the train was being operated by the employees of the defendant company.

3. It is thought the court erred in overruling defendant's objection to questions asked witness Blewitt, which, as appellant claims, relate to other similar occurrences. Cases are cited under this to support the proposition that evidence of other accidents is inadmissible, and that it is not within

4. APPEAL AND ERROR: harmless error: belated objection to incompetent testimony.

the scope of expert evidence to prove what was sought to be proved by the witness in this case; but this objection was not made, except, perhaps, to one of the last questions, after the witness had gone somewhat into detail on the subject. The objection was that it was not cross-examination. Whether it was cross-examination is largely a question of discretion of the trial court. This witness was first used by plaintiff, and in that examination gave a general description of the railroad crossing and surroundings. He was afterwards called as a witness for defendant, and was asked, on direct examination, as to the view of the crossing as it would appear to a person approaching the crossing in an automobile after dark and driving across it from west to east. He gave it as his opinion that there was nothing in the situation to obstruct the driver's view of the planking in this crossing. The defendant then had him describe the Marion car as to length of wheel base, location of lights, position of the lamps, springs, and the length of the machine.

Upon cross-examination, he detailed, without any objection from the defendant, the exact construction of this crossing, the location of the ditch east of the north end of the crossing, and the weeds and grass which plaintiff claimed concealed the open ditch into which the north front wheel of the plaintiff's machine plunged, when the car struck the unplanked part of the crossing, swerved from its regular course, and passed over the east rail of the track. Only three of the many questions asked this witness on cross-examination were objected to. When asked in respect to driving an automobile over such a crossing as this, and under circumstances like those in which the plaintiff was placed, and striking the earth as the plaintiff did, the witness answered, over defendant's objection that it was not cross-examination, that he never had an experience of that kind, as he always kept as near the center as possible. The

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following question was asked the witness, and he answered it without objection:

"Q. You never happened to meet with an experience of that kind? A. I did in one case, but not on that crossing. Q. What was the effect? (Objected to as not proper cross-examination. Objection overruled. Defendant excepts.) A. The effect was a blow-out. I burst my tire, and I had to replace it."

This answer could have no effect upon the rights of the parties in this case, because no question of a blow-out or of a ruptured tire is involved. The interrogatory was germane to the question upon which the defendant had previously obtained the opinion of the witness. No objection was made to these two questions then asked the witness:

"Q. You were not caught on the crossing? A. I struck the rail on one side. I went a little to the right, but struck the rail instead of keeping squarely on the plank. Q. What effect did that have on your machine,—on the rear of the machine? A. Well, it swung it around pretty badly."

Having permitted these questions to be answered, without objection, the defendant is not in position to complain about the next question and answer, which were as follows:

"Q. After your wheel had gone into the ditch, did that change the course in which you were going? (Objected to as not cross-examination, asking for the conclusion and opinion of the witness. Objection overruled. Defendant excepts.) A. It jerked me clear out of line. It jerked my machine clear out of line from where I was running."

The witness's answer merely detailed the facts in reference to his own experience. Defendant did not ask the trial court to exclude the answer. The answer was substantially the same as that given without objection in the two questions immediately preceding it. Manifestly, it

could not have been prejudicial to the defendant, because the information contained in this answer had previously been fully given in substance to the jury, without any objection's being urged by the defendant. Having thus permitted the other questions to be answered without objection, the defendant cannot now complain because of the repetition. In *Butler v. Chicago, B. & Q. R. Co.*, 87 Iowa 206, Par. 3, the court said:

"It will be seen that, in effect, the witness testified without objection several times to the same facts as disclosed in the answer which is objected to. Under such circumstances, even if the answer in controversy was objectionable, it could not prejudice defendant."

We think there was no error at this point.

4. The next error assigned is that the court erred in Instruction No. 4, in requiring defendant to maintain a "convenient" crossing for public use, and in submitting to the jury as a ground of negligence the laying of defendant's track diagonally across the highway without so placing the planks as to cover the entire space between the rails. A part of Instruction 4 is as follows:

5. RAILROADS :  
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structions.

"Before the plaintiff can recover in this action any sum whatever, he must establish by a preponderance of the evidence that the defendant railway company, at the highway crossing complained of, did not maintain a safe and 'convenient' crossing for public use."

Complaint is made because of the use of the word "convenient." Appellant says that the law provides that a railway company shall construct and maintain a good, sufficient, and safe crossing. It occurs to us that the requirement of the statute in requiring a good, sufficient, and safe crossing is a greater requirement than that stated in the instruction, which requires a safe and convenient crossing.

Doubtless it would have been better to have followed the language of the statute.

It is contended by appellee that no exception or objection was made by appellant to the use of the word "convenient" in the instruction, and that no question was there raised in regard to the part of the instruction now challenged, and that, therefore, the question may not be considered on appeal. However this may be, we think the instruction is not susceptible to the criticism made by appellant. The word "convenient," in the sense in which it is used in this instruction, means "suitable, appropriate, or fit for the purpose." Webster defines convenient: "Fit, adapted, suitable, proper, becoming, appropriate." We think there was nothing in the instruction which could mislead the jury.

5. Defendant contends that there was no negligence in the operation of the train, and particularly as against this defendant, and that the court erred in submitting that question to the jury. Some of the evidence bearing upon this question has been referred to, and there is other evidence on the point. Without going into it further, we think this was a question for the jury. We have already discussed the question as to whether the employees in charge of the train were the employees of this defendant.

6. It is next contended that the court erred in overruling defendant's motion to direct a verdict on the ground that there was no negligence shown in the construction and maintenance of the crossing, and in submitting that question to the jury. This, too, we think, was a question for the jury. It is argued that it is not necessary, on a country crossing, to construct a crossing the full width of the highway, and that the company has performed its duty when it has properly constructed ap-

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7. RAILROADS:  
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crossing: evi-  
dence.

proaches and embankments for the width of the portion of the highway available and actually in use; and cases are cited in support of these propositions. No claim was made by plaintiff, and the jury was not instructed, that it was necessary for defendant to construct a crossing the full width of the highway. It is the duty of a railroad company to construct and maintain reasonably safe crossings at all points where its tracks intersect highways, and it is liable for injury and damages resulting from failure to perform this duty. Code, Sections 2017, 2021, and 2054; *Farley v. C., R. I. & P. R. Co.*, 42 Iowa 234; *City of Newton v. Chicago, R. I. & P. R. Co.*, 66 Iowa 442, at 424; *Funstons v. Chicago, R. I. & P. R. Co.*, 61 Iowa 452. See also *Gray v. Chicago, R. I. & P. R. Co.*, 143 Iowa 268; *Tarashonsky v. Illinois Cent. R. Co.*, 139 Iowa 709. Considering the construction of the planking and the ditch and the condition of the crossing generally, it was a question for the jury as to whether the defendant had performed its duty in this regard.

8. RAILROADS:  
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One of the questions argued is the question as to the last clear chance, and the instruction of the court on that subject. Plaintiff alleged in his petition, as one of the grounds of negligence, that the trainmen saw and knew, or by the exercise of reasonable diligence should have seen and known, that plaintiff's automobile was caught in a place of danger on the public crossing, and would be destroyed unless the train was stopped before striking said automobile, and that they failed to stop said train in time to avoid collision with plaintiff's car. A part of Instruction No. 4 on this subject reads:

"But the plaintiff may recover if he has established by a preponderance of the evidence the fact alleged that the defendant was negligent as alleged, through its employes, in the operation of its train over and along its said rail-



road and across said crossing, if, by the exercise of ordinary and reasonable care and diligence, in the operation of its said train, said employes of the said defendant might have avoided the collision with plaintiff's car."

As we understand it, the same state of facts is relied upon as coming within the doctrine of last clear chance. The defendant pleaded specially that plaintiff was guilty of contributory negligence, and was making that claim on the trial. The trial court instructed the jury on the question of the alleged contributory negligence of plaintiff in getting his automobile in the position it was in on the crossing, and doubtless considered that there was evidence for the jury on that point, and that the jury might find that plaintiff was guilty of contributory negligence. To meet this phase of the case, the trial court gave Instruction 5-A, which is as follows:

"If you find from all the evidence in this case, when weighed in the light of these instructions, that it has been established by a preponderance of the evidence that the employes of the defendant company in charge of defendant's gravel train, *by the exercise of reasonable vigilance could have discovered the position of plaintiff's car in time to have averted a collision therewith*, and did not do so, the defendant would be liable to plaintiff for all damages accruing to him as the direct result of such collision; and this would be true even though you should find from the evidence before you that the plaintiff was guilty of negligence on his part in getting his car in the place it was in when the collision with it occurred on the part of defendant's train, and even though you should also find that the crossing in question was at the time in a reasonably safe condition for public use."

The words italicized are the part complained of. It is assigned as error that the instruction is erroneous because,

as defendant contends, in it the jury was told that, if plaintiff was guilty of contributory negligence, defendant was liable if its employees, by the exercise of reasonable diligence, could have discovered plaintiff's position; and defendant says further that there was no evidence to support the question of last clear chance. This last proposition is upon the theory that, under the doctrine of last clear chance, it must, as defendant contends, appear that the persons in charge of the train actually knew of plaintiff's dangerous situation. Appellant argues that the vice of the instruction in question is that it did not tell the jury that the question for determination was whether the train employees actually realized the position plaintiff's automobile was in, in time to avoid injuring it, but did tell the jury that it was for them to determine whether, by the exercise of reasonable vigilance, said employees could have discovered plaintiff's position in time to avoid the injury, notwithstanding the fact that he put himself in such position, as defendant says, by his own carelessness.

In the reply argument, defendant concedes the rule to be that, under the doctrine of the case of *Purcell v. Chicago & N. W. R. Co.*, 117 Iowa 667, *Dale v. Coal Co.*, 131 Iowa 67, and other cases, the jury may determine from all the circumstances in the case whether the trainmen did actually know of plaintiff's dangerous situation, notwithstanding the testimony of the trainmen that they did not know. Appellee argues that there was evidence from which the jury would have been justified in finding from the evidence and all the circumstances that the trainmen did know of plaintiff's situation in time to avoid the injury. We think this is so, and that the trial court might have properly so instructed the jury, had there been any necessity for instructing at all on the question of last clear chance.

The majority hold that this instruction was not preju-

dicial, because the evidence showed conclusively that the fireman and trainmen did see the plaintiff and his peril for a considerable distance before they reached the crossing, and up to the time of the collision, and in time to have avoided the injury.

The trial court did instruct the jury, as to one of the grounds of negligence set up in the petition, that a recovery would be authorized if the trainmen could have, by the exercise of reasonable vigilance, discovered plaintiff's position and avoided injuring him. No complaint is made by defendant of such instructions as to the original negligence set up in the petition. This same matter is relied upon by appellee as bringing the case within the doctrine of last clear chance.

After the automobile became stalled in the ditch and in the hole on the crossing, plaintiff tried in every way he could to release the machine. His situation was then no different than as though his machine had become stalled without any fault upon his part; and to hold that, under such circumstances, the trainmen in charge of an approaching train are not required to look out for a person so on the track, is to hold that such trainmen may wilfully run down a man who is so fastened upon a public crossing, notwithstanding that they could have, by the exercise of ordinary care, discovered his position and avoided the injury. What we have just said applies more to this question as set out in the petition as a ground of negligence.

We have repeatedly held that persons who are traveling over a highway or street crossing or places where the public is licensed to pass, are not trespassers, and are where they have a right to be, and the railway company owes them the active duty of keeping a lookout for them. *Black v. Burlington, C. R. & M. R. Co.*, 38 Iowa 515; *Hart v.*

9. NEGLIGENCE:  
contributory  
negligence:  
when plain-  
tiff's negli-  
gence is inop-  
erative.

*C., R. I. & P. R. Co.*, 56 Iowa 166; *Kinyon v. Chicago & N. W. R. Co.*, 118 Iowa 349; *Thomas v. Chicago, M. & St. P. R. Co.*, 103 Iowa 649. And that the company owes the same duty in respect to property rightfully using the crossing. *Wooster v. Chicago, M. & St. P. R. Co.*, 74 Iowa 593; *Ressler v. Wabash R. Co.*, 152 Iowa 449; *Graybill v. Chicago, M. & St. P. R. Co.*, 112 Iowa 738; *Hartman v. Chicago G. W. R. Co.*, 132 Iowa 582.

These last two propositions are conceded by appellant in its reply brief. Appellant also contends that there is no ground for the doctrine of last clear chance where, after plaintiff's peril is discovered, the engineer did all he could to avoid injuring him, and cites *Hoffard v. Illinois Cent. R. Co.*, 138 Iowa 543; and they contend that, under the evidence in this case, the trainmen did all they could to avoid injuring him.

We should, perhaps, set out a little more of the testimony. Some of it, and the efforts of the plaintiff and those with him to flag or stop the train, have already been referred to. Some of the trainmen testify that, after they struck the automobile, the train was stopped within the length of the train, some 800 or 900 feet, and one of them says he thought they made a good stop. The evidence shows that the side light of plaintiff's automobile was burning, and was seen by defendant's brakeman, who was on the engine when the train came over the hill, three quarters of a mile from this crossing; and he testifies that he had a clear, unobstructed view from that point to the crossing; that he kept watching the light; that the train was slowing down; that he knew there was a public crossing there, and that people often used it; that he said nothing to anybody about the light; that the light was in plain sight all the time after they came over the hill. The fireman testified:

"I noticed this light when we came over the hill, noticed that it was on or near the public crossing, and noticed that it remained there as we approached. There was no change in the position of the light. \* \* \* I said nothing to the engineer when I saw the light. \* \* \* I saw the whole thing, the track, the automobile, and the three people beside it, at about the same time. Ordinarily, when we see an obstruction on the track, I call the engineer's attention to it. In this case, I did not say anything to the engineer, until the automobile was struck and knocked off the track."

The conductor testified that the engineer applied the air somewhere in the neighborhood of two or three train lengths west of this crossing; that he slowed down to 8 or 10 miles an hour; that the train was slowing down when he saw the light, but did not come to a complete stop until after they struck the automobile. He says further:

"When I saw the light on the track, I did nothing, made no attempt to stop the train, and paid no attention to the light. Ordinarily, when we see a light or anything on the track, we stop if we can."

Some of the trainmen testified that the light looked as though it was at the side of the track, and that the train would clear; but they say it was not moving about, but standing still. There was evidence that the train could have been stopped within its length before the crossing was reached, if the emergency had been applied. The trainmen all say that they did not have actual knowledge of plaintiff's dangerous situation.

We think there is no reversible error in the record, and the judgment is, therefore,—*Affirmed*.

DEEMER, WEAVER, and EVANS, JJ., concur.

STATE SAVINGS BANK, MISSOURI VALLEY, Appellee. v. .  
GUARANTY ABSTRACT COMPANY, Appellee; W. J.  
BURKE, Garnishee, et al., Appellants.

**APPEAL AND ERROR: Parties—Garnishment Proceedings—When Judgment Defendant Necessary Party to Appeal.** A judgment defendant is a necessary party to an appeal by a garnishee if a reversal would prejudicially affect such judgment defendant. (Sections 3951-3953, inc., 4111, Code, 1897; Sections 3947, 3948, Code Supp., 1913.)

*Appeal from Harrison District Court.*—E. B. WOODRUFF,  
Judge.

MARCH 19, 1915.

SUPPLEMENTAL OPINION, AND REHEARING DENIED DECEMBER 14, 1917.

ACTION by way of garnishment. Burke, garnishee, appeals from a judgment rendered against him in favor of the plaintiff. No notice of appeal was served on the judgment defendant. Appeal, on motion of the plaintiff, dismissed.

*C. W. Kellogg*, for appellant.

*J. S. Dewell*, for appellee.

GAYNOR, C. J.—On the 21st day of March, 1912, the plaintiff herein, appellee, obtained judgment against the principal defendant, the Guaranty Abstract Company, of Missouri Valley, Iowa, for \$2,768.88. On the 18th day of July, 1912, the appellant herein, W. J. Burke, was garnished under execution issued upon said judgment, and on the 6th day of November, 1912, appeared and made answer in said garnishment proceeding. The defendant the Guaranty Abstract Company appeared by its president, and waived

notice of garnishment proceedings on the principal defendant. On the 8th day of January, 1913, the plaintiff filed a pleading controverting the answers of the garnishee, claiming that said garnishee was indebted to the defendant the Guaranty Abstract Company in the sum of \$500. Issue was joined upon this pleading between the plaintiff and the garnishee, W. J. Burke. No pleading was filed by the Guaranty Abstract Company in this proceeding. Upon the issue joined, a trial was had to a jury, and a verdict and judgment rendered against the garnishee and in favor of the plaintiff, for the sum of \$429.25. From this judgment, the garnishee, W. J. Burke, alone appeals.

It appears that the notice of appeal to this court was served upon the attorneys for the plaintiff, and upon A. W. Blackburn, clerk of the district court. As to them, the service of notice was complete, but no notice of appeal was served upon the principal defendant, the Guaranty Abstract Company. The plaintiff filed a motion in this court to dismiss the appeal, on the following grounds:

"The abstract herein shows that, on March 21, 1912, the plaintiff, State Savings Bank, appellee herein, obtained a judgment against the principal defendant, Guaranty Abstract Company, for the sum of \$2,768.88, and that such judgment, or at least more than the amount claimed against the garnishee herein, was due and unpaid at the time the notice of garnishment herein was served, and at the time of this trial. That the appellant herein has not perfected his appeal to this court in the manner required by law, for the reason that no notice of appeal was ever served upon the principal defendant, Guaranty Abstract Company, the only notice of appeal served herein being a notice directed to State Savings Bank, of Missouri Valley, Iowa, and to A. W. Blackburn, clerk of said district court, and that no notice of appeal directed to the Guaranty Abstract Company was ever served or filed herein. That the only

service of notice of appeal on file herein is the acceptance of service of said notice by J. S. Dewell, Ross McLaughlin, and S. H. Cochran, attorneys for plaintiff, and by A. W. Blackburn, clerk of said district court. That, as appears from the record herein, the Guaranty Abstract Company, the principal defendant, is directly interested in the event of this suit; for the reason this action in garnishment is based on the claim that the garnishee was indebted to the principal defendant, the Guaranty Abstract Company, and said claim having been established herein, and if judgment herein is paid, would, to that extent, inure to the benefit of the principal defendant, and a reversal of this judgment would, therefore, be prejudicial to the interests of said Guaranty Abstract Company. In addition to the foregoing, it fully appears that the principal defendant, the Guaranty Abstract Company, is party to this present proceeding, said principal defendant having entered its appearance in this garnishment proceeding before judgment was rendered herein."

This motion involves a question of procedure. We hesitate to sustain a motion of this kind, which has the effect of depriving the garnishee of a hearing upon the merits of his case; nor would, unless, by well-established principle and precedent, we are forced to do so. The motion goes to the right of this court to hear and determine the questions raised upon the appeal upon their merits. If the contention of the plaintiff is well-founded, we have no choice or discretion in the matter, but must refuse a hearing upon the merits. Section 4111 of the Code of 1897 provides as follows:

"A part of several co-parties may appeal; but in such case they must serve notice of the appeal upon those not joining therein, and file proof thereof with the clerk of the Supreme Court."

These questions meet us, therefore, at the threshold of



this inquiry: (1) Was the defendant the Guaranty Abstract Company a co-party to this proceeding? (2) Would a reversal of this case be prejudicial to it?

If both of these questions are answered affirmatively, this court is without jurisdiction, and therefore without right to hear or determine the main question urged by appellant. It is apparent that, if it prejudicially affects the principal defendant, and it has no notice of this proceeding, this court has no right to make any pronouncement prejudicial to its interests.

Section 3947, Code Supplement, 1913, provides: "

"Judgment against the garnishee shall not be entered until the principal defendant shall have had ten days' notice of the garnishment proceedings, to be served in the same manner as original notices."

It is apparent that, after such notice, the principal defendant is in court for all purposes connected with the garnishment proceedings, and is bound to take notice of all further actions of the court touching the subject matter of the garnishment.

Section 3951 of the Code provides:

"The judgment in the garnishment action, condemning the property or debt in the hands of the garnishee to the satisfaction of the plaintiff's demands, is conclusive between the garnishee and defendant."

In *Smith v. Dickson*, 58 Iowa 444, it was held, in substance, that the court might proceed against the garnishee who had been served properly with notice of garnishment, without having jurisdiction of such debtor, and it was said he was not a necessary party; but this was before the statute was enacted requiring notice to the defendant of the garnishment proceedings, and the decision is based upon the stated fact that there was no provision of the statute then requiring the notice on the principal defendant.

Section 3948 of the Code provides that the defendant in the main action may, by proper pleading filed in the garnishment proceedings, interpose certain claims or defenses against the plaintiff.

Section 3953 of the Code provides:

"An appeal lies in all garnishment cases at the instance of the plaintiff, the defendant, the garnishee, or an intervener claiming the money or property."

In *Sinard v. Gleason*, 19 Iowa 165, this court said:

"As to the right of the principal debtor to appeal from the judgment against the garnishee, we have but little doubt, the latter being a part and auxiliary to the main action."

The statute at the time the above case was decided was the same as it is now. See Revision of 1860, Section 3214.

Section 3952 of the Code provides that, when a judgment is rendered against the garnishee, the same shall distinctly refer to the original judgment.

Thus it is apparent that the principal defendant is bound by the judgment against the garnishee, condemning its property in the hands of the garnishee to the payment of its debt. This judgment is conclusive on it, unless it appeals. It is also conclusive on the garnishee, unless the garnishee appeals. Each has a right to appeal from the judgment, if adverse to his interests. Before judgment could be entered against the garnishee, notice must be served on the garnishee, as provided in Section 3935 of the Code. This notice forbids him to pay any debt owing the defendant, due or to become due, and requires him to retain possession of all the property of the defendant in his hands or under his control, to the end that the same may be dealt with according to law. Notice must be served upon the principal defendant of this fact of garnishment, and that its property is so held. The judgment entered in that proceeding, condemning the prop-

erty of the principal defendant in the hands of the garnishee, is conclusive between the garnishee and the defendant, and either party feeling himself aggrieved by such judgment may appeal. If judgment is entered against the garnishee, the effect of the judgment is to condemn the property of the defendant in the hands of the garnishee, to the payment of the judgment held by the plaintiff against the defendant. The judgment rendered against the garnishee, when collected, discharges the debt from the defendant to the plaintiff *pro tanto*. To the extent of the judgment when satisfied, defendant is relieved of his obligation to the plaintiff. A reversal of the judgment, or a finding that the garnishee, as claimed in this case, was not indebted to the defendant, is to leave the defendant still charged with the full amount of the judgment against it. A reversal, therefore, would be prejudicial to its interests.

We must answer both questions in the affirmative. Defendant was a party to this garnishment proceeding, in that it was bound by the judgment against the garnishee equally with the garnishee, and had a right to appeal if it felt itself aggrieved; and there is apparently nothing left for us to do but to sustain the motion and dismiss this appeal. As supporting this contention, see *Hunt v. Hawley*, 70 Iowa 183; *Goodwin v. Hilliard*, 76 Iowa 555; *Day v. Hawkeye Ins. Co.*, 77 Iowa 343; *Tukey v. Foster*, 158 Iowa 311; *Dillavou v. Dillavou*, 130 Iowa 405; *Smith Lbr. Co. v. Scott County Garbage Co.*, 149 Iowa 272; *Schaller & Son v. Marker*, 136 Iowa 575.

The appellant relied upon the case of *Payne v. Raubinek*, 82 Iowa 587. That case does nothing more than hold that, in case of co-parties, no notice is necessary where the defenses are distinct and separate, and a judgment against one does not affect in any way the interests of the other. In that case, it is said that the judgment as to appellant can be modified, affirmed, or reversed, without injuriously

affecting the interest of the other co-party. It was held that the party who did not appeal, and on whom notice was not served, had no concern with the questions presented. A determination either way on the issues between the plaintiff and defendant cannot affect the liability of the co-party on whom no notice of the appeal was served. This is not the fact in the case at bar, and the *Payne* case is not controlling.

*Motion to dismiss appeal sustained.*

DEEMER, LADD, and SALINGER, JJ., concur.

SUPPLEMENTAL OPINION.

GAYNOR, C. J.—A petition for rehearing having been filed in this case, we have deemed it advisable to file a supplemental opinion, in view of the fact that, since the handing down of the opinion in this case, this court has passed upon what is claimed to be the identical question involved here, and in passing, reached a different conclusion from that reached in this case. See *Ober v. Seegmiller*, 180 Iowa 462.

In this *Ober* case, it appears that the plaintiff, on the 7th day of February, 1899, obtained judgment against one Jacob Seegmiller for \$124, with 8 per cent interest thereon from that date. On the 12th day of April, 1915, execution was issued on this judgment, and the sons of Jacob Seegmiller were garnished. It appears from the record in that case that the wife of Jacob had died, prior to the issuing of the execution, leaving a will, in which she bequeathed certain property to her three sons, the garnishees in the case, and in the will provided that the gift to them was subject to and depended upon the performance by them of certain conditions, to wit, the payment to her husband, Jacob Seegmiller, defendant in the case, each year during the period of his natural lifetime, so much of the sum of one third of \$1,000 as he might demand. It appeared that

Jacob Seegmiller, the defendant, had never demanded anything of these sons under the provisions of this will. The sons, however, were garnished, and they were cited to appear, and an effort was made to hold them as debtors of the original defendant under this provision of the will. A hearing was had, in which it appeared that the father, Jacob Seegmiller, had never demanded any sum of money from these defendants under this will. The court, however, entered judgment against the garnishees for the amount of the original judgment against Jacob Seegmiller, to wit, \$124, with interest. The garnishees claimed that they did not owe their father anything under the will, for the reason that he had never demanded anything, and that the indebtedness was contingent upon the demand. They appealed to this court. They served no notice of the appeal upon the judgment defendant, Jacob Seegmiller.

The opinion in that case recites that Jacob Seegmiller was satisfied to have the judgment go against his sons for the amount of the judgment under the provisions of this will. He was satisfied to have the judgment paid by his sons, the garnishees, so that he might be discharged from any personal obligation under the original judgment. A contention was made in this court that this court could not hear and determine the case without the presence of Jacob Seegmiller; that, if the case was reversed, it would injuriously affect him, inasmuch as the payment of the judgment entered against the garnishees would satisfy the judgment which the plaintiffs had against him, Jacob, and therefore a reversal would be prejudicial to him, and would leave him standing with the judgment unsatisfied, and the garnishees relieved from any obligation to him to pay the amount. This court in that case reversed the judgment against the garnishees, holding that they were not bound to the old man, their father, in any sum under the provisions of the will, because he had never made any demand

upon them for it, and that the judgment, therefore, against the garnishees, was erroneous, and they were not required to discharge it; and left the plaintiff with his judgment unsatisfied against the original defendant, Jacob Seegmiller, but with a right to demand it of the sons in the future.

The rule was recognized in that *Ober* case that, where there is a party to a controversy whose interests may be injuriously affected by an adverse ruling in this court, this court will not consider the case without his presence in this court, and that notice is essential to bring him before the court. In that case, it was said:

"No notice of appeal need be given any party to an appeal except one who is interested in the result thereof, and whose rights may be affected thereby, save as the statute expressly requires such notice. As the original judgment defendant's interest cannot be prejudicially affected by the appeal, we do not think it necessary that he be served with notice thereof."

The query arises: Why might not his interest be prejudicially affected? If the judgment against the garnishees had been affirmed, the judgment of the plaintiff against him would be satisfied by the garnishees. If the judgment was reversed, and the garnishees were relieved of the obligation to pay the amount of the judgment entered against them to the plaintiff, in satisfaction of the plaintiff's judgment against the judgment defendant, then the original judgment defendant would be still holden for the judgment as originally entered against him, and his rights against the garnishees would be thereby adjudicated; for, as said in Section 3951 of the Code of 1897, "The judgment in the garnishment action, condemning the property or debt in the hands of the garnishee to the satisfaction of the plaintiff's demand, is conclusive between the garnishee and defendant." The original defendant, being a party to the proceedings, and having been served with notice of the gar-

nishment, as provided by Section 3947, Code Supplement, 1913, is bound by whatever judgment the court enters, touching the liability of the garnishee to the plaintiff in execution as his debtor.

It will be noted that, in the *Ober* case, the same doctrine is recognized that finds pronouncement in the case to which this opinion is supplemental. It is true that, in this *Ober* case, some language is used that would be, in strict construction, antagonistic to something that has been said by us in the original case. But what is said there must be understood in the light of the facts presented in that record. It is said in the *Ober* case that, if the garnishees are successful in the appeal, and the cause is reversed and the judgment against the garnishees set aside, the original defendant is not injuriously affected. It must be borne in mind that, in this *Ober* case, this court denied plaintiff judgment against the garnishees because no demand had been made on them by the judgment defendant which would mature their obligation to pay under the provisions of the will,—that their liability depended upon a demand by the father; and it was said:

“There, as here, if no demand was made, nothing was to be paid, and, as no demand was made by the father at any time, nothing was due which he could collect for the years that had passed, and nothing would be due in the future, save as he might fix the amount and make demand for the same.”

It appears, therefore, that, by failing to make a demand, he lost all rights against these garnishees for any sum that might have been obtained, if demand had been made in the past, but for the future, there was no adjudication in the garnishment proceedings or otherwise; that, until demand made therefor, an obligation would not mature in favor of the father under the provisions of the will;

that, until demand was made by the father of the sons for a certain fixed sum required by the will to be paid to the father by the sons, no obligation rested on the sons to make payment; that demand was a condition precedent to the creation of any obligation on the part of the sons to whom the property was devised.

The plaintiff in execution could have no greater right against the garnishees than existed on the part of the father at the time the garnishment was made. He had made no demand of any fixed sum; therefore no fixed sum was due from the sons. Therefore, there was no determined sum that could be reached by garnishment. The court did not adjudicate, however, the right of the father thereafter to make a demand under the provisions of the will, nor adjudicate the obligation of the garnishees to pay him on such demand. Therefore, it was held that his rights were not prejudicially affected, and he was not a necessary party to the appeal.

What is said in an opinion must be read in the light of the facts on which the pronouncement is made, and must be limited to the record that is then before the court for its consideration. The legal principle upon which the pronouncement was made in the *Ober* case is in no way inconsistent with the pronouncement made in the instant case. In the instant case, however, we wish to modify something that was said herein. We said:

"These questions meet us, therefore, at the threshold of this inquiry: 1st. Was the defendant the Guaranty Abstract Company a co-party to this proceeding? 2d. Would a reversal of the case be prejudicial to it?"

We followed this by saying, "If both of these questions are answered affirmatively, this court is without jurisdiction." We should have said, "If the latter question is answered affirmatively, this court has no right to determine the controversy." We further said, "We answer both these



questions in the affirmative." We should have said, "We answer the latter question in the affirmative."

With this modification, the petition for rehearing is overruled.

LADD, WEAVER, PRESTON, SALINGER, and STEVENS, JJ., concur.

EVANS, J., dissents.

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WOODBINE SAVINGS BANK, Appellee, v. E. G. TYLER et al.,  
Appellants.

**TAXATION: Levy and Assessment—Void Assessments—Review by**

- 1 **Equity Court.** Equity will afford relief against a void tax, even though the one complaining (a) is not the one against whom the tax was originally assessed and (b) makes no tender of payment of the tax which would have been due had the assessment been legally completed.

**TAXATION: Levy and Assessment—Assessment Rolls—Failure to**

- 2 **Authenticate.** Principle recognized that the failure of the assessor to attach his oath to the assessment rolls wholly invalidates the tax.

**PLEADING: Demurrer—Standing on Demurrer—Effect.** He who,

- 3 by his demurrer, takes the position that his antagonist is entitled to *no relief whatever*, and, on the overruling of the demurrer, stands thereon, may not, on appeal, contend that such antagonist is not entitled to all the relief which the overruling of the demurrer gave him.

**PRINCIPLE APPLIED:** Plaintiff pleaded that an assessor had wholly failed to attach his oath to an assessment roll, and that consequently a tax levied thereon, affecting plaintiff's property, was wholly void. He pleaded for the cancellation of said tax and of the sale had and certificate issued. Defendant demurred, on the theory that plaintiff was, in equity, entitled to no relief whatever. Demurrer was overruled. Defendant stood on his demurrer. *Held*, defendant was precluded, on appeal, from claiming that plaintiff might not complain of certain specified parts of the tax.

*Appeal from Harrison District Court.*—J. B. ROCKAFEL-  
LOW, Judge.

MAY 14, 1917.

REHEARING DENIED DECEMBER 14, 1917.

THE action is one by plaintiff against defendant to have certain alleged taxes declared null and void, and to have a tax certificate of purchase, a tax sale, and the sale of lands based upon said taxes, canceled, on the ground that there was no valid listing, assessment or levy of said taxes, because the assessor who attempted to list the property liable for taxes failed to attach his oath to the assessment rolls, as required by Code Section 1365.—*Affirmed.*

*Roadifer & Roadifer and L. W. Fallon, for appellants.*

*H. L. Robertson, for appellee.*

SALINGER, J.—I. We agree with appel-

1. TAXATION:  
levy and as-  
essment: void  
assessment:  
review by  
equity court.

lant that the foreclosure suit through which appellee has title was in such condition as to parties joined and issues made as that the decree of foreclosure does not preclude the appellants from contending that the tax in controversy was a valid one, and we proceed to determine that question, unaffected by said foreclosure decree.

In *Warfield-Pratt-Howell Co. v. Averill*

2. TAXATION:  
levy and as-  
essment: as-  
essment rolls:  
failure to  
authenticate.

*Groc. Co.*, 119 Iowa 75, there was an attempt to enter upon the assessment book a tax against a stock of goods. There, as here, the assessor did not attach the oath which Section 1365 of the Code of 1897 requires to be attached to the assessment roll. Averill owned this stock of goods from January 1, 1899, to June 1st of that year, when he delivered possession to the Letts-Fletcher Company, in pursuance of an agreement entered into May 2, 1899. The latter sold and delivered the stock remaining, about two thirds, to plaintiff Warfield on June 20, 1899.

In October and December of that year, the proper officers of the county and city levied the annual taxes, and plaintiff, on being advised that, unless these taxes were paid before June 25, 1900, collection would be enforced by distress and sale, paid the entire amount. He sought at law to recover back from the defendant Averill. We held that the requirement to attach the oath is mandatory, and that without same the assessment is invalid, as distinguished from being merely irregular.

## 1-a

The appellants claim the *Warfield* case makes a distinction between actions at law and suits in equity. Without passing at this time upon whether such a distinction exists, we are of opinion that the case does not make it. It says that there is reliance by appellee upon authorities to the effect that equity will not lend its aid to defeat the collection of a tax unless it appears to be unequal and unjust, and an offer is made to pay such sum as in justice and equity the complainant ought to pay; and the citations for which this claim is made are set out. It continues that, in the cited cases, the distinction between an action in equity to restrain or prevent the enforcement of an alleged tax lien and a suit at law directly involving the validity of the assessment is clearly pointed out; that the fact that the two lines of decisions run throughout the reports of several states, both of which are unquestioned, indicates there is no conflict; that, in the one, equity refuses to interfere unless, in good conscience, the suitor shows himself entitled to relief, while at law, relief is awarded because of the absence of a valid assessment upon which to base a recovery. Since the *Warfield* action was at law, the court had no occasion to determine whether a different rule prevails in equity, and up to this point, makes no attempt to determine it, and, in effect, merely points out that such a distinction is claimed; that cases cited by appellee make it,

and make it clearly; and points out upon what basis these cases make the distinction. The most that is added is a dictum that the distinction made by these cases is not in conflict with the rule prevailing on the law side. To make clear that there is no attempt to say what the rule should be in equity, there is added that this distinction was declared unsound by the Supreme Court of North Dakota in *Eaton v. Bennett*, 87 N.W. 188, overruling an earlier case upon which appellee relied, on the ground that nothing can be said to be justly due, in the absence of a valid assessment. The question whether the distinction which appellant seeks to make obtains, is not foreclosed by the *Warfield* case.

## 1-b

In *Conway v. Younkin*, 28 Iowa 295, there was no failure to verify the roll, but there was an omission of the assessor to insert the name of a person whom he intended to assess jointly with another as the owner of the property assessed, and it was held that this was an error which might properly be corrected by the clerk of the board of supervisors, under Section 747 of the Revision. It is upon this record we said that equity will not interfere to prevent the collection of a tax authorized by law, and to which the property is justly liable, on account of what this particular omission is, to wit, a mere irregularity. We have no quarrel with this, but it does not settle the case before us. It does not settle that equity will attach conditions to resisting a void assessment. In *Litchfield v. County*, 40 Iowa 66, at 68, a suit in equity, nothing but irregularities were involved. They consisted: (1) In the classification of the lands by the supervisors as to their values, (2) the assessment of the lands to unknown owners in 80-acre tracts; (3) the want of a warrant to the tax list; (4) the failure of the treasurer to offer the lands for sale at a time required by law. It is as to this we held that mere irregularities in the assessment or levy of taxes will not justify

the interference of equity to stay their collection. What we have said as to the *Conway* case applies to this.

*Rood v. Board*, 39 Iowa 444, involved what was held to be an illegal tax. We said:

"In many states it has been held that a court of equity will not interpose by injunction to restrain the enforcement of a tax, but that the party will be remitted to the usual remedies at law. In this state, however, it has uniformly been held that, if the tax is illegal and not merely irregular, its enforcement will be restrained by injunction."

For this, many of our own decisions are cited. This statement is approved in *Montis v. McQuiston*, 107 Iowa 651, at 652. *Hubbard v. Board*, 23 Iowa 130, was an action in equity to restrain the collection of a tax which is held to be void. The equity jurisdiction is upheld. (151). *Reed v. City of Cedar Rapids*, 138 Iowa 366, holds by strong implication that the requirement to verify the assessment roll is not abrogated in a suit in equity to enjoin the collection of taxes assessed. *Chamberlain v. City of Burlington*, 19 Iowa 395, cited in the *Rood* case, sustains enjoining the collection of an illegal tax. So of *Macklot v. City of Davenport*, 17 Iowa 379. And so of *Litchfield v. County*, 18 Iowa 70. And of *Williams v. Peinny*, 25 Iowa 436. The citations of the *Rood* case include *Zorger v. Township*, 36 Iowa 175, and *Olmstead v. Board*, 24 Iowa 33, both of which sustain the holding of the *Rood* case by at least very strong implication. Approving the *Rood* case, we say, in *Security Sav. Bank v. Carroll*, 131 Iowa 605, at 608, 609, that, if a tax be illegal and void, equity may be invoked even if there be a tribunal provided for reviewing the same. To like effect, and approving the *Rood* case, is *Hubbell v. Bennett*, 130 Iowa 66, at 68. And so of *Chicago, M. & St. P. R. Co. v. Phillips*, 111 Iowa 377, at 380, 384. *State Board v. Holiday*, (Ind.) 49 N. E. 14, sustains a proceeding to enjoin

the state board from listing and valuing the life insurance policies for taxation that were held by appellees. *Senour v. Ruth*, (Ind.) 39 N. E. 946, 947, permits an invalid taxation to be attacked collaterally. The proposition that courts may relieve from assessments levied without jurisdiction is supported by the following authorities: *County of Santa Clara v. Southern Pac. R. Co.*, 6 Sup. Ct. Rep. 1132; *Central Pac. R. Co. v. People of California*, 16 Sup. Ct. Rep. 766; *St. Marys Gas Co. v. Elk County*, (Pa.) 43 Atl. 321; *Keokuk & H. Bridge Co. v. People*, (Ill.) 43 N. E. 691; *Maxwell v. People*, (Ill.) 59 N. E. 1101; *Poe v. Howell*, (N. M.) 67 Pac. 62; *State v. Ernst*, (Nev.) 65 Pac. 7.

Holding that equity may intervene where the tax is void, as distinguished from being merely irregular, is supported in analogy by cases like *Worrall v. Chase*, 144 Iowa 665, and *Rea v. Rea*, 123 Iowa 241, to the effect that one who attacks a void judgment based upon an alleged debt does not have the burden of showing he does not owe the debt in order to be entitled in equity to a cancellation of the judgment.

It is true this is not an injunction to restrain the collection of a tax, and is a suit to have the title to certain premises quieted in the plaintiff. But the foundation of it all is whether a claimed tax shall be held to be effective. And so while, as is usual, there is a variation in facts, we are of opinion that the case here is, in principle, within these rules. See *First National Bank v. City of Council Bluffs*, 182 Iowa—.

True, there is a presumption that the alleged taxation was valid, and that everything was done by the appropriate officers that the law requires to be done. Though true, it is immaterial here, because the demurrer admits that there was an omission which, under the law, makes the tax void.

We are at a loss to understand why appellant has cited

*Darner v. Daggett*, (Neb.) 75 N. W. 548.\* The case decides that, in an action for damages because of false representations by the vendor as to the character of an invoice of the goods sold, there was no prejudicial error in permitting a witness to testify that certain goods were old, when that fact was important in determining their real value tested by the invoice, and that this was especially the case in view of the fact that the court afterwards instructed the jury it should not take such evidence into account as furnishing a basis for recovery because of the defective quality of the goods in question.

1-c

Having settled that the tax is void, as distinguished from being merely irregular, we hold that the appellee could have relief without a tender of taxes that might exist to be paid if the process of taxation had ever been completed, or if there was a tax to be paid which was irregular rather than void.

We are of opinion, too,—and the *Warfield-Averill* case gives support to it,—that the one whose property is sought to be affected by an illegal tax may complain even though the person against whom the tax was attempted to be assessed does not complain. We do not dispute the text of 37 Cyc. 1085d, that a taxpayer can waive irregularities; but the answer again is that here is more than an irregularity.

We have no fault to find with the text in Jaggard on Taxation, pp. 466, 491, which points out the distinction between irregularity and invalidity or illegality; and it is true that failure to attach the affidavit required by the Iowa statute is not pointed out as being an illegality. It is not referred to at all. But, as seen, it is settled in this jurisdiction that the omission here involved makes a tax void. Therefore, it is void even though no text writer included it in his statement of what constitutes a void tax.

In view of our position that the tax which is the basis

of appellee's complaint is void, and that the equity jurisdiction is available as to a void tax, we are unable to see that statute provisions making it the duty of an owner to list property for taxation have any importance. Therefore it is also unimportant to go into what constitutes an owner, within the meaning of provisions requiring listing by one. For that matter, we have passed upon the precise point in *Hubbard v. Board*, 23 Iowa 130, at 151, where we say:

"It is true that the owner is required to assist the assessor in listing his property; but it would be a most violent presumption to say that, because of this duty, without any averment that in the particular case it was discharged, the owner was estopped from complaining of an illegal or unauthorized levy."

II. It is contended, as we understand  
3. PLEADING: it, that, at all events, the appellee may not  
demurrer: complain of some part of the alleged tax.  
standing on  
demurrer: effect.

We have met the argument, in part at least, by holding that one against whom the assessment was attempted may not waive the illegality at the expense of the one whose property is now sought to be charged, and that in this case, no tender of the claimed tax was required. We have to add that the demurrer proceeded on the expressed ground that the allegations of the petition do not entitle the plaintiff to the relief demanded. It was the duty of the court to overrule the demurrer, if the petition entitled to any relief. So, even if overruling the demurrer finally resulted in relieving the appellee of some part of the tax from which it should not have been relieved, that is due to the fact that appellant elected to stand upon the demurrer. If it felt that the ruling on the demurrer unjustifiably effected discharge from some part of the tax, it should have excepted to the ruling on demurrer and then pleaded over by framing an issue on whether, at all events,

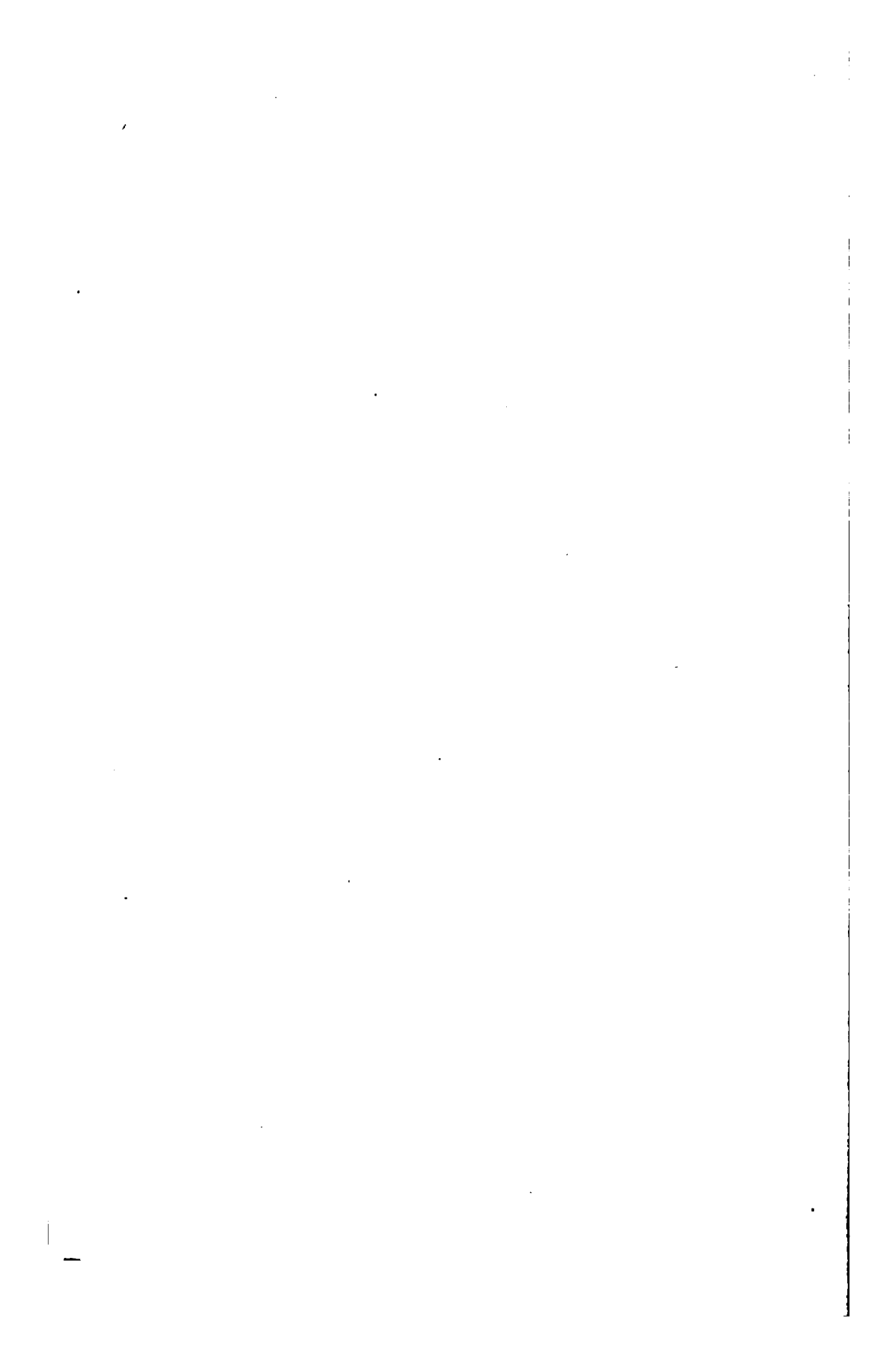


some part of the tax was not valid. The trial court was compelled to either sustain or overrule the demurrer. If that resulted in giving appellee too much relief, we have pointed out how that might have been avoided.

III. Concede that Section 1417 of the Code of 1897, *Genther v. Fuller*, 36 Iowa 604, *Eldridge v. Kuehl*, 27 Iowa 160, *Parker v. Sexton*, 29 Iowa 421, and *Parker v. Cochran*, 64 Iowa 757, sustain that a tax sale is not illegal merely because part of the taxes for which land is sold are. This is not material, because, upon the issues presented on this appeal, we are constrained to find that all of the tax was illegal.

The decree of the district court must be—*Affirmed*.

GAYNOR, C. J., LADD and EVANS, JJ., concur.



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ACCORD AND SATISFACTION

TO

ADVERSE POSSESSION

## ACCORD AND SATISFACTION.

**Unconditional Payments.** Payments neither tendered nor received in full satisfaction of a claim fall short of an accord and satisfaction. *McCoy v. Smith*, 181—707.

## ACCOUNT, ACTION ON.

**Sufficiency of Evidence.** Sufficient proof of an account appears from the fact that defendant (a) admitted the account in his letters, (b) ratified the account by making partial payments thereon, and (c) in portions of his argument treated the account as genuine. *McCoy v. Smith*, 181—707.

## ADJOINING LANDOWNERS. See DEEDS, 8.

**Encroachments on Adjoining Soil.** Principles recognized: (1) That an excavation which removes the lateral support of the *soil* of another, in its natural state, with consequent damage, ripens a cause of action, irrespective of negligence; and (2) that an excavation which removes the lateral support of *buildings* of another (no grant appearing) ripens a cause of action only in case of negligence. *Starrett v. Baudler*, 181—965.

## ADVERSE POSSESSION. See DEEDS, 8.

**Possession Under Unqualified Deed.** Possession of lands is presumed to be referable to the possessor's deed, if he have one; that is, he is presumed to have and to assert a possession as strong as the terms of his deed will justify. It follows that, if his deed be an *unqualified* warranty deed, such possession, if open, notorious and continued, is presumed not only to be in good faith but *adverse to all and*

ADVERSE POSSESSION Continued TO APPEAL AND ERROR  
every outstanding claim and interest. Collins v. Reimers,  
181—1143.

Unprovable Claim of Right. Open, notorious, continuous and  
2 hostile possession of real estate, under claim of right, with  
the express or implied knowledge of an adverse claimant,  
ripens into an absolute title after the lapse of ten years,  
even though said claim of right originally was legally un-  
provable. Ratigan v. Ratigan, 181—860.

**APPEAL AND ERROR.** See CRIMINAL LAW.

**PRESENTATION AND RESERVATION OF GROUNDS.**

Failure to Object to Instructions. Instructions must be objected  
1 to in order to secure review on appeal. City Nat. Bank v.  
Mason, 181—824.

Points First Raised on Appeal. Points made for the first time on  
2 appeal will not be considered. Northwestern Trading Co. v.  
Western L. S. Ins. Co., 181—853.

Failure to Except to Instructions. Allowing a cause to be sub-  
3 mitted to the jury on a certain theory of law, as reflected  
in the instructions, without objection or exception there-  
to, precludes subsequent complaint by the non-objecting  
party. Gilling v. Held, 181—926.

Failure to Except to Report of Referee. Objections to the refusal  
4 of a referee to grant a continuance must be made by excep-  
tions to the report of the referee, and in the trial court, or  
such objection will be waived. Jewett Lbr. Co. v. Anderson  
Coal Co., 181—950.

Quo Warranto or Equity. That *quo warranto* and not an equit-  
5 able action for injunctive relief is the only remedy to  
test the legality of a public corporation, may not be raised  
for the first time on appeal. Taylor v. Independent School  
Dist., 181—544.

New Arguments on Appeal. One who has properly presented and  
6 reserved a point in the trial court is not limited, on ap-

## APPEAL AND ERROR Continued

peal, to the same *arguments* presented by him to the trial court. United States Trust Co. v. Guthrie Center, 181—992.

## PARTIES.

**Judgment Defendant as Necessary Party to Appeal in Garnish-  
7 ment Proceedings.** A judgment defendant is a necessary party to an appeal by a garnishee if a reversal would prejudicially affect such judgment defendant. State Sav. Bank v. Guaranty Abst. Co., 181—1378.

## NOTICE.

**Specification of Judgment or Order.** An appeal "from the judgment," without further specification, is sufficient to bring up for review *the order overruling a motion to reopen the judgment by default*. Reilley v. Kinhead, 181—615.

## ASSIGNMENT OF ERROR.

**Sufficiency.** An assignment "that the court erred in not excluding the question 'What did she say?'" or "that the court erred in not granting a new trial because the whole record discloses that defendant was deprived of a fair trial," raises no reviewable question. State v. Powers, 181—452.

**Assignment Without Brief Point.** An assignment of error which forces the court to an examination of the abstract in order to determine its exact nature, with no separately stated brief point, raises no question upon which the court is bound to pass. State v. Burley, 181—981.

## BRIEFS.

**Points Noticed Sua Sponte.** The appellate court will, on its own motion, raise the point that no reversible error results from the erroneous exclusion of a question, when the record does not show *what* appellant lost by the erroneous exclusion. Jacobs v. City of Cedar Rapids, 181—407.

## APPEAL AND ERROR Continued

## DISMISSAL, ETC.

**Non-Moot Cases.** Lapse of time will not render a cause moot if  
12 *an enforceable right is involved*. So held on an appeal involving the validity of a contract of employment of a teacher, it appearing that, at the time of the appeal, the time in which the contract might be performed had expired. Independent School Dist. v. Pennington, 181—933.

## REVIEW, SCOPE OF.

**Noneffective Judgments or Orders.** Jurisdiction of the court to  
13 enter an order will not be considered on appeal when such order works no change whatever in the rights of the parties. Barber Asphalt Pav. Co. v. District Court, 181—1265.

**Matters Inhering in Judgment.** An appellee who stands on the  
14 judgment appealed from must submit to review of any finding that inheres in such judgment, even though, in the rendition of such judgment, the trial court radically departed from the pleadings before it. Guthrie v. Winters, 181—1324.

**Void Presentation.** The appellate court will not review the merits of an application to set aside the dismissal of an action  
15 when said application has never been legally presented to the proper district court. Baff v. Waller, 181—1072.

**Trial Theory and Counter Theory on Appeal.** A trial in the lower  
16 court on the theory of *deliberate fraud* will not be reviewed on appeal on the theory of an *honest mutual mistake*. Seymour v. Chicago & N. W. R. Co., 181—218.

**Hearing in Probate.** Hearings on claims in probate are at law,  
17 with the consequence that findings of fact by the court have the force and effect of a jury finding. Harter v. Harter, 181—1181.

## PARTIES ENTITLED TO ALLEGE ERROR.

**Non-Appealing Party.** Principle recognized that an appellee,  
18 *without presentation of error points*, may show, if he can,

APPEAL AND ERROR Continued

that he was so erred against as to entirely neutralize any error against appellant. Applied when appellant, in an election contest, was able to show that the trial court had erroneously *rejected* one vote, and appellee countered with a showing that the trial court had erroneously *accepted* one vote. *Taylor v. Independent School Dist.*, 181—544.

**Non-Interested Party.** An appellant may not complain that damages asked by, and allowed to, him were apportioned to different non-complaining defendants. *Birdsall v. Perry Gas Works*, 181—1268.

**Estoppel by Requesting Instruction.** He who requests an instruction on a question of fact may not thereafter contend that there was no evidence to justify the submission of such question. *Martens v. Martens*, 181—350.

PRESUMPTIONS.

**Non-Sufficient Record on Excluded Question.** On the erroneous exclusion of a question, counsel must see to it that the record shows just what he has lost by the erroneous ruling. In other words, the record must substantially show what relevant or material answer the witness would have given had he been permitted to answer. Phrased differently, the court will not *imagine* the testimony that would have been given and therefrom *presume* prejudice. *Jacobs v. City of Cedar Rapids*, 181—407.

**Trial De Novo.** It will be presumed, in support of an equity decree, that the trial court found the existence of a material fact of which there was supporting evidence. *Ratigan v. Ratigan*, 181—860.

**Existence of Essential Fact.** It will be presumed, on appeal, that the trial court found the existence of a fact, when such fact is essential to sustain the judgment. *Iowa Imp. Co. v. Aetna Explosives Co.*, 181—1186.

DISCRETION OF LOWER COURT.

**Deference to Judgment of Trial Court.** It is often as important

## APPEAL AND ERROR Continued

- 24 to see a witness as to hear what he says; hence the reluctance of the appellate court to overrule the trial court in denying a new trial. Applied where the lower court, in denying a new trial, characterized the defendant's testimony, in part, as rank perjury. *Morgan v. Muench*, 181—719.

## HARMLESS ERROR.

**Admission of Conclusion Evidence.** Allowing a witness to state

- 25 "that he delivered to defendant all the property which he had sold to defendant" is harmless when such statement came at a time after the witness had been fully examined by both parties as to each and every item of property which the witness claimed to have so sold. *Hirsch v. Butler*, 181—345.

**Erroneous Refusal of Instructions.** It is harmless error to refuse

- 26 proper instructions when the same result was reached by those actually given by the court. *Hirsch v. Butler*, 181—345.

**Non-Fraudulent Representations.** While reliance on alleged

- 27 fraudulent representations is an important element, yet harmless error results from refusing to permit a party to testify that he did so rely, *when the representations are held non-fraudulent*. *Seymour v. Chicago & N. W. R. Co.*, 181—218.

**Belated Objection to Incompetent Testimony.** Permitting objec-

- 28 tionable testimony to go into the record without objection precludes basing reversible error on the subsequent reception, over objection, of substantially the same testimony. *Monson v. Chicago, R. I. & P. R. Co.*, 181—1354.

**Improper Exclusion on Cross-Examination.** Unduly limiting

- 29 cross-examination as to matters bearing on the interest and credibility of the witness is harmless when it affirmatively appears that, had the desired testimony been received, the verdict would not and should not have been different than it was. *State v. Burley*, 181—981.



## APPEAL AND ERROR Continued TO BILLS AND NOTES

**Sufficiency of Record on Excluded Question.** A defendant who  
 30 calls plaintiff's physician as a witness and seeks to show what said witness discovered while professionally treating plaintiff, and is denied the right to so show, must, on appeal, in order to establish reversible error, demonstrate two facts, to wit: (1) That plaintiff had in some manner waived the right to object to the divulging of said professional communications; and (2) that said witness, had he been permitted to answer, would have given a material or relevant answer. *Jacobs v. City of Cedar Rapids*, 181—407.

## REVERSAL.

**General Order of Reversal.** A *general* order of reversal in a law  
 31 action tried in the lower court to a jury has the effect of sending the cause back to the lower court for *full retrial* on the former issues, even though the opinion on reversal is based upon the insufficiency of the evidence for plaintiff. *Owens v. Norwood-White Coal Co.*, 181—948.

## ASSIGNMENTS.

**Mode and Sufficiency.** No formality is required to make a valid oral assignment of an account. *Jewett Lbr. Co. v. Anderson Coal Co.*, 181—950.

**AUTOMOBILES.** See MALICIOUS MISCHIEF; NEGLIGENCE, 15.

## BANKS AND BANKING.

**Compensation of Employees—Ratification.** The board of directors of a banking corporation has ample power to fix the compensation of its employees, and, in reference thereto, to ratify subsequently what formerly had been informally authorized. *Rossing v. State Bank*, 181—1013.

## BILLS AND NOTES.

## CONSIDERATION.

**Extensions, and Reduction in Interest.** Surrender of old notes,

**BILLS AND NOTES Continued                      TO                      BOUNDARIES**

1 reduction of interest, an extension of time of payment, howsoever short, and even forbearance to make a claim, furnish adequate consideration for a new note by a wife for notes owed by her deceased husband. *Mohn v. Mohn*, 181—119.

**Failure.** The payee of a note may not recover thereon when the  
2 consideration is the unfulfilled promise of payee to pay a debt owed by the maker to a third party. *Steckel & Son v. Smith*, 181—361.

**Want of Consideration.** A renewal note, even though extend-  
3 ing the time of payment, is without consideration if the original note was without consideration. It follows that a defense that was pleadable to the original note is pleadable against the renewal. *City Nat. Bank v. Mason*, 181—824.

**HOLDERS IN DUE COURSE.**

**Defective Indorsement.** The plea of holdership in due course is  
4 materially discredited when allowed to rest on an indorsement which is open to the reasonable possibility of having been made without authority. So held where the original payee was a corporation, and the indorsement was in the corporation name, "per L. A. Miller," there being no showing as to the official position, if any, occupied by "Miller," or his authority. *City Nat. Bank v. Mason*, 181—824.

**BONDS.** See LANDLORD AND TENANT, 8.

**Common-Law Bonds.** Bonds when neither provided for nor prohibited nor condemned by public policy may nevertheless be valid and enforceable as common-law obligations. *Quinn v. Mumm*, 181—1216.

**BOUNDARIES.**

**Controlling Force of Government Monuments.** Government monuments take precedence over meager and uncertain testimony bearing on acquiescence in a different boundary line. *Longshore v. Copeland*, 181—957.

BREACH OF MARRIAGE CONTRACT TO BROKERS

**BREACH OF MARRIAGE CONTRACT.** See MARRIAGE.

**BROKERS.**

**EMPLOYMENT.**

**Bad-Faith Revocation.** A principal may not, after he knows that  
 1 the broker's proposed purchaser is on the ground, revoke the  
 broker's employment, and then avail himself of the pur-  
 chaser produced, and escape payment of the agreed com-  
 mission. *Miller v. Bohanan*, 181—1207.

**COMPENSATION.**

**Dual Agency—Who Entitled to Commission.** On the issue as to  
 2 which of two brokers is entitled to a commission, he must  
 fail who secured his broker's contract with the principal  
 by falsely pretending to the principal that the purchaser  
 produced had been secured by him, when in truth such  
 purchaser had been secured by the other agent. *Swaney  
 Land Co. v. Bradford*, 181—1244.

**Improper Payment to Another.** One who has agreed to pay his  
 3 broker a commission may not avoid paying the same by  
 settling with another who was merely assisting the broker,  
 but was not his partner. *Home Securities Co. v. Todd*, 181  
 —931.

**Attempt by Broker to Prevent Sale.** A broker who is content  
 4 to show the reasonable value of services in *fully* effecting a  
 sale may not recover when the record reveals the fact that  
 the broker carried his services to the point of bringing the  
 seller and purchaser together, that thereupon dispute arose  
 between the seller and the broker as to the commission to  
 be paid in case of a sale, and that the broker then made no  
 further effort to effect the sale, but actively attempted to  
 prevent it. *Johnson v. Doubravsky*, 181—77.

**Procuring Cause of Sale.** The conclusion of a witness that he  
 5 did not purchase certain property by reason of anything  
 said or done by a broker is not controlling on the ques-  
 tion of the efficient cause of the sale if the facts and cir-  
 cumstances relating to what the broker did say and did do

BROKERS Continued TO CARRIERS

fairly justify a different conclusion. *Johnson v. Doubravsky*, 181—77.

**Performance of Contract.** To be "able" to make a purchase 6 means that one must actually have the cash necessary to make the cash payment, and not merely the property on which he could raise it. *Reynor v. Mackrill*, 181—210.

**Performance of Contract.** Recovery of commissions may not be 7 defeated on the plea that the owner was not specifically notified that the agent had secured a customer, when what was done substantially amounted to the giving of such notice. *Reynor v. Mackrill*, 181—210.

**Bad-Faith Refusal to Make Sale.** Manifestly, a broker may not 8 be defeated in his action for commissions by the fact that the owner, in order to defeat such commission, refused to make a sale to the broker's customer, but later did so on the unfounded claim that the agent was not instrumental therein. *Reynor v. Mackrill*, 181—210.

**When Earned.** Evidence reviewed, and held to show that the 9 broker had earned his commission under the terms of the contract. *Home Securities Co. v. Todd*, 181—931.

## CANCELLATION OF INSTRUMENTS.

**Incumbrances by Optionee.** A written recorded option to purchase real estate may not be canceled by reason of acts of dominion over the property by the optionee which in no wise lessen the estate of the optionor. So held where the optionee in possession mortgaged the property to one fully cognizant of the state of the title. *Ferguson v. Ferguson*, 181—1076.

**CARRIERS.** See RAILROADS; VENUE, 3.

## CARRIAGE OF GOODS.

**ratification of Unauthorized Diversion of Shipment.** An unau-

## CARRIERS Continued

1 thorized diversion of a shipment from its proper point of destination is irrevocably ratified by the act of the shipper (a) in making claim to the *delivering* carrier for loss and damage, *less the freight*, and (b) in instituting an action against the initial, connecting and *delivering* carriers for such loss and damage. *Adams Seed Co. v. Chicago G. W. R. Co.*, 181—1052.

**Goods Awaiting Delivery.** Principle recognized that the liability  
2 of a common carrier, *as such*, terminates when the goods have reached their destination and are ready for delivery to the consignee. *Adams Seed Co. v. Chicago G. W. R. Co.*, 181—1052.

**Liability of Connecting Carrier.** A *connecting* carrier is, under  
3 the Carmack Amendment to the Interstate Commerce Act, only liable for its *own* wrong. *Adams Seed Co. v. Chicago G. W. R. Co.*, 181—1052.

**Initial Carrier's Liability.** An initial carrier is not liable, un-  
4 der the Carmack Amendment to the Interstate Commerce Act, for any default of the delivering carrier occurring after it has ceased to be a *carrier*, and while it is acting as a *warehouseman*. *Adams Seed Co. v. Chicago G. W. R. Co.*, 181—1052.

## CARRIAGE OF LIVE STOCK.

**Furnishing Cars on Specified Days Only.** A state court has juris-  
5 diction to entertain an action for damages by reason of delayed transportation in an interstate shipment, even though the carrier pleads that the delay was occasioned by the fact that it had established a rule—though it had not filed the same with the Interstate Commerce Commission—under which it furnished cars for interstate shipments of the kind in question *only on certain specified days of each week*, and that the plaintiff shipper demanded cars on days not provided by said rule. In other words, the state courts have jurisdiction to pass on the unadjudicated reasonableness of such a rule. *Baird Bros. v. Minneapolis & St. L. R. Co.*, 181—1104.

## CARRIERS Continued TO CHATTEL MORTGAGES

**Pleading and Variance.** A shipper who bases his right to recover solely on a written contract may not recover on evidence of an oral or implied contract. *Quillen v. Minneapolis & St. L. R. Co.*, 181—536.

**CERTIORARI.** See COSTS.**ORDERS REVIEWABLE.**

**Change of Venue.** Certiorari will lie to review an order of the municipal court denying a change of venue in an action involving \$30. *Atchison, T. & S. F. R. Co. v. Mershon*, 181—892.

**Refusal to Determine Highway Petition.** Certiorari will lie to review the act of a board of supervisors in *refusing* to pass upon a petition for the vacation and relocation of a highway, even though it be conceded that petitioners might, by petition, have instituted entirely new proceedings for the vacation and relocation. *Riggs v. Board*, 181—178.

**SCOPE OF REVIEW.**

**Discharge of Policeman.** On certiorari to review the action of the Civil Service Commission and other city officers in discharging an employee, the *sufficiency* of the evidence on which the discharge was based will *not* be reviewed. The review will go no further than to determine whether the discharging board and officers exceeded their jurisdiction, or otherwise acted illegally. *Riley v. Crawford*, 181—1219.

**CHANGE OF VENUE.** See CERTIORARI, 1; VENUE.**CHATTEL MORTGAGES.**

**Mortgage by Nonresident on Exempt Property Without Joinder by Wife.** A chattel mortgage, executed in a foreign state by a nonresident of this state, without his wife's joining therein, and upon property which would have been exempt from general execution had the mortgagor been a resident of

CHATTEL MORTGAGES Continued TO CONTRACTS

this state, instantly attaches and *continues* as a valid lien on such property, even though, shortly prior to its execution, the mortgagor had been a resident of this state, and, shortly subsequent to its execution, returned and became such resident in compliance with the agreement attending the execution of said mortgage. (See Section 2906, Code, 1897.) *Dickson v. Cooper*, 181—337.

**CIVIL SERVICE COMMISSION.** See CERTIORARI, 3.

**CONCEALED WEAPONS.** See WEAPONS.

**CONSPIRACY.**

**Declarations.** A prima-facie showing of conspiracy is a condition precedent to the admissibility of declarations of one alleged conspirator against the other. *State v. Meyer*, 181—440.

**CONSTITUTIONAL LAW.**

**Legislative Grant of Franchise in Streets.** Principle recognized that a legislative grant of a franchise in public streets may not be added to by the imposition by the municipality of additional burdens. *City of Des Moines v. Iowa Tel. Co.*, 181—1282.

**CONTRACTS.** See SALES.

REQUISITES AND VALIDITY.

**Implied Contract Supplanting Express One.** An express agreement for a specified wage for a specified service, excludes an implied agreement for a different wage for the same service. *Carlin v. Day*, 181—903.

**Drunkenness.** Drunkenness, in order to avoid a contract with reference to nonnecessaries, must be such as to render the party incapable of understanding the nature and effect

## CONTRACTS Continued

of the agreement or its consequences. *Snittjer v. Paterni*, 181—961.

## CONSIDERATION.

**Spendthrift Trusts.** A recital in the provisions of a spendthrift  
3 trust that the *cestui que trust* accepts the provisions thereof in lieu of a devise to him in a will, clearly reveals that the *cestui que trust* himself furnished an adequate consideration for the said trust. *De Rousse v. Williams*, 181—379.

**Materiality of Recitals.** The recital of a clear, definite and  
4 specified consideration for a contract is very influential on the question of consideration. *De Rousse v. Williams*, 181—379.

## LEGALITY OF OBJECT AND CONSIDERATION.

**Unlawful Practice of Profession.** *Recovery may not be had for*  
5 *services which constitute a crime.* More concretely, when the practice of a vocation or profession is punishable by fine or imprisonment unless certain specified statutory conditions are first complied with, one who assumes to practice, without strictly complying with all such conditions, may not recover for his services, even though he possesses high qualifications and acts in perfect good faith. *Rader v. Elliott*, 181—156.

**Partial Illegality.** He who performs services in such a manner  
6 as to go beyond that which is legal, and to embrace that which is criminal, may not expect the court to sever the criminal acts from the non-criminal acts and grant him a recovery. The poison of criminality inseparably permeates the whole. *Rader v. Elliott*, 181—156.

**Highway Superintendent Performing Inconsistent Rights and Du-**  
7 **ties.** A contract by which one is employed by the township trustees (a) to act as superintendent of roads, and (b) to furnish his own personal labor and teams in the actual doing of the road work, is not, in view of our general highway



**CONTRACTS Continued**

statute (Ch. 1-A, Tit. VIII, Code Supp., 1913), contrary to public policy. *Liggett v. Shriver*, 181—260.

**CONSTRUCTION AND OPERATION.**

**Construction Leading to Impossibility of Performance.** The practical impossibility of complying with a contract, provided an asserted construction of an *ambiguous* clause is adopted, furnishes persuasive reason for rejecting such construction. *Birdsall v. Perry Gas Works*, 181—1268.

**Implying Impracticable Conditions.** A persuasive argument for rejecting a construction contended for is that it would render the other party to the contract practically remediless. *Welbel v. Boston P. & M. Co.*, 181—199.

**Evidence to Aid Construction of Ambiguous Contract.** Extraneous evidence is admissible to show the sense in which one party to an ambiguous contract understood its terms, and that the other party had knowledge of such understanding. *County v. Katz-Craig Cont. Co.*, 181—1313.

**Practical Construction by Parties.** The practical construction placed upon a contract by the parties may quite persuasively point the way to the court to reject a contrary and subsequently asserted construction. So held on an issue as to the proper construction of that part of a lease providing for renewal. *Iowa Imp. Co. v. Aetna Explosives Co.*, 181—1186; *McCullough Realty Co. v. Laemmle Film Serv.*, 181—594.

**Construction Against Party Using Words.** The rule that construction of an ambiguous contract will be most strongly against the party using the words, is, by its very terms, not applicable to clear and definite terms. So held as to a policy of insurance against loss by burglary. *Blank v. National Surety Co.*, 181—648.

**Sale Depending on Opinion of Attorney.** The actual rendition by an attorney of an *honest* but *erroneous* opinion that a bond issue is illegal, furnished complete protection to a prospective purchaser in his refusal to buy, under his contract to

## CONTRACTS Continued

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## CONTRACTS Continued

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## CONTRACTS Continued

purchase, provided the bonds be legal "*to the satisfaction of our counsel.*" United States Trust Co. v. Guthrie Center, 181—992.

**Non-Severable Consideration.** An indivisible consideration—one  
14 incapable of being apportioned among different things contracted for—stamps the contract as indivisible. So held where the contract was for the purchase of *two* sets of bonds of materially different amounts, with a deposit of earnest money in a lump sum of \$1,000. United States Trust Co. v. Guthrie Center, 181—992.

## RESCISSION.

**Failure to Tender Consideration Received.** Rescission of a con-  
15 tract on the ground of mutual *mistake* demands, as a condition precedent, a return or a tender of return of the consideration received. (*Reddington v. Blue*, 168 Iowa 34, distinguished.) Seymour v. Chicago & N. W. R. Co., 181—218.

## PERFORMANCE OR BREACH.

**Breach—Estoppel to Plead.** One may not, expressly or impliedly,  
16 consent that a contractor, in the construction of a building, might use certain material which the contractor claimed was in compliance with the contract, and thereafter maintain a plea of breach of the contract by reason of the use of said material. Birdsall v. Perry Gas Works, 181—1268.

**Failure to Perform by Stipulated Time.** One who agrees to per-  
17 form by a stipulated time, "*subject to causes beyond his control,*" may justify a failure to so perform by a showing that, with due diligence on his part, a dealer who had a monopoly of a necessary article was the cause of the delay, along with the delay of other independent contractors. Birdsall v. Perry Gas Works, 181—1268.

**Architect's Certificate of Performance.** An owner who, in an  
18 action by a subcontractor to foreclose a mechanics' lien, fully adjudicates, with the principal contractor, his liability to such principal contractor, *without asserting the defense that*

## CONTRACTS Continued

TO

## CORPORATIONS

*the architect had never certified to the performance of the contract as therein provided as a condition to payment, thereby precludes himself from asserting such lack of certification in abatement of the subcontractor's action, it appearing that said owner was owing the non-appealing principal contractor more than the amount due the subcontractor.* Birdsall v. Perry Gas Works, 181—1268.

## ACTION FOR BREACH.

**Non-Contracted Items.** One may not recover for items or things  
19 which he neither furnished nor contracted to furnish. So held where a receiver was permitted to recover for electric power furnished, but denied a recovery for a non-contracted fixed charge for keeping the plant in readiness for additional power. Maxwell v. Missouri Valley I. & C. S. Co. 181—108.

**Express Contract Excludes Quantum Meruit.** *Quantum meruit*  
20 and evidence thereunder have no place in an action wherein the record shows beyond question that the parties had expressly agreed on the amount of compensation. Cammack & Son v. Welmer, 181—1. See Swaney L. Co. v. Bradford, 181—1244; Quillen v. Minneapolis & St. L. R. Co., 181—536.

## CORPORATIONS.

## CAPITAL STOCK, ETC.

**Issuance in Payment for Money Advancements.** A corporation  
1 may validly issue its stock in payment of bona fide advancements of money to the corporation. Wing v. Credit Guide Co., 181—370.

## MEMBERS AND STOCKHOLDERS.

**Voting by Proxy.** Voting by *proxy* is apparently (?) authorized  
2 by articles of incorporation which provide for dissolution upon a vote "of stockholders *representing* a three-fourths majority of all stock then issued." Rossing v. State Bank, 181—1013.

## CORPORATIONS Continued

**Usage as Justifying Voting by Proxy.** Usage may justify the  
3 voting of corporate stock by proxy. *Rossing v. State Bank*,  
181—1013.

**Necessity for Prompt Objection to Proxies.** Voting stock by  
4 proxy, though not formally provided for, is valid unless  
prompt objection is made when the votes are offered. *Rossing v. State Bank*, 181—1013.

**Sale of Assets.** Majority stockholders have the absolute right to  
5 sell the assets of a duly dissolved corporation to another  
corporation controlled by them, *provided the sale is fair*.  
*Rossing v. State Bank*, 181—1013.

**Right to Assets of Undissolved Corporation.** Individual stock-  
6 holders may not have the court apportion to them a share  
of the assets of an undissolved corporation. *Rossing v.*  
*State Bank*, 181—1013.

## CORPORATE POWERS.

**Debts in Excess of Authorization.** Corporate debts in excess of  
7 corporate authorization are not void because of such excess.  
*Junkin v. Plain Dealer Pub. Co.*, 181—1203.

## DISSOLUTION.

**Majority Ordering Dissolution.** Majority stockholders who val-  
8 idly order a dissolution of the corporation, buy its assets  
at a fair price, and convey them to their own newly organ-  
ized corporation, violate no trust relations with the minor-  
ity stockholders. *Rossing v. State Bank*, 181—1013.

**Reasonableness.** Not whether a voluntary dissolution of a cor-  
9 poration by the majority stockholders was reasonable, but  
whether it was in accordance with law and the articles of  
incorporation. *Rossing v. State Bank*, 181—1013.

**Fraud in Subsequent Sale of Assets.** A voluntary dissolution of  
10 a corporation by the majority stockholders, in accordance  
with the articles of incorporation and statute law govern-

## CORPORATIONS Continued

ing, is in no manner affected by subsequent fraud in the sale of the assets. *Rossing v. State Bank*, 181—1013.

**Non-Necessity for Public Sale.** A *private* sale of the assets of a  
11 dissolved corporation is unimpeachable if just as much was realized as would have been realized had the sale been public. *Rossing v. State Bank*, 181—1013.

**“Good Will” as Element of Value.** “Good will,”—that element  
12 of value which attends the business of a *going* concern, and which consists of the probability that old customers will continue to be customers,—becomes legally nonexistent instantly upon the *closing out of the business*. So held where, on the *dissolution* of an incorporated bank, the majority stockholders, who purchased the tangible assets at a fair price, were held non-chargeable for alleged “good-will” value, even though said assets were by them transferred to a new banking corporation organized and controlled by them. *Rossing v. State Bank*, 181—1013.

**Rights of Minority Stockholders.** The plea that a stockholder  
13 voted for the dissolution of the corporation and the sale of its assets on the mere “understanding” or “expectation” on his part that he would get the same interest in a new corporation which was to be organized, as he held in the dissolved corporation, is wholly insufficient on which to decree a trust in his favor against the property of the new corporation, especially when the court does not have jurisdiction of *all* stockholders in the new corporation. *Rossing v. State Bank*, 181—1013.

**Rights of Minority Stockholders.** Whatever illegality may be  
14 lodged against the acts of majority stockholders in dissolving a corporation and selling its assets to a corporation newly organized by said majority stockholders, the court has no power to give to minority stockholders in the defunct corporation an interest in the new corporation when the new corporation has stockholders who were not stockholders in the dissolved corporation and *who are not parties to the action*. *Rossing v. State Bank*, 181—1013.

**Finality.** The court may not resurrect and give life to a cor-  
15 poration which has been voluntarily and validly dissolved by

CORPORATIONS Continued TO Courts  
 majority stockholders, or which has had its life terminated *ipso facto* by the expiration of its corporate existence. *Rossing v. State Bank*, 181—1013.

## COSTS.

**Losing Party.** He who leads a court or other public official body into illegal action must, on certiorari to correct the illegality, pay the costs necessitated by the writ. *Riggs v. Board*, 181—178.

## COUNTIES.

**Selection of Official Newspapers.** The publisher of a newspaper  
 1 who, in good faith and for a valuable consideration, purchases the subscription list of a defunct newspaper, and, as a part of the contract of purchase, furnishes his own newspaper to such subscribers in fulfillment of their subscriptions, with the express or implied consent of such subscribers, thereby constitutes such purchased list of subscribers bona fide subscribers to his own newspaper. In re Official Newspaper, 181—255.

**Tie Vote on Highway Petition.** A tie vote by a board of super-  
 2 visors on the question of granting or rejecting a petition for the vacation and relocation of a highway (jurisdiction being then complete), determines nothing, but leaves the question still pending, with unabated jurisdiction and *legal duty* to the parties interested to determine the same, and necessitates a statutory continuance for further consideration. It follows that a dismissal of the entire proceeding *because of such vote*, and a consequent refusal to *determine the question*, are illegal, and open the door to certiorari. (Section 413, Code, 1897.) *Riggs v. Board*, 181—178.

## COURTS.

**Jurisdiction Over Subject Matter—Voluntary Appearance—Effect.**  
 Principle recognized that jurisdiction of the subject matter  
 of an action may not be conferred by consent. *Estrem v. Town of Slater*, 181—920.



## COVENANTS

TO

CRIMINAL LAW

**COVENANTS.**

**Covenant Running with Land.** A provision in a lease that the act of the lessee in remaining in possession of the leased premises for a period of three days after the expiration of the lease shall work a renewal of the lease for another year is not a covenant "running with the land." *Iowa Imp. Co. v. Aetna Explosives Co.*, 181—1186.

**CREDITOR'S SUIT.**

**Property Subject—Consideration Paid.** A creditor, in subjecting  
 1 the property of his debtor to the satisfaction of his claim,  
 is by no means limited to the amount which the debtor paid  
 for the property. *De Rousse v. Williams*, 181—379.

**When Creditor May Resort to Equity.** A creditor is not com-  
 2 pelled, in order to satisfy his claim, to proceed *at law*  
 against property held by the debtor under uncertain title,  
 when the debtor has unquestioned title to property which  
 may be reached *in equity*. So held as to a spendthrift trust.  
*De Rousse v. Williams*, 181—379.

**How Insolvency Shown.** Proceedings in equity by a creditor to  
 3 satisfy his judgment are allowable without the return of an  
 execution *nulla bona* when it otherwise appears that the  
 debtor is insolvent. *De Rousse v. Williams*, 181—379.

**Property Forfeited to Debtor.** Principle recognized that a debtor  
 4 is under no legal obligation to accept property under a for-  
 feiture in his favor, in order that his creditor may be able  
 to satisfy his claim. *De Rousse v. Williams*, 181—379.

**CRIMINAL LAW.****PARTIES TO OFFENSE.**

**Immature Children—Corroboration.** Mere *submission* of a child  
 1 of seven years to a crime against nature gives rise to no  
 presumption of consent on the part of such child to such  
 act; therefore, not being deemed an accomplice from the  
 act of submission, his uncorroborated testimony will sup-  
 port a conviction. *State v. Yates*, 181—539.

## CRIMINAL LAW Continued

## VENUE.

**Change of Venue—Erroneous Exercise of Discretion.** The trial  
2 court possesses no unbridled discretion to refuse a change  
of venue. *State v. Meyer*, 181—440.

**Belated Testimony as to Venue.** Testimony as to venue may be  
3 permitted even after part of the arguments have been made.  
*State v. Brooks*, 181—874.

## FORMER JEOPARDY.

**Bad-Faith Prosecution.** A collusive judgment of conviction, ob-  
4 tained by the accused himself in order to prevent a prosecu-  
tion on the merits by the State, is no obstacle to a prosecu-  
tion. *State v. Bartlett*, 181—436.

## PRELIMINARY INFORMATION.

**“Holding to Answer.”** A sufficient “holding to answer” is  
5 shown by the entry by a committing magistrate of the fol-  
lowing order, to wit: “I have ordered that he (accused) be  
held to answer the same.” (See Section 5230, Code, 1897.)  
*State v. Powers*, 181—452.

## EVIDENCE.

**Unproved Allegations not Excepted to.** An accused cannot waive  
6 his legal right to a fair trial. No trial can be said to be  
fair or be allowed to stand which results in a conviction  
*with any essential element of the offense unproved*, even  
though the accused, in the trial below, entered no excep-  
tions of any kind. So held where, on a charge of carrying  
concealed weapons, the State proved all elements except  
the element of “non-permit” to carry. (Sec. 5462, Code,  
1897.) *State v. Burns*, 181—1098.

**Self-Incrimination—Coroner’s Inquest.** Testimony obtained be-  
7 fore a coroner’s jury from one suspected of a criminal hom-  
icide, but unrepresented by counsel and not informed of

## CRIMINAL LAW Continued

his right of non-self-incrimination, is not voluntary, and therefore not admissible on the trial of such person for said homicide. *State v. Meyer*, 181—440.

**Incompetent Evidence—Promise to Show Competency.** Testimony incompetent in itself may properly be received under a promise to subsequently show its competency, especially when the jury is specifically and repeatedly told that the testimony in question is of no weight unless the defendant is shown to be responsible therefor. *State v. Burley*, 181—981.

## INSTRUCTIONS.

**Included Offense.** Formula for submitting or refusing to submit included offenses (assuming that the included offense is necessarily or expressly charged in the indictment):

(1) Submit if, in view of the evidence, the jury *might*, in the exercise of their right to believe or disbelieve, find the accused guilty of the included offense.

(2) Refuse to submit if, in view of the evidence, it would be the duty of the court to direct an acquittal were the accused charged with nothing more than the included offense. *State v. Brooks*, 181—874.

**Requests and Refusal.** Refusal of a requested instruction as to the matters which might be taken into consideration in determining whether an accused was guilty of a named offense is harmless, when, as to such offense, the jury rendered a verdict of "not guilty." *State v. Brooks*, 181—874.

**Conflicting Instructions.** Instructions reviewed, and held not contradictory. *State v. Brooks*, 181—874.

## NEW TRIAL.

**Competency of Affidavits.** Affidavits are competent to show that jurors were improperly influenced by prejudicial evidence which was wholly aside the record. *State v. Salmer*, 181—280.

## CRIMINAL LAW Continued

TO

## DAMAGES

**Matters Not in Evidence.** The act of jurors in stating and reiterating to their fellow jurors, during their deliberations, as of their own personal knowledge, influential facts which are derogatory to the accused, which are wholly aside the record, and which bear strongly on a material and sharply contested issue, demands the granting of a new trial. *State v. Salmer*, 181—280.

## APPEAL AND ERROR.

**Preparation of Briefs.** Manifest guilt, in criminal causes, is ample reason for demanding a strict compliance with the rules governing the preparation of briefs and arguments. *State v. Burley*, 181—981.

**Contradictory Assignments of Error.** One who asserts that a certain question was one of *law* and not of *fact* may not predicate error on the failure of the court to submit it as a question of fact, even though his brief point so asserts. *State v. Burley*, 181—981.

**Failure to Argue Assignments.** Errors specified and points made in rule manner may not be considered as abandoned because the same are not elaborated by argument *in extenso*. *State v. Burley*, 181—981.

**Waiver of Motion to Strike.** One who consents that the court may reserve a ruling may not predicate error on the failure to subsequently rule, without a request therefor and proper entry of exceptions, in case of a refusal. *State v. Burley*, 181—981.

**DAMAGES.** See LIBEL AND SLANDER, 6; SALES 6.

**Exemplary Damages.** Exemplary damages are recoverable in an action for breach of promise to marry, in connection with seduction, on a showing that defendant's conduct was wanton and in wilful disregard of the rights of plaintiff. A showing of hatred or ill will towards plaintiff is not necessary. *Morgan v. Muench*, 181—719.

## DAMAGES Continued

TO

## DEEDS

**Liquidated Damages and Penalty.** A clause in a non-fraudulent  
 2 contract providing that all payments made shall be forfeited in event of failure to comply with the contract, will not be treated as providing for *liquidated* damages, in the absence of some fair showing that the parties contemplated, or that the non-defaulting party actually suffered, damages in an amount *approximately the same as the payments made*. *Brown v. Verzani*, 181—237.

**DEATH.**

**Damages and Interest Thereon.** Interest is allowable on unliquidated claims whenever it appears that the damages were  
 1 complete at a particular time. So held in case of damages for injury resulting in death. *Bridenstine v. Iowa City Elec. R. Co.*, 181—1124.

**Death of Woman—Elements of Damage.** Expert evidence of the  
 2 money value of a woman as a wife or mother or both, is not only not necessary, but is of trifling value when introduced. The more proper basis for the assessment of such damages is to show, *inter alia*, her capacity, ability and efficiency in the discharge of her duties as wife and mother, along with her age, life expectancy and health. *Bridenstine v. Iowa City Elec. R. Co.*, 181—1124.

**DEEDS.** See TAXATION, 3, 4.

**VALIDITY.**

**Mental Infirmity—Unbelievable Traits of Character.** The fact  
 1 that the grantor in a deed had been shockingly cruel to his wife, was a hermit, starved himself from choice, and not from necessity, possessed unspeakably filthy personal habits, and entertained beliefs unbelievable to an ordinary mind, does not necessarily show that he was incapable of understanding in a reasonable degree the nature and consequences of his business transactions. *Flynn v. Moore*, 181—1163.

**Fraud—Failure to Read.** One who knows that the instrument

**DEEDS Continued**

- 2 he is signing is a deed may not predicate fraud or invalidity on the plea that he signed the instrument without reading it. *Cochran v. Main*, 181—906.

**Burden of Proof.** A grantee in a deed, executed wholly without  
3 grantee's instigation, though largely in the nature of a gift to grantee, does not have the burden, no fiduciary relation appearing, to show that the deed was free from fraud and undue influence. *Flynn v. Moore*, 181—1163.

**Fraud and Undue Influence—Breach of Condition.** Evidence re-  
4 viewed, and held wholly insufficient to set aside the execution of a deed for fraud, undue influence, or breach of conditions. *Heminger v. Carney*, 181—42.

**Consideration—Support for Aged Grantor.** The recognition of  
5 past kindnesses and an agreement by grantee to care for the grantor for the remainder of his life may furnish adequate consideration for a deed to property of large value, though the financial consideration be wholly inadequate. *Flynn v. Moore*, 181—1163.

**Consideration—Failure of Consideration.** An obligation on the  
6 part of a grantee in a deed to care for the aged grantor is fully met by furnishing such care and comforts to the grantor as he, in view of his abnormal and desired way of living, is willing to receive. *Flynn v. Moore*, 181—1163.

**CONSTRUCTION AND OPERATION.**

**Rule in Shelley's Case—Life Estate Enlarged to Fee.** A deed to  
7 grantee "and to her heirs \* \* \* to have and hold the same during her natural life, and at her death to descend to her heirs, the intention being to convey to the said (grantee) a life estate \* \* \* with reversion in her heirs at her death," conveys not a life estate but a fee, under the Rule in Shelley's Case. (See Sec. 2924-a, Code Supp., 1913.) *Alt v. Young*, 181—1260.

**Rights Between Grantees of Common Grantor.** A grantee of land  
8 who claims a contingent easement in adjoining land because of a reservation for his benefit in a deed of a com-

## DEEDS Continued

## TO

## DIVORCE

mon grantor, loses the right to such easement by allowing such adjoining owner to remain in undisturbed possession for more than ten years under an *unqualified* warranty deed. *Collins v. Reimers*, 181—1143.

**DESCENT AND DISTRIBUTION.****SURVIVING SPOUSE.**

**Life Insurance.** The surviving wife of an intestate, issueless  
1 husband, is not estopped to claim the *entire* proceeds of the life insurance left by her husband, by the fact that as administratrix she repeatedly treated said proceeds as a part of the estate, when other distributees have not in any wise changed their position, and the wife has not secured any advantage thereby. In re Estate of Ensign, 181—1081.

**Life Insurance.** Proceeds of life insurance, payable to the es-  
2 tate of an intestate, issueless deceased, belong wholly to the surviving wife, in the absence of an agreement or assignment thereof to the contrary. (Sections 1805, 3313, Code, 1897; Section 3379, Code Supplement, 1913.) In re Estate of Ensign, 181—1081.

**DIVORCE.****GROUND.**

**Profane and Abusive Language.** Profane and abusive language  
1 addressed to complainant by the defendant in a divorce action, is material, though *in and of itself* insufficient on which to base a decree. *Chapman v. Chapman*, 181—801.

**Abusive Language.** Evidence relating to charges of want of  
2 chastity, physical encounters between husband and wife, and much in the way of mutually coarse, profane, and abusive language between them—both of apparently equal coarseness of nature—reviewed, and held insufficient to justify a decree of divorce. *Chapman v. Chapman*, 181—801.

**Prior Unsuccessful Action.** A second action for divorce by the  
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## DIVORCE Continued

TO

DRAINS

- 3 same party for the same cause, following the dismissal, on the merits, of a former action, must be determined on the evidence of acts occurring subsequent to the decree of dismissal. *Chapman v. Chapman*, 181—801.

## PLEADING.

**Failure of Proof.** An allegation "that plaintiff has conducted herself at all times since her marriage as a dutiful and faithful wife," followed by an affirmative showing that such allegation is untrue, reveals a *fatal* failure of proof on a material allegation. *Chapman v. Chapman*, 181—801.

## EVIDENCE.

**Corroboration—Rule to Determine.** No exact standard exists for the measurement of required corroboration in divorce proceedings. But it must be sufficient in quantity and nature to lead an impartial and reasonable mind to believe that the applicant's *material* testimony is true. Slight corroboration on a vitally material point may be sufficient. Large corroboration on a comparatively immaterial point may be wholly insufficient. Corroboration on *one* alleged transaction or fact does not necessarily work corroboration of *all* other alleged transactions or facts. *Chapman v. Chapman*, 181—801.

## ALIMONY.

**Satisfaction—Spendthrift Trusts.** A final decree awarding alimony, while constituting a judgment, may not be satisfied out of the property of a spendthrift trust of which the defendant in execution is the *cestui que trust*, when such trust property has not been acquired by reason of any consideration furnished by said *cestui que trust*. *De Rousse v. Williams*, 181—379.

## DRAINS.

## ESTABLISHMENT.

**Preliminary Survey.** The preliminary survey of a drainage project, having for its object the straightening of a natural



**DRAINS Continued**

watercourse, is not insufficient because it does not specify in detail the manner in which the waters of lateral streams will be taken care of. Such details properly belong in the permanent survey. *Hall v. Polk*, 181—828.

**Engineer's Report.** Preliminary reports by the engineer, even though lacking in *some* information which might be of value, may be sufficient to give the establishing board jurisdiction. So held when the report *did* show (a) the boundaries of the proposed district, (b) the location, starting point, route, and terminus of each of the proposed drains, (c) the overflowed lands, and (d) elevations and depressions. *Schafroth v. Buena Vista County*, 181—1228.

**Lands Already Fully Drained.** Lands *already completely tiled* are justifiably included within a drainage district if *some* special benefit will result to the lands by reason of the drainage district's furnishing a more adequate outlet for said tile. *Schafroth v. Buena Vista County*, 181—1228.

**Direct and Immediate Benefits.** In determining the question of benefits, preliminary to the establishment of a drainage improvement, the test is not whether market values will be *immediately* affected, but whether, within a *reasonable time*, the proposed improvement will adequately increase the actual values of the lands within the proposed district. *Hall v. Polk*, 181—828.

**Failure to File Claim for Damages.** One who files a claim for damages by reason of lands taken for the construction of a drainage improvement, and who is not entitled to the damages allowed because not owning the land, may not defeat the actual owner's claim to the damages on the ground that such actual owner had filed no claim for such damages, when the drainage district did not see fit to raise such question. *Haswell v. Thompson*, 181—248.

**Who May Claim Damages.** Principle recognized that only the legal or equitable owners of lands taken for the construction of a drainage improvement may claim damages therefor. *Haswell v. Thompson*, 181—248.

**Appeal—Inadequate and Speculative Scheme.** An order establishing a public drainage improvement will be set aside

## DRAINS Continued

## TO

## EASEMENTS

when it fairly appears that the scheme is inadequate and would be experimental, with the probabilities strongly in favor of inefficiency. So held where the ditch proposed was purposely made smaller than necessary, in order to save costs, it being contemplated that nature would in time enlarge it to a size sufficient to properly care for all waters; but whether it would so enlarge within a reasonable time was left in doubt and speculation, with probability strongly in favor of inefficiency. *Hall v. Polk*, 181—828.

**Appeal—Reviewable Matters.** Findings of *fact* involved in the  
8 establishment of public drainage improvements are appealable: i. e., whether the proposed improvement is adequate, or whether the costs will be out of all reasonable proportion to the benefits. *Hall v. Polk*, 181—828.

**Appeal—Review of Fact Findings.** Courts will overrule the  
9 board of supervisors in its findings on questions of *fact* involved in orders establishing drainage improvements only when the objectors establish a fairly clear case of error. Evidence reviewed, and held insufficient to overthrow the findings of the board: (a) That the expense would not exceed the benefits; (b) that the area of the district was sufficient to justify the expenditure; and (c) that all benefited lands were included. *Hall v. Polk*, 181—828.

## EASEMENTS. See DEEDS, 8.

### CREATION, EXISTENCE, AND TERMINATION.

**Easements by Implication—Lateral Support.** An owner of land  
1 may, *by implied grant*, obtain the same absolute right of lateral support for buildings, etc., as he has *by law* for the soil in its natural state: i. e., a grantor who conveys a *part* of a lot or other integral tract of land, upon which part, at the time, is located a permanent, visible improvement, thereby *impliedly* burdens the *retained* part of the lot or land with an easement, running with the land, for the lateral support of the improvement located on the part of the land sold—an easement the *non-negligent* invasion of which matures a cause of action for damages. *Starrett v. Baudler*, 181—965.

EASEMENTS Continued TO ELECTIONS

**Rights as Against Purchaser of Servient Estates.** Ordinarily, a  
2 conveyance by an owner of *part* of an integral tract of land will not give rise to an implied grant of an easement in the land so conveyed, but such is not the case when the easement contended for is:

1. *Apparent*—such as one may see if he cares to look;
2. *Continuous*—such as may be enjoyed without interference with the servient estate; and
3. *Necessary*—such that there could be no other reasonable mode of enjoying the dominant estate. *Starrett v. Baudler*, 181—965.

**Severance of Ownership of Dominant and Servient Estates.** It is  
3 quite immaterial that the owner of a servient estate took his deed *subsequent* to the deed to the owner of the dominant estate, and that said servient owner, when he took his deed, had no “record” notice of such former deed, when the easement in question would also have been implied had the order of executing the deeds been reversed, and the servient owner been the first grantee. *Starrett v. Baudler*, 181—965.

**Lateral Support.** The right to lateral support for buildings may  
4 *not* be acquired by prescription. *Starrett v. Baudler*, 181—965.

**Contingent Easement under Deed of Common Grantor.** An owner  
5 of land who claims a *contingent* easement or right in adjoining land because of a reservation, for his benefit, in the deed of a common grantor, loses all right to such easement or right by failing to have the same established as a fact prior to the expiration of ten years' open, notorious, continued, and good-faith possession, by the owner of the adjoining land, under an unqualified warranty deed, even though such adjoining owner had knowledge of the claim to such contingent easement or right. *Collins v. Reimers*, 181—1143.

**ELECTIONS.** See SCHOOLS AND SCHOOL DISTRICTS, 3, 4.

QUALIFICATIONS OF VOTERS.

**Voting on School Consolidation.** Voting on a proposal to create

**ELECTIONS Continued**

- 1 a consolidated school district is an "election," within the meaning of the constitutional provision which prescribes the qualifications for electors. (Art. 2, Sec. 1, Constitution.) *Taylor v. Independent School Dist.*, 181—544.

**Construction of Statute—Schools and School Districts.** The statutory creation of an election, with proviso that only "voters" shall vote thereat, without more, manifests a clear intent to treat such election as a constitutional one—a clear intent to adopt the constitutional requirements governing the qualifications of electors. *Taylor v. Independent School Dist.*, 181—544.

**Right of Suffrage—When Nonexistent.** Principle recognized that no one would have the right to vote at an election (a) if it was not a constitutional election, (b) if the legislature had fixed no voting qualifications for voters, and (c) if the legislature had not provided for voting without qualifications. *Taylor v. Independent School Dist.*, 181—544.

**Residence.** The constitutional requirement that a citizen shall have resided in the county in which he proposes to vote, for 60 days preceding the election, is an *absoluté* requirement—just as absolute as the requirement that he shall have reached the age of 21 years. Where a proposed consolidated school district comprised territory within two adjoining counties, *held* that an elector who had resided in the proposed district for more than 60 days, but had moved from one county to the other less than 60 days prior to the election to consolidate, was not qualified. *Taylor v. Independent School Dist.*, 181—544.

**Residence.** One's voting residence is at the place which he treats as his home and to which he intends at all times to return when not employed at other places. Evidence reviewed, and *held* not to show legal residence in the district where the election was held. *Taylor v. Independent School Dist.*, 181—544.

**Residence—Intention—Temporary Inability to Consummate.** A citizen who wholly abandons his residence in one county with no intention to return thereto, and, with his family, moves to another county with the good-faith intention to

## ELECTIONS Continued

## TO

## EQUITY

there take up his home, becomes a resident of such latter county at once, upon his arrival at his intended abiding place, even though, for reasons not under his control, he was *temporarily* unable to fully consummate said latter intention by physically remaining in said latter county. Taylor v. Independent School Dist., 181—544.

## CONDUCT OF ELECTIONS.

**Irregularities.** Principle recognized that irregularities and 7 omissions of clear statutory requirements *by election of- ficials* do not necessarily invalidate an election. State v. Lockwood, 181—1233.

## CONTESTS.

**Oral Testimony as to How Elector Voted.** Principle recognized 8 that, under some circumstances, an elector may voluntarily testify *how* he voted. State v. Lockwood, 181—1233.

**EQUITY.** See CREDITOR'S SUIT, 2; WATERS AND WATER- COURSES.

## JURISDICTION, ETC.

**Mistake—Inexcusable Neglect.** Principle recognized that equity 1 will not grant relief from a mistake due to inexcusable neglect, but principle also recognized that the court will be slow to deny relief when the mistake flows from a negli- gent act which injures no one but the one guilty thereof, and when no intervening equities have attached. Kent v. Bailey, 181—489.

## LACHES AND STALE DEMANDS.

**Effect as Between Original Parties.** No delay in bringing suit, 2 short of the statutory period, will amount to a defense as between the original parties. Carter v. Cohen Bros. I. & M. Co., 181—588.

EQUITY Continued

TO

EVIDENCE

## PLEADING.

**Praying Impossible Relief.** Prayers for *impossible* relief do not,  
3 in equity under a general prayer, ordinarily bar all relief;  
yet it is suggested that a litigant may so pin his faith to  
impossible relief as to bar the granting of the possible.  
Rossing v. State Bank, 181—1013.

## DECREE.

**Court-Made Contract.** Decrees in equity must conform to the  
4 proofs. Equity may not make a new contract for the parties. Tuttle v. King, 181—288.

**Alternative Relief.** The instigator of a fraud-induced contract  
5 of exchange of lands who has industriously so shaped conditions as to render rescission impracticable, may not object to the allowance of alternative relief in the form of damages to the injured party. Bronson v. Lynch, 181—654.

**ESTOPPEL.** See CONTRACTS, 16, 18; GUARDIAN AND WARD.

**Absence of Prejudice.** Absence of prejudice excludes estoppel.  
1 Ludden v. Butters, 181—94.

**Inconsistent Conduct—Belated Objections.** One who has employed an *expert* to supervise certain work, in accordance with definite plans and specifications, is not estopped from objecting to the sufficiency of the results of such supervision by the fact that he was present during the progress of the work and then made no objections. Cammack & Son v. Weimer, 181—1.

**EVIDENCE.**

## JUDICIAL NOTICE.

**Time of Sunset.** It seems that the court will take judicial notice of the time of sunset.

EVIDENCE Continued

1 tice of the time the sun sets, even though, in order to determine said time, the court is compelled to resort to an independent investigation. *Topper v. Maple*, 181—786.

**Laws of Foreign State.** Laws of a foreign state must be duly introduced in evidence before they can be given any recognition: *Clark v. Hadley*, 181—487.

PRESUMPTIONS.

**Mailing Letters.** The mailing of letters, properly inclosed, 3 stamped and addressed, furnishes substantive, but rebuttable, evidence that they were duly received. *De Bolt v. German Am. Ins. Co.*, 181—671.

**Confidential Relations—Undue Influence.** The presumption that 4 one occupying a close and confidential relation with another exercised undue influence in securing from such other a deed to valuable property, constitutes substantive evidence of the fact, and such presumption is very materially strengthened by a showing: (a) That grantor was very sick at the time; (b) that grantor was without business experience; (c) that the consideration was inadequate; and (d) that the circumstances strongly indicated that grantor was imposed on in the transaction. Evidence reviewed, and held insufficient to overcome the presumption. *Hull v. Mitchell*, 181—51.

**Official Acts—County Auditor as Clerk to Supervisors.** Whether 5 a presumption, favorable to public interest, may be indulged that a county auditor, in business correspondence relative to matters then pending before the board of supervisors, was acting at the direction of the board, *quære*. *County v. Katz-Craig Cont. Co.*, 181—1313.

**Conflicting Presumptions.** A war of conflicting presumptions of 6 equal force necessarily presents a jury question. *Mohn v. Mohn*, 181—119.

**Unsupported Deductions.** Quite manifestly, one may not make 7 a prima-facie case by drawing conclusions from facts not shown. *Seymour v. Chicago & N. W. R. Co.*, 181—218.

## EVIDENCE Continued

## RELEVANCY, MATERIALITY, AND COMPETENCY.

**Assertion of Intention.** The statement of a party to the effect  
8 that he is going to do a certain act, followed by the act's  
being done, or what would indicate that the act had been  
done as indicated, is substantive evidence of the doing of  
the act by the person making the declaration. *Seefried v.*  
*Wangler Bros. Co.*, 181—504.

**Increase of Sales—Prior Amount of Business.** On the issue  
9 whether a dealer's business had increased during a certain  
stated time, evidence is admissible as to the amount of  
business transacted during the same period immediately  
preceding the commencement of the time in issue. *Weibel*  
*v. Boston P. & M. Co.*, 181—199.

**Nonconsent to Legal Action.** It is wholly immaterial that one  
10 did or did not consent to that which the law commands.  
So held where objectors to the vacation of a highway sought  
to show that they did not consent to a continuance of the  
proceeding by the board of supervisors following a tie vote.  
(See Section 413, Code, 1897.) *Riggs v. Board*, 181—178.

**Custom as to Propping and Timbering Roof.** Evidence is admissi-  
11 ble to show that the master's failure to prop and timber the  
roof of a mine was contrary to the custom prevailing in the  
mine. *Mitchell v. Phillips Mining Co.*, 181—600.

## BEST AND SECONDARY.

**Absence of Market—Cost of Replacing Under Foreign Market.** In  
12 the absence of a market for a thing at the time and locality  
in question, it is competent to show, in the light of an exist-  
ing market at a foreign point, what it would cost to re-  
place the article in question at the locality in question; but  
such testimony does not necessarily overcome other circum-  
stances tending to show a higher value. *Weaver v. Na-*  
*tional Fire Ins. Co.*, 181—1000.

**Value—Absence of Markets.** One who is required to prove the  
13 "market" value of a thing, when no market, in its usually  
accepted meaning, exists at the time and place in question,  
is not necessarily helpless. He may resort to the best ob-



## EVIDENCE Continued

tainable evidence, even though it be but *circumstances as to value*. *The jury may find it necessary to do some approximating*. Weaver v. National Fire Ins. Co., 181—1000.

**Notice to Produce.** Copies of correspondence passing between 14 litigants are admissible only after due notice to produce the originals. Singmaster v. Robinson, 181—522.

## ADMISSIONS.

**Pleadings Containing Admissions.** A pleading containing material admissions may be offered and received in evidence even though such pleading has been superseded by an amended and substituted pleading. Garrison G. & L. Co. v. Farmers Merc. Co., 181—568.

## HEARSAY.

**Interpreters.** On who interprets, for court and jury, the testimony of a witness who speaks in a foreign tongue, does not give hearsay testimony. State v. Powers, 181—452.

**Repeating Conversation.** Plaintiff, who testifies that he told defendant of the promise which defendant's agent made to him (plaintiff), may later be permitted to testify that said agent did make said promise to him, without prejudicially violating the rule as to hearsay evidence. Lenhart v. Bean, 181—85.

## PAROL AS AFFECTING WRITING.

**Contemporaneous Waiver.** Oral evidence of a waiver of conditions and limitations on a warranty embraced in a written bill of sale and contemporaneous with the execution thereof, is inadmissible. Singmaster v. Robinson, 181—522.

**Circumstances Attending Execution of Wills.** Parol evidence of the circumstances attending the execution of two separate wills is admissible to show that they are in reality but one mutual or reciprocal will. Anderson v. Anderson, 181—578.

**Express Trusts with Partial Execution.** Parol evidence, if clear

## EVIDENCE Continued

- 20 and strong, is competent to ingraft an express trust upon an absolute deed, *provided the trust has been wholly or partially executed*. (Sec. 2918, Code, 1897.) *Ratigan v. Ratigan*, 181—860.

## OPINION EVIDENCE.

**Conclusion as to Payment.** A contractor may competently testify that a subcontractor has not been paid. *Garrison G. & L. Co. v. Farmers Merc. Co.*, 181—568.

**Value—Improper Inclusion of Facts.** An opinion as to the total unitemized value of several items of services is wholly nullified when it appears that some of the items included in the estimate are material but wholly unallowable. *Johnson v. Doubravsky*, 181—77.

**Proper Subject of Expert Testimony.** "Whether or not it is a physical impossibility for a young person to have sexual intercourse and sleep through it all," is a jury question—not a proper subject of expert testimony. *State v. Brooks*, 181—874.

**Insanity—Nature of Facts Detailed.** Justification for the opinion of a non-expert that a testator was of unsound mind is found in a detailing by the witness of facts and circumstances (a) which are in *some* fair degree extraordinary and unusual, and (b) which *tend* to indicate an unsound mind. Unusual circumstances and conduct in the life of a testator reviewed, and held to furnish ample basis for the opinion by a non-expert that testator was of unsound mind. *Ranne v. Hodges*, 181—162.

**Value—Injured Automobile.** An owner of an automobile, with some fair knowledge of its value prior to injury, may testify to its value in a described injured condition. *Monson v. Chicago, R. I. & P. Co.*, 181—1354.

**Form and Accuracy of Hypothetical Question.** Hypothetical questions need not be framed with technical accuracy. It follows that misstatements in the recital of facts do not render erroneous the reception of the opinion, especially

## EVIDENCE Continued TO EXECUTORS AND ADMINISTRATORS

when the question is lengthy and there is no objection specifically pointing out such misstatement. *Ranne v. Hodges*, 181—182.

## WEIGHT AND SUFFICIENCY.

**Conclusiveness on Party Offering—Right to Deny Truthfulness.**

27 A party to an action may not, for his own advantage, say that his *own* testimony is false and the testimony of another is true. *Jacobs v. City of Cedar Rapids*, 181—407.

**Amount of Corn in Crib.** Evidence reviewed, and held sufficient to support a verdict as to the quantity of corn in a crib. *Weaver v. Nat. Fire Ins. Co.*, 181—1000.

**Inconsistency in Proof.** No privilege is extended to a defendant to be inconsistent in his proofs. So held where defendant practically admitted the correctness of an account, claimed he had paid it, yet contended that the account had not been proved. *Jewett Lbr. Co. v. Anderson Coal Co.*, 181—950.

**EXECUTORS AND ADMINISTRATORS.**

## ADMINISTRATION IN GENERAL.

**Omission.** Principle recognized that administration is not necessarily required on *all* estates. *Baldrige v. Evans*, 181—204.

## ALLOWANCE TO SURVIVING WIFE.

**Annulment of Order.** Long delay upon the part of a creditor of an estate in attacking the propriety of an allowance to the widow for her support for the year following the death of her husband, may deprive the court of *any discretion* to set aside such allowance, even though the order of allowance has *some* appearance of having been obtained by undue advantage. *Tetzloff v. May*, 181—1253.

## CLAIMS.

**Belated Presentation.** Claims in probate against *solvent* estates

## EXECUTORS AND ADMINISTRATORS CONT'D. TO

FRAUD

- 3 may be presented, proved, and allowed, as late as the time of hearing on the administrator's final report. So held in the case of a husband's claim for expenses attending the sickness and burial of his wife. *Harter v. Harter*, 181—1181.

## EXECUTORS DE SON TORT.

**Accounting in Foreign State.** One who has intermeddled in the  
4 affairs of a foreign estate and there done what an administrator might have done (there being no debts, and jurisdiction being acquired) may be compelled to account in this state to the heirs, even though the time for instituting administration has not expired, and even though it may be more difficult for the wrongdoer to account in this state than in the foreign state. *Baldrige v. Evans*, 181—204.

**EXEMPTIONS.** See CHATTEL MORTGAGES.**FORCIBLE ENTRY AND DETAINER.** See JUDGMENT, 10.**FRAUD.** See RELEASE.

## ACTS CONSTITUTING FRAUD.

**Opinions and Value.** A positive assertion of value, made by one

- 1 who knows the value, for the purpose of being relied on as  
a fact by one who does not know the value, *may be relied on*, and a recovery of damages had if the assertion be knowingly false, even though the property was open to the free inspection of the one so relying. *Hise v. Thomas*, 181—700.

**Value of Good Will of Business.** Naked assertions of the value

- 2 of the "good will" of a business are matters of opinion, and may not be relied on. *Hise v. Thomas*, 181—700.

**Education, Experience, etc., as Bearing Thereon.** Evidence re-

- 3 viewed, on the issue whether defendant's education, experience, mental strength and business capacity were such as to render her easily susceptible to fraudulent imposition,

**FRAUD Continued**

and held to present a jury question. *Mohn v. Mohn*, 181—119.

**Assertion of Value.** Record reviewed, and held to present a jury  
4 question on the issues: (a) Whether certain assertions of value were made for the purpose of inducing reliance thereon; and (b) whether the purchaser did rely thereon. *Hise v. Thomas*, 181—700.

**Knowledge of Facts.** Principle recognized that one may not  
5 predicate fraud on facts concerning which he had the fullest knowledge prior to parting with his money. So held in a transaction involving the purchase of corporate stock. *Wing v. Credit Guide Co.*, 181—370.

**LIABILITY FOR FRAUD.**

**Knowledge of Falsity—Constructive Knowledge.** Actual knowl-  
6 edge that a representation was false is not deducible, as a matter of law, from the fact that the maker of the representation had *constructive* knowledge only that it was false. *Mohn v. Mohn*, 181—119.

**WAIVER OF FRAUD.**

**Accepting Deed with Knowledge of Fraud.** One who, with full  
7 knowledge that he has been fraudulently induced to execute a contract, accepts a deed in compliance with the contract, thereby ratifies and confirms the original fraud-induced contract and waives all claim for damages by reason of the fraud. *Scott v. Simons*, 181—1037.

**PLEADING.**

**Sufficiency.** An allegation that a certain article or thing is a  
8 "fraud," without any allegation of fact, presents no issue. *Plagmann v. City of Davenport*, 181—1212.

**Avoidance of Release.** One seeking to avoid a release of a claim  
9 for personal injuries on the ground of fraudulent concealment by those representing the one receiving the release,

## FRAUD Continued

TO

## GARNISHMENT

must, as a condition to the introduction of evidence bearing thereon, specifically plead the ultimate facts constituting such fraud. *Seymour v. Chicago & N. W. R. Co.*, 181—218.

## EVIDENCE.

**Admissibility.** Fraud perpetrated by a husband upon his wife  
10 in inducing her to execute a mortgage is not admissible against the mortgagee unless such mortgagee is connected therewith. *Cochran v. Main*, 181—906.

**Fraudulent Representations—Jury Question.** Evidence reviewed,  
11 on the issue whether certain false representations were made, and held to present a jury question. *Mohn v. Mohn*, 181—119.

## FRAUDS, STATUTE OF.

## PERSONAL PROPERTY.

**Part Delivery.** In a contract of sale of personal property, delivery of a *part* of the property takes the contract out of the statute of frauds. *Hess v. Dicks*, 181—342.

**Delivery under Separate Contracts.** Delivery such as will take  
2 one contract out of the statute of frauds cannot possibly have such effect on another separate and distinct contract. *Hess v. Dicks*, 181—342.

## GARNISHMENT. See APPEAL AND ERROR. 7.

**Debt "to Become Due."** Principle recognized that a debt which  
1 is not in existence when the garnishment is made is not a debt "to become due," within the meaning of Section 3935, Code, 1897. *Eller v. National Mot. Vehicle Co.*, 181—679.

**Future Dealings with Defendant.** A garnishee, after garnishment and prior to the determination thereof, may continue, without liability to the plaintiff in execution, to deal with

## GARNISHMENT Continued TO GUARDIAN AND WARD

the execution defendant and carry out contract obligations existing prior to and after the garnishment, so long as such continued dealings do not render him indebted to the defendant in execution, or place the property of the execution defendant in his possession. *Eller v. National Mot. Vehicle Co.*, 181—679.

**GOOD WILL.** See CORPORATIONS, 12; FRAUD, 2.

**GRAND JURY.**

**Deficiency—Failure to Object.** The acts of a grand jury of 7, drawn from a panel of 11 instead of 12 names, are not wholly void, and are unimpeachable *by one duly held to answer*, unless objected to at the time of impaneling. *State v. Powers*, 181—452.

**GUARANTY.**

**Discharge of Guarantor.** A guarantor who pleads that he has been *fully* released by the act of the one holding the guaranty in wrongfully permitting the principal debtor to dissipate other security held for the debt, must show that such dissipation was *to the full amount of the guaranty*. *Central State Bank v. Ford*. 181—319.

**GUARDIAN AND WARD.**

**Failure to Qualify—Estoppel.** One who, on reaching majority, knows that funds belonging to him have, in good faith, been paid to a supposed guardian (appointed on motion of the claimant while a minor), and for more than a year recognizes the rightfulness of the payment to said supposed guardian, collects a part of the funds from such guardian, and in no wise repudiates such payment until he discovers that said supposed guardian has never qualified and is insolvent, is estopped to deny that such guardian is his guardian. Such conduct constitutes such supposed guardian an *agent by ratification*. *Nassen v. Anfenson*, 181—134.

HIGHWAYS

TO

HUSBAND AND WIFE

**HIGHWAYS.** See CERTIORARI, 2; COUNTIES, 2.

**Township Road System—Superintendent of Roads—Legality of Contract.** A township superintendent of roads, under Sec. 1527-s13, Supplemental Supplement, 1915, may be something more than a mere "overseer." He may validly contract with the township trustees to *personally* perform the ordinary road work of the township as provided in said section, such work not constituting an "improvement," within the meaning of Section 1527-s15, Code Supp., 1913, prohibiting such superintendent from being interested in contracts for the "improvement" of roads. *Liggett v. Shriver*, 181—280.

**HOMESTEAD.**

**Joinder of Husband and Wife in Conveyance.** Where both husband and wife joined in the execution of an absolute deed to a homestead, it is immaterial to the validity of such transaction that the wife was not a party to a subsequent arrangement between the grantee and the husband by which, under specified conditions, the husband was to receive a reconveyance. *Cochran v. Main*, 181—906.

**HOMICIDE.**

**Manslaughter—Reckless Conduct—Intoxication.** On the trial  
1 of an indictment for manslaughter by means of reckless conduct, evidence is admissible that, at the time of the conduct in question, defendant was intoxicated. *State v. Salmer*, 181—280.

**Aiding or Abetting.** *Instructions must be applicable to the evi-*  
2 *dence.* Held error to instruct that defendant might be convicted if she "aided or abetted" another in the commission of a homicide when the record revealed the fact that there was no evidence of aiding or abetting. *State v. Meyer*, 181—440.

**HUSBAND AND WIFE.** See CHATTEL MORTGAGES; DEATH, 2; FRAUD, 10.



## HUSBAND AND WIFE Continued

## ACTIONS.

**Death of Wife by Negligence.** Whether the death of a wife by  
 1 reason of a negligent or willful injury to her leaves the  
 husband with a cause of action for loss of consortium,  
*quaere*. *Jacobson v. Fullerton*, 181—1195.

**Loss of Time—Expenses—Right of Recovery.** A woman, wheth-  
 2 er married or single, has the *sole* right to recover for *loss*  
*of time* and *all expenses* proximately resulting from a neg-  
 ligent, non-fatal injury to her, even though, if married, she  
 is engaged in no separate business of her own, and even  
 though, if married, such expenses have been contracted or  
 paid by the husband. (Section 3477-a, Code Supplemental  
 Supplement, 1915.) *Jacobson v. Fullerton*, 181—1195.

**Plaintiffs—Husband and Wife—Injury to Minor.** Principle rec-  
 3 ognized that the mother of a minor may not (the father  
 being alive, with his family, and under no disability) main-  
 4 tain an action for an injury to her minor child, i. e., the  
 seduction of the minor. *Ludden v. Butters*, 181—94.

## ENTICING AND ALIENATING.

**Right of Parent to Advise Child.** No parent may be rendered  
 4 liable for exercising his *natural* right to advise with his  
 child concerning the child's domestic affairs, without proof  
*by the one seeking to recover* that the parent acted ma-  
 liciously. *Moir v. Moir*, 181—1005.

**Declarations of Alienated Spouse.** Declarations of the husband,  
 5 whose affections are alleged to have been alienated, con-  
 cerning his opinion as to what the members of defendant's  
 family other than defendant had said or done, are wholly  
 inadmissible. *Moir v. Moir*, 181—1005.

**Declarations of Alienated Spouse.** Declarations of the husband,  
 6 whose affections are alleged to have been alienated, tend-  
 ing to show what effect the intermeddling of defendant's  
 relatives had on him (defendant) are wholly inadmissible.  
*Moir v. Moir*, 181—1005.

## HUSBAND AND WIFE Continued TO INDICTMENT AND INFORMATION

**Declarations of Alienated Spouse.** Declarations of a husband to

7 his wife (who is seeking to recover of the husband's father for alienation of affections) concerning transactions with the father, are hearsay and wholly inadmissible when they have no probative force (a) on the issue as to the husband's state of mind, (b) on the issue of affection between the husband and wife, or (c) on the issue of wrongdoing on the part of the defendant. So held as to declarations of the husband that his father reluctantly gave him money to defray the expenses of the wife in sickness. *Moir v. Moir*, 181—1005.

**Declarations of Alienated Spouse.** Declarations of a husband

8 (whose affections are alleged to have been alienated) to the plaintiff wife are competent to show his affection for his wife. *Moir v. Moir*, 181—1005.

**Declarations of Alienated Spouse.** Declarations of a husband

9 (whose affections are alleged to have been alienated) to the plaintiff wife, to the effect (a) that defendant was making trouble between plaintiff and her husband, or (b) that defendant wanted the husband to leave plaintiff, are admissible on *one* issue only, to wit, the condition of the mind of the husband in consequence of any influence which it may be shown, by evidence *distinct from such declarations*, was actually exerted by the defendant. *Moir v. Moir*, 181—1005.

**Hearsay.** Evidence in an action for alienation of affections

10 that an attorney promised the one whose affections are alleged to have been alienated to write to the defendant and ask him to desist from his efforts to separate plaintiff and her husband, is hearsay. *Moir v. Moir*, 181—1005.

**INCLUDED OFFENSES.** See CRIMINAL LAW, 9; RAPE, 3-6.

**INDICTMENT AND INFORMATION.** See WEAPONS.

NECESSITY.

Judgment in Absence of Formal Information. A judgment of

INDICTMENT AND INFORMATION Cont'd. TO INFANTS

- 1 conviction for crime entered by a justice of the peace without formal written information, as commanded by Section 5576, Code, 1897, is a nullity. *State v. Bartlett*, 181—436.

FINDING AND FILING, ETC.

**Indorsement of Witnesses on Indictment.** The name of one  
2 who is used as an interpreter of witnesses who testify in a foreign tongue need not be indorsed on an indictment. (Section 5373, Code Supplement, 1913.) *State v. Powers*, 181—452.

REQUISITES AND SUFFICIENCY.

**Duplicity.** An indictment charging an assault with intent to  
3 rape and carnally abuse is not subject to the vice of duplicity. (See Section 4756, Code, 1897.) *State v. Powers*, 181—452.

**Venue.** Venue is sufficiently laid if the court, irrespective of  
4 punctuation or paragraphing, can determine that such venue is laid in a specified county. *State v. Powers*, 181—452.

**Negating Exceptions.** Principle recognized that an indictment  
5 must negative an exception contained in the statutory section which defines the crime. *State v. Burns*, 181—1098.

**Improper Designation of Offense.** It is quite immaterial what  
6 name is given in the indictment to the offense charged. The facts alleged are the all-important consideration. *State v. Burley*, 181—981.

INFANTS.

**Right of Minor to Choose Guardian.** A minor of sound mind reaches his or her majority at the age of 14 years for the purpose of selecting a guardian of property. (Section 3195, Code, 1897.) It follows that a minor over 14 years of age who selects his or her property guardian may be estopped to deny such guardianship. *Nassen v. Anfenson*, 181—134.

INJUNCTION

TO

INSURANCE

**INJUNCTION.**

**Illegality of Corporate Organisation.** An action in equity to test

- 1 the legality of the organization of a school corporation, with prayer for injunctive relief, is not the *allowable* remedy, even though such action be transferred to the law side of the calendar. *Nelson v. Consolidated Ind. School Dist.*, 181—424.

**Scope of Relief—Competition.** An injunctive order prohibit-

- 2 ing certain unfair competition "*in all other localities in which the plaintiff is advertising and selling*" a certain type of furnace, if subject to the vice of being indefinite and uncertain, is cured, under the record, by striking out the words, "advertising and." *Lennox Furn. Co. v. Wrot Iron Heater Co.*, 181—1331.

**INSURANCE.** See DESCENT AND DISTRIBUTION.**CONSTRUCTION OF POLICY.**

**"Entry by Use of Tools or Explosives."** A policy of insurance

- 1 against loss by burglary, provided entrance into the safe is effected "*by means of the use of tools or explosives directly thereupon*," does not cover a loss by burglary when entrance into the safe is effected "by successfully working the combination or lock on the outer door and by then applying tools to break the inner money drawers." *Blank v. National Surety Co.*, 181—648.

**AVOIDANCE OF CONTRACT.**

**Prohibited Additional Insurance—Acceptance of Premiums.** A

- 2 clause avoiding a policy in case the insured procures additional and concurrent insurance is waived by accepting subsequently maturing premiums, with knowledge on the part of the insurer that its soliciting agent had, when the policy was issued, agreed that the insured might *immediately* procure such additional insurance. *De Bolt v. German Am. Ins. Co.*, 181—671.

INSURANCE Continued

TO

JUDGMENT

**Additional Insurance—Knowledge of Agent.** A policy may not  
3 be avoided on the ground that the insured took out additional and concurrent insurance in violation of the policy, when, at the time the policy was issued, it was distinctly agreed between the soliciting agent and the insured that the insured might *immediately* secure additional insurance, and might increase such additional insurance *as the stock increased in value*. *De Bolt v. German Am. Ins. Co.*, 181—671.

**INTEREST.** See DEATH, 1; MECHANICS' LIEN, 8.

**INTOXICATING LIQUORS.** See PROSTITUTION, HOUSE OF, 3.

**Injunction—Who May Maintain.** A corporation may not main-  
1 tain an action to enjoin an intoxicating liquor nuisance. (See Sec. 2405, Code, 1897; Sec. 2406, Code Supp., 1913.) *Civic Improvement League v. Hanson*, 181—327.

**Injunction—Law Controlling.** The right to an injunction to re-  
2 strain the unlawful sale of intoxicating liquors depends on the state of the law *at the time the action is brought*. *Civic Improvement League v. Hanson*, 181—327.

## JUDGES.

**Proceedings at Chambers.** A district *judge*, sitting at chambers  
1 in one county, has no jurisdiction to set aside an order of the district *court* of another county. *Baff v. Waller*, 181—1072.

**Bias and Prejudice.** Temporary irritations between counsel  
2 and the presiding judge are not sufficient to disqualify the judge. *Reilley v. Kinkead*, 181—615.

## JUDGMENT.

By DEFAULT.

**Opening or Vacating.** A litigant is not *personally* negligent in

## JUDGMENT Continued

- 1 relying upon a reputable attorney, whom he has duly employed, to take such action as will properly present his defense. *Reilley v. Kinkead*, 181—615.

**Opening and Vacating.** Accidental misplacement by an attorney's assistant of the files in a newly commenced cause, with consequent failure by the attorney to appear, and the entry of default judgment, should not be considered negligence on the part of the attorney, and such default should be set aside on prompt motion accompanied by a fair showing of meritorious and good-faith defense. *Reilley v. Kinkead*, 181—615.

## CONFORMITY TO PROOF.

**Agreement for Support.** Judgments not in conformity to the proofs of either party are necessarily erroneous. So held on the issue as to what was contemplated in an agreement for support of parents. *Heminger v. Carney*, 181—42.

## EQUITABLE RELIEF.

**Perjury.** Decrees in an action to quiet title will not be set aside, especially in a collateral proceeding, on the ground of perjury, or the equivalent thereof, committed in the trial of the action. *Smith v. Cretors*, 181—189.

**Fraud.** Fraud sufficient to set aside a decree which quiets title is not made out by showing (a) fraudulent statements of a party made in a proceeding separate and distinct from the proceedings to quiet title, or (b) statements which constitute nothing more than erroneous legal conclusions. *Smith v. Cretors*, 181—189.

## CONSTRUCTION AND OPERATION.

**Decree of Reversal as Relating Back.** A final judgment, entered, in an action to quiet title, in compliance with a reversing or modifying order of the Supreme Court, *relates back*, and takes effect as of the date of the original decree from which appeal was taken. *Haswell v. Thompson*, 181—248.

JUDGMENT Continued  
CONCLUSIVENESS.

TO

JURY

**Matters Concluded.** A judgment on appeal from an order involving the *priority* of a creditor's claim and an allowance to a surviving widow for her year's support, is not an adjudication of the *propriety* of the order for allowance to the widow. *Tetzloff v. May*, 181—1253.

**Matters Concluded.** Principle recognized that, where material concessions are made of record in an action to quiet title, the decree will be construed as involving a *finding in accordance with such concessions*. *Smith v. Creditors*, 181—189.

**Parties Concluded.** A nonfraudulent decree, which specifically adjudges that plaintiff has absolute title and that neither of two joint defendants has any title, *which latter part of the decree was squarely within the issues tendered*, necessarily operates as an estoppel on both defendants to again litigate such issues *as between themselves*. *Smith v. Creditors*, 181—189.

**Judgment in Forcible Detention as Bar to Subsequent Action.** A judgment in forcible entry and detainer that plaintiff was not entitled to possession of part of the property embraced in a foreclosure decree because of want of service on defendant in the foreclosure action, bars a subsequent action for the possession based on the same foreclosure proceeding. *Citizens St. Bank v. Snyder*, 181—11.

**Decree Beyond Issues.** Principle recognized that an estoppel may not be predicated on that part of a decree which assumes to adjudicate issues not litigated. *Alt v. Young*, 181—1260.

**JURISDICTION.** See COURTS.

**JURY.**

**Competency—Disregard of Interpreter.** One who positively says on oath that he understands a foreign language and will be

## JURY Continued

TO

## LANDLORD AND TENANT

controlled by his understanding of what he hears the witness say in such foreign language, irrespective of what the official interpreter of the language may say, is a wholly incompetent juror. *State v. Powers*, 181—452.

**Competency—Doubtfulness.** When the competency of a proposed  
2 juror is manifestly doubtful, it is the duty of the court—at least the safer course—to sustain the challenge. *State v. Powers*, 181—452.

**LANDLORD AND TENANT.** See COVENANTS.**LEASES.**

**Business Permitted—Specific and General Clauses.** A *general*

- 1 clause or word designating the business which may be carried on under a lease, immediately following a specific designation of the business permitted, will be construed, if such is the intent, as including only a business of the like kind and nature as that specifically designated. So held where premises were leased "for Film Exchange and film and *theater supplies* purposes only," it being held that the clause "theater supplies" was limited to supplies incidental to the film exchange business. *McCullough Realty Co. v. Laemmle Film Serv.*, 181—594.

**Provision for Renewal—Occupancy by Succeeding Tenant.** The

- 2 removal of one tenant from rented premises, and the act of another in moving in and paying the same rent as was paid by the former tenant, do not constitute such assumption of the former tenant's lease as to bind the latter tenant to a provision in said former lease to the effect that remaining in possession for a stated time after the expiration of the lease shall work a year's renewal of said lease. *Iowa Imp. Co. v. Aetna Explosives Co.*, 181—1186.

**TENANCIES AT WILL.**

**Holding Over.** A holding over by a tenant, after the expiration

- 3 of a lease, for a stated time, and pending negotiations for a new lease, constitutes a tenancy at will. *Iowa Imp. Co. v. Aetna Explosives Co.*, 181—1186.



LANDLORD AND TENANT Continued TO

LATERAL SUPPORT

**RENT.**

**Change in Law Rendering Business Unlawful.** The obligation to  
 4 pay rent is automatically canceled (a) by the enactment of  
 a valid city ordinance which renders unlawful the business  
 permitted by the lease, and (b) by the vacation of the prem-  
 ises. *McCullough Realty Co. v. Laemmle Film Serv.*, 181—  
 594.

**Attachment—Priorities.** The right of a landlord under a mort-  
 5 gage clause in an unrecorded lease is, in the absence of any  
 valid levy or seizure thereunder, inferior to the right of a  
 prior unrecorded mortgage. *Guthrie v. Winters*, 181—  
 1324.

**Insufficiency of Levy.** The act of an officer, under a landlord's  
 6 writ of attachment, in posting notice of a levy on the locked  
 doors at the front and rear of a house, after looking at the  
 property through the window, does not constitute a valid  
 levy on the contents of the house. *Guthrie v. Winters*.  
 181—1324.

**Mortgagees—Intervention.** A mortgagee who claims that his un-  
 7 recorded mortgage is prior in right both to a landlord's  
 claim for rent and to a mortgage clause in the unrecorded  
 lease, may intervene in the action for rent and contest the  
 sufficiency of the alleged levy which the landlord claims was  
 made under the writ. *Guthrie v. Winters*, 181—1324.

**Delivery Bond—Validity.** A delivery bond, *though not provided*  
 8 *for by law*, by which defendant in landlord's attachment  
 obtains possession of the attached property, conditioned  
 "that he will deliver the property or its value in satisfac-  
 tion of any judgment which the landlord might obtain in  
 the action," is enforceable as a common-law bond, *without*  
*any showing that the landlord actually had a lien on the*  
*property attached.* *Quinn v. Mumm*, 181—1216.

**LATERAL SUPPORT.** See ADJOINING LANDOWNERS; EASE-  
 MENTS, 1, 4.

## LIBEL AND SLANDER

**LIBEL AND SLANDER.****WORDS ACTIONABLE.**

**Imputation of Unchastity.** It is slanderous *per se* to charge a  
1 woman with having been pregnant prior to her marriage.  
Martens v. Martens, 181—350.

**Imputation of Immorality.** To charge that a married woman  
2 "*had been making dates with men*" is not slanderous *per se*, unless accompanied with *allegation* and *proof* that such charge was made with the intent to charge immorality on the part of the woman, and that the persons to whom the statements were made so understood them. Jackson v. Ferguson, 181—1192.

**PRIVILEGED COMMUNICATIONS.**

**Financial Condition of Another.** Information concerning a  
3 merchant's financial condition, properly obtained from said merchant by an agent of a credit-rating company, and in good faith and without malice communicated by said agent to his principal, with substantial truthfulness, is privileged. Simons v. Petersberger, 181—770.

**EVIDENCE.**

**Repetition of Slander.** On the trial of an issue of slander, evi-  
4 dence of the speaking of substantially similar statements to persons other than those charged may be admissible. Martens v. Martens, 181—350.

**INSTRUCTIONS.**

**Scurrilous Adjectives.** When the plaintiff bases a claim to re-  
5 covery solely on the speaking of terms which were manifestly slanderous *per se*, it is not reversible error for the court to refuse to instruct that certain other vulgar terms applied by defendant to plaintiff were non-slanderous *per se*. Martens v. Martens, 181—350.

LIBEL AND SLANDER Continued      TO      LIMITATION OF ACTIONS  
DAMAGES.

**Separation of Actual and Exemplary Damages.** Defendant has no  
6 arbitrary right to demand that the jury be instructed to so  
return their verdict that the same will show separately the  
amount allowed as actual and the amount allowed as exem-  
plary damages. *Martens v. Martens*, 181—350.

**LIFE ESTATES.** See TAXATION, 3.

**Who Liable for Taxes.** A life tenant (*pur autre vie*) is not liable  
to the remainderman for taxes assessed before but levied  
after the termination of the life estate. *Gates v. Wirth*, 181  
—19.

**LIMITATION OF ACTIONS.** See MUNICIPAL CORPORATIONS,  
8.

**REAL PROPERTY.**

**Recovery by Means of Redemption.** An action to redeem from  
1 an absolute deed given as a mortgage is not, in any event,  
barred until the lapse of ten years from the maturity of the  
obligation. *Carter v. Cohen Bros. I. & M. Co.*, 181—588.

**Five- or Ten-Year Period.** An action to quiet title against a  
2 fraudulent deed is essentially an action "to recover real  
property," even though the prayer is silent as to possession,  
and is not barred until the lapse of ten years after plain-  
tiff has legal notice of such deed. *Tilton v. Bader*, 181—473.

**COMPUTATION OF PERIOD.**

**Object of Action Contrasted with Evidence to Support Action.**

3 Whether an action is one brought "to recover real prop-  
erty," and therefore barred in ten years, or one "for relief  
on the ground of fraud," etc., and therefore barred in five  
years, depends on the *object and purposes* of the action, and  
not on the *kind or character* of the evidence adduced. *Til-  
ton v. Bader*, 181—473.

## LIMITATION OF ACTIONS Cont'd. TO

## MARRIAGE

**Knowledge of Tort but Ignorance of Extent of Damage. A**

4 wrongful or negligent act which invades some legal right of another gives rise to a cause of action from the date when the injured party has knowledge of such act, and not when the full extent of the damages develops, even though the wrongdoer falsely and fraudulently assures the injured person, at the time of the doing of the act, that the injury is temporary and of no consequence. *Ogg v. Robb*, 181—145.

**Amendment Amplifying Claim. No new cause of action is plead-**

5 ed by amendments which accomplish nothing more than unnecessarily pointing out the statute which is the basis of the action. *Bridenstine v. Iowa City Elec. R. Co.*, 181—1124.

**LIS PENDENS.**

**Purchase Pending Suit—Rights Acquired.** Principle recognized that he who purchases real estate pending record proceeding to quiet title takes subject to the outcome of such litigation. *Ratigan v. Ratigan*, 181—860.

**MALICIOUS MISCHIEF.**

**Operation of Automobile—Consent of Owner.** When the original taking and operating of a motor vehicle is with the *consent* of the owner, as required by Section 4823, Code Supplement, 1913, the taker and operator may not be convicted under *said* section, even though the consent was fraudulently obtained and the use and operation of the car were in excess of the permission so obtained. *State v. Boggs*, 181—358.

**MARRIAGE.****PROMISE TO MARRY.**

**Promise Made During Prohibited Period.** A divorcee may, during the year following the securing of the divorce (during which time remarriage is prohibited [Section 3181, Code Supplement, 1913]), make a valid promise to marry the promisee after said year has expired. *Morgan v. Muench*, 181—719.

**MARRIAGE Continued**

TO

**MASTER AND SERVANT**

**Valid as Affected by Invalid Promise.** A promise of marriage  
2 made by the promisor at a time when he is already married,  
does not relate forward and work a nullification of a like  
promise by the promisor after he had secured a divorce,  
especially in view of the principle of law that an implied  
promise to marry may exist from the conduct of parties.  
Morgan v. Muench, 181—719.

**History of Case—Relation of Parties.** In an action for breach  
3 of promise to marry, the mutual conduct of the parties is  
admissible to show (a) the history of the case, (b) the re-  
lations of the parties, and (c) the malice of the defendant,  
even though such conduct occurred at a time when no valid  
promise of marriage could be entered into because the prom-  
isor was already married, the action being based on a prom-  
ise made by promisor after he had secured a divorce. Mor-  
gan v. Muench, 181—719.

**Seduction.** Proof of seduction is competent as bearing on the  
4 question of a marriage contract. Morgan v. Muench, 181—  
719.

**Standing of Defendant.** The financial condition, earning capac-  
5 ity and reputed wealth of defendant are material in an  
action for breach of promise to marry, as bearing on what  
plaintiff has lost by defendant's breach. Morgan v. Muench,  
181—719.

**ANNULMENT.**

**Evidence—Sufficiency.** Evidence reviewed, and held insufficient  
6 upon which to base a decree of annulment of marriage.  
Byrne v. Byrne, 181—1137.

**MASTER AND SERVANT.**

**THE RELATION.**

**Implied Contract of Employment.** The relation of master and  
1 servant may result from the act of the master in acquiesc-  
ing in the good-faith rendition of services for the master

**MASTER AND SERVANT Continued**

by another without any express contract of employment.  
Woodard v. Herald Pub. House, 181—791.

**Wrongful Discharge.** Evidence tending to show a cause for the  
2 discharge of a servant is wholly inadmissible when there  
exists no basis in the pleading for such evidence, and when,  
if there was such basis, no attempt is made to show that  
the servant was responsible for such cause. Seelman v.  
Farmers' Co-operative Co., 181—1228.

**Wrongful Discharge—Non-Moving Cause.** A wrongful discharge  
3 of a servant may not be justified by establishing a fact  
which in no manner was the moving cause of the discharge.  
Seelman v. Farmers' Co-operative Co., 181—1228.

**MASTER'S LIABILITY.**

**Res Ipsa Loquitur.** The doctrine of *res ipsa loquitur* may have  
4 application to an injury to a servant. The controlling fact  
is not the *relation* which exists between the parties, but the  
*nature* of the occurrence. Hunt v. Chicago, B. & Q. R. Co.,  
181—845.

**Voluntary Departure from Employment.** A servant may not vol-  
5 untarily step aside from his known and understood line of  
employment, without the consent of the master, and do an  
unauthorized act, and, when injured, obtain any benefit by  
the plea that he did the unauthorized act in the manner in  
which it was customarily done by those who were author-  
ized to do it. Haller v. Quaker Oats Co., 181—389.

**PLACE FOR WORK.**

**Dangerous Machinery—Proximate Cause.** The plea that plain-  
6 tiff's place of work was surrounded by dangerous machinery  
is entirely immaterial when such machinery was in no  
manner the cause of plaintiff's injury. Haller v. Quaker  
Oats Co., 181—389.

**Transitory Dangers.** A place for work which is otherwise reas-  
7 onably safe is not rendered legally unsafe by a dangerous

**MASTER AND SERVANT Continued**

condition *which is extraordinary and strictly transitory*.  
So held in the case of an explosion. Seefried v. Wangler  
Bros. Co., 181—504.

**Railway Right of Way—Presence of Noxious Weeds.** The mere  
8 presence of weeds upon a right of way is not, of itself, a  
breach of duty to a section hand whose duties involve the  
care and maintenance of such right of way. McCutcheon  
v. Chicago, M. & St. P. R. Co., 181—501.

**Mines and Mining—Shifting Duty.** In the progress of mining,  
9 that which today may constitute the miner's place of work,  
with consequent duty on his part to prop and timber, may  
tomorrow constitute a haulageway, with consequent duty on  
the master to prop and timber. Mitchell v. Phillips Mining  
Co., 181—600.

**Sudden Jerk of Train.** No jury question is presented on the is-  
10 sue of defendant's negligence by the mere fact that the  
conductor of a freight train, while in a place of safety, was  
injured by a sudden and severe jerk of the train. Hunt  
v. Chicago, B. & Q. R. Co., 181—845.

**WARNING AND INSTRUCTING.**

**Voluntary Departure from Line of Employment.** A master is un-  
11 der no obligation to warn and instruct a child of some 12  
years of age, and of average intelligence, against dangers  
wholly aside from his employment, as known and under-  
stood by the child, on the assumption that such minor may  
voluntarily depart, without the master's consent, from his  
line of employment and encounter such dangers. Haller  
v. Quaker Oats Co., 181—389.

**Non-Apprehended Dangers.** The duty of a master to warn and  
12 instruct does not exist as to dangers which the master has  
no reason to apprehend, or as to dangers just as obvious to  
the servant as to the master. Haller v. Quaker Oats Co.,  
181—389.

**Unusual and Extraordinary Dangers.** A master is under no obli-  
13 gation to warn a servant of remote and improbable dangers,  
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## MECHANICS' LIEN

**MECHANICS' LIEN.** See CONTRACTS, 18.

## RIGHT TO LIEN.

**Payments by Owner to Contractor.** A subcontractor who demands that certain payments be made by the owner to the principal contractor, and who receives such payments, will not thereafter be heard to assert that such payments were unauthorized. *Garrison G. & L. Co. v. Farmers Merc. Co.*, 181—568.

**Payments by Owner—Crediting Contractor's Indebtedness to Another.** A building owner who is owing a building contractor a matured payment on the building may, through its managing officer, make a valid payment to said contractor by applying said mature payment on an indebtedness due from the contractor to a bank of which said officer was also a managing officer, even though said contractor did not request such application and had no knowledge thereof until after it was done. *Garrison G. & L. Co. v. Farmers Merc. Co.*, 181—568.

**Intentionally Fraudulent Items.** Principle recognized that the right to a mechanics' lien for labor, materials, etc., is wholly lost by the insertion in said claim of intentionally fraudulent items, howsoever small. *Garrison G. & L. Co. v. Farmers Merc. Co.*, 181—568.

**Unauthorized Items.** A subcontractor who, with knowledge that the contract between the owner and the principal contractor has been rightfully terminated, furnishes to the contractor an item of material, and serves notice of a claim for a lien within the 30 days thereafter, stands on exactly the same basis as a subcontractor who serves his notice after the expiration of 30 days from the furnishing of allowable items. *Garrison G. & L. Co. v. Farmers Merc. Co.*, 181—568.

## OPERATION AND EFFECT.

**Subcontractor Inducing Unauthorized Payments—Effect.** A subcontractor who induces the owner to make a payment to



MECHANICS' LIEN Continued TO MORTGAGES

the contractor *not authorized by the contract*, and in an amount greater than the claims of all other subcontractors, and receives said payment, will, in the adjustment of priorities, be relegated to the foot of the list of claimants. *Garrison G. & L. Co. v. Farmers Merc. Co.*, 181—568.

**Priority.** A subcontractor who, in good faith, and without  
6 knowledge of the cancellation by the owner of the contract with the principal contractor, continues to furnish material, labor, etc., is not a mere volunteer, and is entitled, *as against a subcontractor who furnished material with full knowledge of such cancellation*, to the establishment of a prior lien for his entire claim. *Garrison G. & L. Co. v. Farmers Merc. Co.*, 181—568.

**Priority.** Where all the payments made by the owner had been  
7 made before a subcontractor commenced work, and the owner had then properly terminated the contract, the right of said subcontractor to payment, though earlier in point of filing, depends upon whether, after paying all that is due to all other claimants, the owner has enough to pay said subcontractor. *Garrison G. & L. Co. v. Farmers Merc. Co.*, 181—568.

ENFORCEMENT.

**Interest.** An owner who has properly tendered the amount due  
8 from him is liable to interest on the amount only from the date of final decision on appeal. *Garrison G. & L. Co. v. Farmers Merc. Co.*, 181—568.

**MINES AND MINERALS.** See EVIDENCE, 11; MASTER AND SERVANT, 9; NEGLIGENCE, 1.

**MORTGAGES.** See SUBROGATION, 3.

**Absolute Deed.** Evidence reviewed, and held to support a find-  
1 ing that an absolute deed was intended as a mortgage. *Carter v. Cohen Bros. I. & M. Co.*, 181—588.

## MORTGAGES Continued TO MUNICIPAL CORPORATIONS

**Fraud.** Evidence reviewed, and held insufficient to show that a mortgage had been obtained by fraud. *Cochran v. Main*, 181—906.

**Purchase-Money Mortgage Antedating Judgment.** Principle recognized that a purchase-money mortgage is prior in right to an antedating judgment. *Kent v. Bailey*, 181—489.

**Foreclosure—Prayer for Alternative Relief.** A prayer that plaintiff's title be quieted absolutely, with prayer for foreclosure as alternative relief, entitles the pleader to foreclosure when it is found that he is not entitled to the former relief, but is entitled to the latter. *Cochran v. Main*, 181—906.

**MUNICIPAL CORPORATIONS.** See CONSTITUTIONAL LAW; TELEGRAPHS AND TELEPHONES.

## SEVERANCE OF TERRITORY.

**Petition—Failure to Attach Plat.** The statutory requirement that a plat of the territory sought to be severed shall be attached to the petition for severance, is sufficiently complied with by attaching the same by way of amendment made prior to the publication of the required notice of the action. (Sec. 622, Code Supp., 1913.) *Estrem v. Town of Slater*, 181—920.

**Notice—Jurisdiction.** Jurisdiction of a proceeding, under Sec. 622 *et seq.*, Code, 1897, to sever territory from an incorporated town, is not acquired, either over the *subject matter* or over the *inhabitants* of the town (who are given by statute the right to defend), by the publication of the required notice for a period of *less* than four weeks previous to the commencement of the succeeding term of court. *Estrem v. Town of Slater*, 181—920.

## GOVERNMENTAL POWERS.

**Manner of Exercise—Abatement of Nuisance.** Principle recognized that the statutory power of municipalities (Sec. 696,

## MUNICIPAL CORPORATIONS Cont'd.

Code Supp., 1913) to abate nuisances must be exercised solely by means of duly enacted ordinances. *Wilson v. City of Ottumwa*, 181—303.

## OFFICERS, EMPLOYEES, ETC.

**Policemen's Pension—Unauthorized Deprivation.** A policeman  
4 once duly placed upon the pension rolls of the city may not be removed therefrom except on notice and hearing, as provided by Section 932-p, Code Supp., 1913. *Dickey v. Jackson*, 181—1155.

## PUBLIC IMPROVEMENTS.

**Substantial Compliance with Contract.** Evidence reviewed, on the  
5 issue of substantial compliance with the plans and specifications of a paving contract, and held to authorize an assessment. *Vail v. City of Chariton*, 181—296.

**Informalities Tolerated.** Principle recognized that informality  
6 and irregularity must necessarily mark the proceedings of municipal bodies, and the same must be tolerated, so long as jurisdictional requirements are met. *Burroughs v. City of Keokuk*, 181—660.

**Injunction.** Fraud sufficient to justify enjoining the collection  
7 of a special assessment for the cost of an improvement may not be inferred from the naked fact that, after several years of service, the improvement proved to be of poor quality. *Plagmann v. City of Davenport*, 181—1212.

**Enjoining Assessments—Limitation of Actions.** It is suggested  
8 that an action to test the legality of a street improvement, on the ground that the poor quality of the improvement has resulted in a fraud upon the property owner, is barred after the lapse of three months from the date of the order for the issuance of the certificates or bonds. (Section 989, Code, 1897.) *Plagmann v. City of Davenport*, 181—1212.

**Statute Governing Assessments.** Assessments for paving which  
9 was initiated *after* Chapter 76, Acts of the Thirty-fifth Gen-

## MUNICIPAL CORPORATIONS Cont'd.

eral Assembly (Sec. 792-g, Code Supp., 1913) became a law, but *before* the act became fully operative on January 1, 1914, but fully constructed *after* said latter date, must be made in accordance with the provisions of said act. *Burroughs v. City of Keokuk*, 181—660.

**Power to correct invalid assessments.** Unauthorized assessments do not render prior legal proceedings nugatory. It follows that unauthorized assessments may be corrected. (Sec. 836, Code Suppl. Supp., 1915.) *Burroughs v. City of Keokuk*, 181—660.

**Assessments—Presumption.** Principle recognized that an assessment of benefits is presumptively correct. *Vall v. City of Chariton*, 181—296.

**Assessments—When Delinquent.** Penalties for the nonpayment of assessments for the construction of street improvements are held in abeyance, pending appeal to determine the legality and correctness of such assessments. *Barber Asphalt Pav. Co. v. District Court*, 181—1265.

## STREETS, ETC.

**Reserved Legislative Power.** Principle recognized that the plenary power of the general assembly over the highways of the state includes the power to arbitrarily grant to a public service corporation a *free franchise* right in the streets of a municipality. *City of Des Moines v. Iowa Tel. Co.*, 181—1282.

**Snow and Ice—Knowledge of Danger.** Negligence does not necessarily follow from the act of passing over a *known* defective walk. So held where the one injured knew that the walk was covered with rough and uneven ice. *De Wall v. City of Sioux City*, 181—333.

**Non-Negligent Defects—Depressions.** Defects in municipal sidewalks are, *as a matter of law*, non-negligent when of such character, in view of their location and use, as not to attract the attention of the proper public authorities and cause them, as ordinarily cautious and prudent persons, to antici-

MUNICIPAL CORPORATIONS Cont'd. TO

NEGLIGENCE

pate danger therefrom to pedestrians. *Depression* of three inches held non-negligent. *Johnson v. City of Ames*, 181—65.

**Duty to Take Safe Route.** The plea that one injured by a defective street ought to have taken another route cannot prevail in the absence of evidence that such other route was a safer way than the one actually taken. *De Wall v. City of Sioux City*, 181—333.

**TORTS.**

**Unauthorized Nuisance by Private Parties.** A city which has in no manner assumed jurisdiction or control over a natural watercourse within its corporate limits, is not liable in damages resulting from the acts of private parties in converting said watercourse into a nuisance by depositing offensive matter in said watercourse without the knowledge or consent of the city authorities. *Wilson v. City of Ottumwa*, 181—303.

**NEGLIGENCE.** See MASTER AND SERVANT; MUNICIPAL CORPORATIONS; PROPERTY; SUBROGATION, 3.

**ACTS CONSTITUTING NEGLIGENCE.**

**Failure to Timber Roof of Mine or Take Down Same.** Failure to timber the roof of a known dangerous haulageway, or to take down known dangerous portions thereof, may amply justify the jury in finding negligence on the part of the master. *Mitchell v. Phillips Mining Co.*, 181—600.

**Trespasser.** A workman who has been warned of a possible danger attending the pursuit of his task does not become a trespasser by continuing his work, especially when he was in no wise subject to the direction of the one giving the warning. *Harn v. Cedar Valley Elec. Co.*, 181—1173.

**Intersecting Crossings—Unallowable Assumption.** Principle recognized that one in charge of a street car may not assume

## NEGLECTED Continued

that a traveler will wait for the car to pass, unless the car is so close to the crossing, or its rate of speed is so apparent that the traveler cannot reasonably expect to pass over the street in safety. *Bridenstine v. Iowa City Elec. R. Co.*, 181—1124.

**Street Car Collision.** Evidence reviewed, with reference to a collision with a street car at a street intersection, and held to present a jury question as to the negligence of both parties. *Seltsinger v. Iowa City Elec. R. Co.*, 181—739.

**Operation of Automobile.** Evidence attending a rear-end collision of an automobile with a buggy reviewed, and held to present a jury question on the issue of defendant's negligence. *Topper v. Maple*, 181—786.

**Exposed Electric Wires.** Evidence reviewed, and held to support a finding that a master was negligent in maintaining heavily charged electric wires in the immediate vicinity of workmen, who did not know of the extreme and attendant danger, and likewise that the servant was not guilty of contributory negligence in the acts resulting in his death. *Woodard v. Herald Pub. House*, 181—791.

**Res Ipsa Loquitur—Applicability—Jerk of Train.** The applicability of the doctrine of *res ipsa loquitur* depends not on the mere fact that an accident happened, but upon the nature of the accident—upon the circumstances attending an accident. No presumption of negligence is deducible from the mere fact that the caboose of a freight train gave a sudden and severe "jerk" just preceding a stop. *Hunt v. Chicago, B. & Q. R. Co.*, 181—845.

## PROXIMATE CAUSE.

**When Plaintiff's Negligence is Inoperative.** The negligence of one in causing his automobile to become hopelessly stalled upon a railroad track at a public highway crossing becomes immaterial if the crew of an approaching train did see or in the exercise of reasonable diligence ought to have seen, the plight of the machine and avoided a collision, and did not do so. *Monson v. Chicago, R. I. & P. R. Co.*, 181—1354.

## NEGLIGENCE Continued

## CONTRIBUTORY NEGLIGENCE.

**Self-Evident Place of Danger—Safety Appliances.** A servant  
9 may not escape guilt of contributory negligence, when he deliberately places himself in a self-evident place of danger, because of the lack of safety appliances which he made no effort to secure, and which evidently might have been had for the asking. *Haskell v. Kurtz Co.*, 181—30.

**Contributory Negligence as Bearing on Defendant's Negligence.**  
10 That plaintiff was wholly free from contributory negligence is no evidence that defendant was negligent. *Haller v. Quaker Oats Co.*, 181—389.

**Street Cars at Crossings—Permissible Presumptions.** Travelers  
11 have a perfect right to assume that street cars, on approaching a public crossing, will be operated with reasonable care and with due regard for the rights of others rightfully upon the street. *Bridenstine v. Iowa City Elec. R. Co.*, 181—1124.

**Travelers and Street Cars—Relative Rights and Duties.** Relative  
12 rights and duties of travelers and those operating street cars, in approaching obscure crossings, discussed, and evidence held to present a jury question on the issue of the contributory negligence of the deceased. *Bridenstine v. Iowa City Elec. R. Co.*, 181—1124.

**Avoidance—"Last Clear Chance."** Two persons may be so con-  
13 temporaneously negligent that, if such negligence continues unbroken, no recovery may be had for a resulting injury to one of the parties; but if one of the parties actually discovers the other party in his position of reasonably manifest danger, at a time when the one discovering can avoid the injury by the exercise of reasonable care, such discovery presents to the one discovering, the last clear opportunity to avoid the injury, and if he does not, from the time of such discovery, exercise such reasonable care, and thereby avoid such injury, he is guilty of a *new, independent* and *proximate* negligence—a negligence which neutralizes the former or continuing negligence of the one injured. *Bridenstine v. Iowa City Elec. R. Co.*, 181—1124.

## NEGLIGENCE Continued

## TO

## NEW TRIAL.

**Conflict of Evidence.** Conflicting testimony as to whether a  
14 workman was warned of the danger attending his work necessarily presents a jury question as to the real fact. *Harn v. Cedar Valley Elec. Co.*, 181—1173.

**Automobile Accident.** Evidence relating to the conduct of plain-  
15 tiff in crossing a street between intersecting streets, with resulting collision with an automobile, reviewed, and held to present a jury question on the issue of plaintiff's contributory negligence. *Gilbert v. Vanderwaal*, 181—685.

## IMPUTED NEGLIGENCE.

**Driver and Mere Occupant with Equal Knowledge of Danger.**

16 Equal knowledge by a husband and wife of the surroundings, of the possible danger, and of the ways to discover and avoid it, imposes on each the *same measure of care*, notwithstanding the doctrine that the negligence of the husband, as driver of the conveyance, may not be imputed to the wife. *Beemer v. Chicago, R. I. & P. R. Co.*, 181—642.

**Non-Common Enterprise.** The doctrine of "imputed" negligence  
17 does not apply when nothing more appears than the naked fact that the injured party was, at the time of the injury, *riding with and in the conveyance of another*. *Bridenstine v. Iowa City Elec. R. Co.*, 181—1124.

## EVIDENCE.

**"No Eyewitness" Rule—Non-Applicability.** The principle that,  
18 where a party is dead and there is no eyewitness as to the manner in which he conducted himself *at and immediately preceding the time of the injury*, a presumption prevails that he exercised due care, has no application to a case where the testimony of eyewitnesses fully accounted for the conduct of the deceased *while passing over the last 40 feet* leading to a known railway crossing which (and the approaches thereto) was then wholly unobstructed. *Beemer v. Chicago, R. I. & P. R. Co.*, 181—642.

**NEW TRIAL.** See CRIMINAL LAW.



NEW TRIAL Continued

TO

PARTNERSHIP

## GROUNDS.

**Discussing Cause with Jurors.** Improperly discussing one's cause

- 1 with members of the jury panel is not ground for new trial when no discussion of any kind was had with the jurors who actually heard the cause. *Gilling v. Held*, 181—926.

**Newly Discovered Evidence of Non-Contested Issue.** Newly discovered

- 2 evidence on a non-contested issue is no ground for a new trial. *Correy v. Inter-Urban R. Co.*, 181—373.

**Failure to Discover Erroneous Instruction.** Objections to instructions,

- 3 urged for the first time in a motion for a new trial, must be accompanied by something more persuasive than a mere *assertion* that they were not discovered by the objecting party at the time of trial. There must be a "*showing*" by means of some evidentiary matter. (Sec. 3705-a, Code Supp., 1913.) *Chumbley v. Courtney*, 181—482.

## PROCEEDINGS TO PROCURE.

**Unverified Motions.** Allegations, in a motion for new trial, of

- 4 misconduct on the part of jurors, are without effect unless verified or otherwise supported by proof. *State v. Burley*, 181—981.

**NUISANCE.** See MUNICIPAL CORPORATIONS, 3, 17.**OPTIONS.** See CANCELLATION OF INSTRUMENTS.**ORIGINAL NOTICE.** See PROCESS.**PARTNERSHIP.**

**Representation of Firm—Non-Trading Corporations.** Circumstances attending the carrying on of a non-trading partnership may show authority in one partner to sign notes in the firm name. *Chumbley v. Courtney*, 181—482.

## PAYMENT

TO

PLEADING

**PAYMENT.**

**Authority to Receive.** Prima-facie proof of authority in a supposed officer of a company to receive payments for the company is shown by the fact that the payments so received were properly turned over to, and accepted by, the company. *Jewett Lbr. Co. v. Anderson Coal Co.*, 181—950.

**Recovery of Excess Payments by Public Officers.** Payments made to a contractor for the construction of a public drainage improvement in excess of the amount due under the contract may be recovered, especially when an element of mistake of fact enters into such payment. *County v. Katz-Craig Cont. Co.*, 181—1813.

**PENSIONS.** See MUNICIPAL CORPORATIONS, 4.

**PERJURY.**

**Willfulness and Corruptness.** Howsoever false a statement under oath may be, it will not constitute perjury unless it is made *corruptly* and *willfully*. It follows of necessity that the defendant's *belief*, *knowledge* and *understanding*, and freedom from any tempting circumstances, may be quite material on the issue of guilt or innocence. *State v. Lazarus*, 181—625.

**PHYSICIANS AND SURGEONS.** See CONTRACTS, 5.

**PLEADING.** See STATUTES, 4.

**PETITION.**

**Prayer for Possession—Limitation of Actions.** A prayer for possession is not necessary, in an action to quiet title, in order to render such action one "to recover real property," within the meaning of the statute of limitation. *Tilton v. Bader*, 181—473.

## PLEADING Continued

## ANSWER.

**Denials—Sufficiency.** A *general* allegation by plaintiff that he  
2 has complied with all conditions which are precedent to  
his right to recover on a contract, is not put in issue by a  
*general* allegation by defendant of noncompliance by plain-  
tiff. *Defendant must specifically state wherein plaintiff has*  
*failed to comply with said conditions.* (Section 3628, Code,  
1897.) *Weibel v. Boston P. & M. Co., 181—199.*

**Defenses—Inconsistency.** Defenses which are not merely incon-  
3 sistent with but *destructive* of each other are not allowable.  
*Seymour v. Chicago & N. W. R. Co., 181—218.*

## DEMURRER.

**Motion as Demurrer.** A motion to strike a pleading wholly bad  
4 may be treated as a demurrer. *Baker v. American Surety*  
*Co., 181—634.*

## AMENDMENTS.

**Standing on Demurrer—Effect.** He who, by his demurrer, takes  
5 the position that his antagonist is entitled to *no relief what-*  
*ever*, and, on the overruling of the demurrer, stands there-  
on, may not, on appeal, contend that such antagonist is not  
entitled to all the relief which the overruling of the de-  
murrer gave him. *Woodbine Sav. Bank v. Tyler, 181—1389.*

**Shifting from Equity to Law.** It is permissible, in a purely equi-  
6 table action, to so amend as to convert the same essential  
cause of action into one purely at law. Right to change  
of forum is the only result. *Cammack & Son v. Weimer,*  
*181—1.*

## BILL OF PARTICULARS.

**Facts Already Possessed by Movent.** A movent may not predi-  
7 cate prejudicial error on the overruling of a motion for  
more specific statement when the information desired is  
*already in his possession*, or, if not in his possession, such  
lack of possession affords movent a *complete defense* to

## PLEADING Continued

TO

PRINCIPAL AND AGENT

plaintiff's action. So held where defendant, in an action on a policy of insurance, prayed for details as to the time, place, and circumstances of the death of insured animals, when, presumptively, he already had such information in his possession, under required proofs of loss; while, if he did not have such proofs of loss, he was armed with a complete defense to plaintiff's action. *Northwestern Trading Co. v. Western L. S. Ins. Co.*, 181—853.

**Conditions and Exceptions.** A motion for a more specific statement will not lie as to matters which are, *under statutory permission*, pleaded generally, nor as to matters which the pleader is under no obligation to negative. So held as to certain exceptions and conditions precedent contained in a policy of insurance. (Section 3626, Code, 1897.) *Northwestern Trading Co. v. Western L. S. Ins. Co.*, 181—853.

**Undue and Burdensome Details.** The fact that to sustain a motion for more specific statement would (a) compel, to some extent, a pleading of evidence, and (b) load the pleading with undue and burdensome details, may be influential in justifying a denial of the motion. *Northwestern Trading Co. v. Western L. S. Ins. Co.*, 181—853.

## ISSUE, PROOF, AND VARIANCE.

**Pleading Quantum Meruit and Proving Express Contract.** Principle recognized that a plea of *quantum meruit* for services, with proof of express contract for specified compensation, presents a fatal variance. *Swaney Land Co. v. Bradford*, 181—1244. See *Quillen v. Minneapolis & St. L. R. Co.*, 181—536; *Cammack & Son v. Welmer*, 181—1.

**Date of Contract.** Proof that a contract was entered into a month and a half prior to the time alleged, presents no fatal variance. *Miller v. Bohanan*, 181—1207.

## PRINCIPAL AND AGENT.

## THE RELATION.

**Fraud and Deception.** Principle recognized that frankness and fairness in the highest degree are imperatively required on

PRINCIPAL AND AGENT Continued

the part of an agent towards his principal. *Swaney Land Co. v. Bradford*, 181—1244.

**Termination.** The relation of principal and agent is terminated  
2 *ipso facto* by the voluntary and mutual initiation by the parties of negotiations under which the agent proposes to buy and the principal proposes to sell the subject matter of the agency. *Scott v. Simons*, 181—1037.

**Subagent Employed by Agent.** Evidence, consisting of conduct  
3 and conversations, reviewed, and, while indefinite, held to present a jury question whether a subagent employed by an agent was in fact the agent of the principal. *Lenhart v. Bean*, 181—85.

**Implied Agency.** Principle recognized that an agent to procure  
4 a loan may, in the performance of one act, be impliedly the agent of the borrower, and, in the performance of another act, be impliedly the agent of the loaner. *Kent v. Bailey*, 181—489.

**Agent Speculating on Subject Matter.** An agent who takes an  
5 assignment of the subject matter of his agency will be *presumed* to have intended to account to his principal for all profits realized. *Steckel & Son v. Smith*, 181—361.

POWERS OF AGENT.

**Authority of Agent to Employ Subagents.** On the question  
6 whether an agent had the authority to employ a subagent on behalf of the principal, evidence that the property taken by the principal in a deal negotiated by the subagent was conveyed by the principal agent in trust for the principal, is material, as tending to show that the authority of the agent was general, and not restricted. *Lenhart v. Bean*, 181—85.

**Payments to Agent—Embezzlement, etc.** If an agent has ex-  
7 press or implied authority to receive payments on behalf of his principal, it is quite immaterial to the one making payment that the agent embezzled the money paid, or otherwise committed crime with reference thereto. *McCullough v. Reynolds*, 181—1089.

## PRINCIPAL AND AGENT Continued TO PROCESS

**Course of Conduct.** *Possession* of an instrument is by no means

- 8 the only evidence of authority to receive payment thereon. When a principal, by his habits and course of dealing, has held out an agent as having general authority to make loans for him and to receive payments on same, he may be bound by payments to the agent *although the securities are not in the possession of the latter*. *McCullough v. Reynolds*, 181—1089.

**Emergencies.** Principle recognized that the implied authority

- 9 of a servant, in cases of great emergency, to employ assistance at the expense of the master, arises only *when some interest of the master is to be conserved*. *Carson v. Chicago, M. & St. P. R. Co.*, 181—310.

**Employment of Physicians.** Authority in subordinate agents,

- 10 etc., of a railway company to engage the services of physicians to care for employees of the company who are injured *while in the line of their duty* to the company, does not embrace authority to employ a physician to care for employees who are injured while "off duty," and consequently *not in the line of any duty* to the company. *Carson v. Chicago, M. & St. P. R. Co.*, 181—310.

**Employment of Physicians—Ratification.** Authority in a rail-

- 11 way employee to take injured employees to physicians who were not regularly employed by the company may be inferred from evidence that the company repeatedly paid such physicians for their services. *Carson v. Chicago, M. & St. P. R. Co.*, 181—310.

**"Holding out"—Ratification.** He who bases his claim to recov-

- 12 ery on an employment by an agent of the defendant, must show actual authority in the agent to employ, or, failing in this, (1) that the agent was held out by defendant as having such authority, or (2) that the defendant ratified the act of the agent. *Carson v. Chicago, M. & St. P. R. Co.*, 181—310.

## PROCESS.

**Service by Publication.** Principle recognized that statutes au-

## PROCESS Continued TO PROSTITUTION, HOUSE OF

- 1 thorizing service by publication must be strictly followed. Estrem v. Town of Slater, 181—920.

**Insufficient Statement of Relief Demanded in Original Notice.** An  
 2 original notice of suit which recites that plaintiff will ask the foreclosure of his mortgage and a personal judgment against the mortgagor only, confers no jurisdiction on the court to decree that a mortgage held by a defaulting defendant, even though in form an absolute deed, is junior to the mortgage held by plaintiff. Martin v. Bennett L. & T. Co., 181—100.

**PROPERTY.**

**Interference with Right of Property—Negligence.** Principle recognized that an invasion of one's "*right of property*" ripens a cause of action, irrespective of negligence. Starrett v. Baudler, 181—965.

**PROSTITUTION, HOUSE OF.**

**Character of Intercourse.** It does not follow that defendant may  
 1 not be properly convicted of keeping a house of ill fame when the only evidence of illicit intercourse relates solely to the defendant herself and in her own home, when the evidence tends to show other material elements of the offense, to wit: (1) That defendant was a prostitute; (2) that she plied her trade in said house with men indiscriminately and for hire; (3) that she urged other women to do likewise; (4) that the house was resorted to for the purpose charged; and (5) that the house was generally reputed to be a house of ill fame. State v. Clough, 181—783.

**"Keeping" and "Resorting to" Contrasted.** The crimes of  
 2 keeping houses of ill fame and of resorting to such houses, etc., are made up of elements common to both, and such elements are necessarily provable by evidence common to both. State v. Clough, 181—783.

**Possession and Use of Intoxicating Liquors.** The possession and  
 3 use of intoxicating liquors is a recognized badge of a house

## PROSTITUTION, HOUSE OF Continued to

## RAILROADS

of ill fame, and evidence of such possession and use is material and relevant on a charge of keeping such house. *State v. Burley*, 181—981.

**QUANTUM MERUIT.** See PLEADING, 10.

**QUO WARRANTO.**

**Illegality in Corporate Organization.** An information in the nature of *quo warranto* is the *exclusive* remedy to test the legality of the organization of a corporation. *Nelson v. Consolidated Ind. School Dist.*, 181—424.

**Pleading.** In an action against a corporation by information in the nature of *quo warranto* to test the legality of its organization, the act of making the so-called corporation a party defendant is not an admission of its corporate existence, in the face of a definite allegation to the contrary. *Nelson v. Consolidated Ind. School Dist.*, 181—424.

**RAILROADS.** See MASTER AND SERVANT, 10.

## ACCIDENTS AT CROSSINGS.

**Notice.** A railway company will be presumed to have had notice of the condition of its crossing which had remained in the same condition for several years. *Monson v. Chicago, R. I. & P. R. Co.*, 181—1354.

**Duty in Maintenance of Crossings.** It is the duty of a railway company to maintain reasonably safe crossings where the tracks intersect highways, and just what construction on the part of the company will satisfy these requirements is ordinarily a question for the jury, in view of all the circumstances. So held where a crossing was planked diagonally, on account of the sharp angle at which the track cut the public highway. *Monson v. Chicago, R. I. & P. R. Co.*, 181—1354.

**Sufficiency of Crossing.** It is not error for the trial court to instruct that, before plaintiff can recover, he must show that



RAILROADS Continued

TO

RAPE

defendant's crossing was not "safe and convenient," the statute requiring the maintenance of a "good, sufficient, and safe" crossing. *Monson v. Chicago, R. I. & P. R. Co.*, 181—1354.

**Unobstructed View.** One who, though quite aged,<sup>4</sup> is possessed of the ordinary senses of sight and hearing, and who, in clear daytime, and under no distracting circumstances, knowingly goes upon a railway crossing, the approaches to which from a point at least 90 feet from the crossing and continuously thereafter are wholly unobstructed for a distance ranging from 800 feet to an indefinite distance, is, in case of injury, *conclusively* guilty of contributory negligence. *Beemer v. Chicago, R. I. & P. R. Co.*, 181—642.

**Last Clear Chance.** An instruction that, if a train crew, by the exercise of reasonable vigilance, *could* have discovered that an automobile was stalled on the track at a public crossing, in time to have prevented a collision, and failed so to do, the defendant company would be liable, even though the plaintiff may have been negligent in getting his car in such a position, is not prejudicially erroneous, when the record conclusively shows that the train crew did actually see the plaintiff in his position of peril in time to have avoided the injury. *Monson v. Chicago, R. I. & P. R. Co.*, 181—1354.

**Ownership of Train.** Evidence reviewed, and held sufficient to justify a finding by the jury that the train in question was owned and operated by the defendant company. *Monson v. Chicago, R. I. & P. R. Co.*, 181—1354.

**Negligent Operation of Train.** Evidence reviewed, and held sufficient to carry to the jury the question whether defendant was negligent in running its train against and over an automobile stalled upon a railway track. *Monson v. Chicago, R. I. & P. R. Co.*, 181—1354.

**RAPE.**

**Rape on Infant.** The elements of force, consent, and resistance, on the part of an infant prosecutrix, are not material on the issue of defendant's guilt of rape. *State v. Brooks*, 181—874.

## RAPE Continued

**Infant Prosecutrix—Materiality of "Force."** Assault and battery cannot exist, *even as to an infant*, without unlawful force. Unlawful force cannot exist if there be valid consent. A mature infant may consent to force. It follows that, on the cross-examination of an infant prosecutrix in a charge of forcibly consummated rape, any line of examination is material, *on the included issue of assault and battery*, which tends to show that the condition of her mind was such as to render improbable any occasion to apply unlawful force to her person. So held where, on such examination, effort was made to show that, prior to the alleged rape, prosecutrix had indulged in lascivious language and conduct. *State v. Brooks*, 181—874.

## INCLUDED OFFENSES.

**Great Bodily Harm.** An assault with intent to inflict great bodily injury is not necessarily in an assault with intent to ravish. *State v. Powers*, 181—452.

**Assault and Battery.** Under a charge of assault with intent to rape "by force," etc., the included offense of assault and battery should always be submitted when the evidence is such as will sustain a verdict for such included offense. *State v. Powers*, 181—452.

**Felonies Generally.** An assault with intent to commit rape is one with intent to commit a felony, but it does not follow that, therefore, it was error not to submit an assault with intent to commit felony generally. *State v. Powers*, 181—452.

**General Rule.** Assault and battery and simple assault should, on a charge of consummated rape on an adult or on an *infant*, be submitted, in the absence of some special reason justifying their exclusion. *State v. Brooks*, 181—874

## EVIDENCE.

**Subsequent Acts.** Acts by defendant with reference to the same prosecutrix, though subsequent to the occurrence charged

**RAPE Continued**

in the indictment, are admissible when tending to prove that the defendant's mental attitude was such as to make it probable that the offense charged was committed at an earlier time. *State v. Powers*, 181—452.

**Nonvoluntary Complaint by Prosecutrix.** Nonvoluntary complaints by prosecutrix of a sexual outrage upon her—those extracted from her by a process of cross-examination—are wholly inadmissible as *complaints*. Evidence reviewed, and held to show that the alleged complaints in question were nonvoluntary. *State v. Powers*, 181—452.

**Complaints by Prosecutrix—Details.** Evidence of a complaint by prosecutrix to the effect "that she said to him (the witness) that defendant threw her down at the cob pile and tried to have sexual intercourse with her" is not objectionable as going into nonallowable detail, but the rule allowing the showing of complaints by prosecutrix cannot by any possibility be so stretched as to permit a long, detailed, and minute recital of the facts leading up to and culminating in the commission of the offense. *State v. Powers*, 181—452.

**Corroboration.** Evidence that defendant, in a prosecution for assault with intent to rape, had mere "opportunity" to commit the offense, and had stated that he "kidded" or "joshed" the girl, constitutes no corroboration as required by the statute. (Section 5488, Code, 1897.) *State v. Powers*, 181—452.

**Corroboration—Complaints by Prosecutrix.** Principle recognized that complaints by a prosecutrix of a sexual outrage upon her are not corroborative of her testimony, as required by statute. (Section 5488, Code, 1897.) *State v. Powers*, 181—452.

**Corroboration—Total Failure.** Evidence reviewed, and held to disclose a total failure of corroborative testimony. *State v. Powers*, 181—452.

**INSTRUCTIONS.**

**Nature of Offense.** A charge which, as given, fully impresses upon the jury that great care should be exercised in arriving

**RAPE Continued****TO****RELEASE**

at a verdict in a rape case, sufficiently meets a request for the giving of the ordinary instruction as to the gravity of the charge, the ease with which it may be made, the difficulty attending an attempt to disprove, etc. *State v. Brooks*, 181—874.

**RECEIVERS.**

**Right to Repudiate Pre-existing Contracts.** A receiver has the right, within a reasonable time after his appointment, to repudiate the pre-existing executory contracts of the person or corporation for whose property he has been appointed receiver. *Maxwell v. Missouri Valley I. & C. Stor. Co.*, 181—108.

**RELEASE.**

**Fraud—Promise of Employment.** Fraud sufficient to avoid a release may not be predicated on the breach by the one receiving the release of a promise "to take care of or employ" the releasor. *Seymour v. Chicago & N. W. R. Co.*, 181—218.

**Mistake—Fact and Opinion Contrasted.** Mutual mistake sufficient to avoid a release must be a mistake of a past or present material *fact*, and not error in opinion respecting future conditions. *Seymour v. Chicago & N. W. R. Co.*, 181—218.

**Fraudulent Concealment.** The plea of fraudulent concealment in the condition of an injured party, sufficient to avoid a release, wholly fails when the evidence shows nothing more than the expression of an honest opinion by the physician charged with the fraud, and the expression of a contrary and equally honest opinion by other physicians. *Seymour v. Chicago & N. W. R. Co.*, 181—218.

**Fraud—Expression of Opinion.** Fraud sufficient to avoid a release may not be built up solely on the good-faith expression of a mere naked opinion.

Applied where the one giving the release had full knowledge of his own injury and his ability to do work, where

## RELEASE Continued

## TO

## SALES

the one charged with fraud did not have such knowledge, but stated to the injured party "that he was making a big fuss over his injury, that said injury was of a *trifling* nature, and that he ought to have been at work for the past six weeks."

Applied also where the statement was made "that plaintiff's shoulder (which was injured) would be all right."

Applied also where a physician honestly believed and stated that certain injuries were not permanent, etc. *Seymour v. Chicago & N. W. R. Co.*, 181—218.

**Fraudulent Concealment.** The plea that the physician representing the one to whom a release was executed *fraudulently* concealed from the injured party that said injured party had an incurable dislocation, or one which rendered subsequent dislocations highly probable, is not established by evidence of the condition of the injured party after a second dislocation. *Seymour v. Chicago & N. W. R. Co.*, 181—218.

**SALES.**

## CONSTRUCTION OF CONTRACT.

**Entire or Severable Contracts—Rescission.** Separate contract orders for separate machinery, in view of the *oneness* of purpose for which the machinery was ordered and the practical construction placed upon the orders by the parties, may constitute one indivisible contract, in the sense that a fraud-induced acceptance of the machinery covered by one of the orders will not bar a rescission of *all* the orders. *International Harv. Co. v. Tjentland*, 181—940.

## RESCISSION.

**Reasonable Time.** Rescissions of sales must be made promptly upon discovering the inducing fraud, but there is no exact standard of diligence in following up and verifying suspicions of fraud, and no exact standard of *time* in which the vendee must rescind after obtaining proof of the fraud. *Held*, a rather belated rescission was timely. *Conroy v. Coughlon Auto Co.*, 181—916.

## SALES Continued

## TO SCHOOLS AND SCHOOL DISTRICTS

**Change of Position of Other Party.** One guilty of fraud may not  
 3 defeat rescission by the naked fact that he has disposed of  
 the property which he received from the one seeking rescission, even though part of such property was a note and mortgage. *Conroy v. Coughlon Auto Co.*, 181—916.

**Trading Contract with Inflated Values.** Trading contracts with  
 4 inflated values will, on rescission, be adjusted on the basis  
 of the actual values of the properties. *Conroy v. Coughlon Auto Co.*, 181—916.

**Waiver—Sufficiency.** A buyer does not elect to waive rescis-  
 5 sion and to proceed for damages by inquiring of the seller  
 whether he (the seller) will stand for the damages or whether the buyer must look to the seller's agent for damages. *International Harv. Co. v. Tjentland*, 181—940.

**Effect.** *Rescission works a waiver of damages.* So held where  
 6 the buyer of farm machinery rescinded the contract and, in  
 addition, sought to recover damages by reason of the loss  
 of his crops, directly traceable to the seller's default. *International Harv. Co. v. Tjentland*, 181—940.

## PERFORMANCE OF CONTRACT.

**Delivery—Intention.** Actual physical possession of property is  
 7 not always necessary to constitute full delivery. *Hess v. Dicks*, 181—342.

## WARRANTIES.

**Waiver.** A written warranty, limited as to duration and rem-  
 8 edy in case of a breach, may not be ignored in the absence  
 of fraud or waiver. *Singmaster v. Robinson*, 181—522.

**SCHOOLS AND SCHOOL DISTRICTS.** See ELECTIONS, 1,  
 2, 4.

## CONTRACT OF EMPLOYMENT.

**Limitations.** The board of directors of a rural independent

## SCHOOLS AND SCHOOL DISTRICTS Cont'd. TO

## SEDUCTION

- 1 school district has no power to employ a teacher under a contract which calls for performance wholly within the term of office of the board *thereafter to be organized*. (See Sections 2757, 2772, 2773, Code Supp., 1913.) Independent School Dist. v. Pennington, 181—933.

## CONSOLIDATED DISTRICTS.

**Size of Remaining Corporation.** The statutory prohibition that, 2 in the formation of a consolidated school district, no school corporation shall be left with less than four contiguous government sections (Section 2794-a, Code Supplement, 1913), has no application to a *subdistrict* of a school district township. Taylor v. Independent School Dist., 181—544.

**Election—How Elector Voted.** The voluntary oral testimony of 3 electors as to *how* they voted at an election to form a consolidated school district is competent on the question whether a majority of the electors, both *inside* and *outside* a village, voted in favor of consolidation, *and no other means exists to decide said question*. So held where there was an omission to provide separate ballot boxes. (Sec. 2794-a, Code Supp., 1913.) State v. Lockwood, 181—1233.

**Election—Failure to Provide Separate Ballot Boxes.** Failure of 4 election officials to provide separate ballot boxes for electors residing within and without villages, etc., does not invalidate an election in favor of consolidation when it is made to appear that a majority of the electors both *outside* and *inside* villages, etc., voted in favor of the consolidation. (Sec. 2794-a, Code Supp., 1913.) State v. Lockwood, 181—1233.

## SEDUCTION. See MARRIAGE, 4.

**Married Person.** Seduction of a woman may be accomplished by 1 a promise of marriage made at a time when the promisor, to the knowledge of the woman seduced, was living in a loveless marriage to a woman desirous of entering a convent, and between which married persons a divorce was





STATUTES Continued

TO

SUBROGATION

**Mandatory (?) or Directory (?)**. Principle recognized that, when  
 3 the provision of a statute is of the essence of the thing required to be done, it is *mandatory*. So recognized in a cause involving the procedure to be followed in order to deprive a policeman of the benefits of a pension fund. *Dickey v. Jackson*, 181—1155.

PLEADING.

**Non-Necessity to Plead**. No necessity exists to specifically mention or point out the domestic statute on which plaintiff bases his alleged cause of action. *Bridenstine v. Iowa City Elec. R. Co.*, 181—1124.

STIPULATIONS.

**State of the Law**. Parties may not stipulate as to what is public law. *Taylor v. Independent School Dist.*, 181—544.

SUBROGATION.

**Doctrine Inapplicable to Primary Liability**. The right of subrogation never follows an actual primary liability. In other words, one who pays a debt in performance of his own covenants is not entitled to subrogation. In such case, payment is extinguishment. *Baker v. American Surety Co.*, 181—634.

**Essential and Non-Essential Elements**. One may be entitled to  
 2 the benefits of subrogation even though he did not advance his money (a) under any *compulsion*, or (b) in order to *protect some interest of his own*, or (c) with entire *freedom from negligence*. The important considerations are that the money be advanced under an agreement, express or implied, that the payer shall have the same rights as possessed by the holder of the discharged obligation, and that no intervening paramount equities have attached. *Kent v. Bailey*, 181—489.

**Mortgagee's Failure to Examine Records—Excusable Negligence**.

3 A mortgagee is not guilty of negligence *per se* by relying

SUBROGATION Continued TO TAXATION  
solely on the assurance of a mortgagor that no prior liens  
exist on the property. Kent v. Bailey, 181—489.

**TAXATION.** See LIFE ESTATES.

**LEVY AND ASSESSMENT.**

**Void Assessments.** Equity will afford relief against a void tax,  
1 even though the one complaining (a) is not the one against  
whom the tax was originally assessed and (b) makes no  
tender of payment of the tax which would have been due  
had the assessment been legally completed. Woodbine Sav.  
Bank v. Tyler, 181—1389.

**Failure to Authenticate Assessment Rolls.** Principle recognized  
2 that the failure of the assessor to attach his oath to the as-  
sessment rolls wholly invalidates the tax. Woodbine Sav.  
Bank v. Tyler, 181—1389.

**COLLATERAL INHERITANCE TAX.**

**Reservation of Life Estate.** Property conveyed by deed to a col-  
3 lateral heir, but with a reservation unto grantor of a full  
life estate,—life possession, use and enjoyment of the prop-  
erty,—is not subject to a collateral inheritance tax if, as a  
part of the deed transaction, or later and prior to the death  
of the grantor, that is done which amounts to a good-faith  
sale or waiver by the grantor of the life estate and an im-  
mediate vesting in grantee of full possession, use and en-  
joyment of the property.

Phrased differently, the tax is avoided if, prior to the  
death of grantor, the parties in good faith substitute a new  
consideration in lieu of the life estate and thereby let the  
remainderman into full and immediate possession, use and  
enjoyment of the property. Brown v. Gulliford, 181—897.

**Deed Postponing Enjoyment, but on Consideration.** Full consid-  
4 eration for a conveyance which is intended to take effect  
in possession and enjoyment in a collateral heir after the  
death of the grantor, does not work an avoidance of the  
collateral inheritance tax. Brown v. Gulliford, 181—897.

TELEGRAPHS AND TELEPHONES

TO

TRIAL

**TELEGRAPHS AND TELEPHONES.**

**Power of Municipality to Collect Rental.** The fee title in trust possessed by a city in its streets, plus the statutory right in the city to "care, supervise and control" its streets, gives the city no such proprietary interest in its streets as will support an action by the city to recover the reasonable rental value of that part of the streets occupied by the poles, fixtures, etc., of a telephone company which received its franchise grant, unburdened with any financial exaction, direct from an act of the state legislature. (Sections 2158-2160, Code, 1897.) *City of Des Moines v. Iowa Tel. Co.*, 181—1282.

**TENDER.** See CONTRACTS, 15.

**TRADE-MARKS AND TRADE NAMES.**

**Fraudulent Duplication of Article.** The manufacture and sale, in competition with a prior manufacturer, of an unpatented article of the same size, form, shape, material, and functional parts as that of such prior manufacturer, do not necessarily constitute unfair competition, even as to one who, by prior manufacturing and making, has acquired a valuable reputation and good will therein; but such duplication will constitute such unfair competition and become enjoinable, provided the duplication is *fraudulent* because so executed, advertised, and marketed as to deceive ordinarily prudent persons into believing that the duplicated article is that of such prior manufacturer. *Lennox Furn. Co. v. Wrot Iron Heater Co.*, 181—1331.

**TRIAL.****RECEPTION OF EVIDENCE.**

**Commingling Quantum Meruit and Express Contract.** Prejudicial error results from receiving evidence and submitting instructions as to *quantum meruit* when the record shows beyond question that the parties had *expressly* agreed as

## TRIAL Continued

to the amount of the compensation, even though the court, in submitting the theory of *quantum meruit*, limited recovery to the amount actually agreed upon. *Cammack & Son v. Welmer*, 181—1. See *Swaney L. Co. v. Bradford*, 181—1244; *Quillen v. Minneapolis & St. L. R. Co.*, 181—536.

**Reopening Case.** After full submission of a cause to the court, 2 complaint may not be made of the refusal of the court to reopen the cause for additional testimony, when the materiality of such testimony was apparent from the inception of the trial. *Steckel & Son v. Smith*, 181—361.

**Exclusion on Insufficient Objection.** Excluding offered evidence 3 on an *insufficient* objection will be sustained if a *sufficient* objection did, in fact, exist. *State v. Brooks*, 181—874.

## CONDUCT OF COUNSEL.

**Persistent Offer of Rejected Testimony.** Counsel has the right to 4 persist in the good-faith offer of rejected testimony until he has made a fair record of the fact which he desires to prove. *Correy v. Inter-Urban R. Co.*, 181—373.

## DIRECTED VERDICTS.

**Disputed questions.** Clearly disputed questions of material fact 5 must be passed on by the jury, irrespective of the court's opinion as to the credibility of witnesses and the weight of their testimony. *Central State Bank v. Ford*, 181—319.

## INSTRUCTIONS.

**Objections.** Objections to instructions not made prior to the 6 submission to the jury are waived. (Section 3705-a, Code Supp., 1913.) *Miller v. Bohanan*, 181—1207.

**Objections and Exceptions.** An exception, under Section 3705-a, 7 Code Supplement, 1913, to an instruction, on the ground that it is incorrect as a statement of substantive law, is not waived by a failure to ask a specific instruction on the point in controversy. So held where defendant, in a criminal cause, excepted to an instruction which *excluded* assault

## TRIAL Continued

and battery from the jury's consideration, but did not specifically request an instruction *including* such offense. State v. Brooks, 181—874.

**Objections.** Objections to instructions prior to submission, on 8 the general ground that the court had failed to instruct as to the *effect of certain evidence*, must be followed by a request for a special instruction covering the point, or the objection will be waived. Seitsinger v. Iowa City Elec. R. Co., 181—739.

**Objections.** Failure to lodge a specific objection to an instruction before it is read to the jury precludes raising such point in a motion for a new trial, no explanation being offered for the delay. (See Section 3705-a, Code Supplement, 1918, now repealed.) Seitsinger v. Iowa City Elec. R. Co., 181—739.

**Lack of Clearness.** The explicitness of instructions may not be 10 questioned by one who asked no instructions and entered no exceptions to those given. State v. Burley, 181—981.

**Singling out Witness.** Instruction reviewed, in a criminal case, 11 and held not to unduly and prejudicially single out the defendant and his testimony. State v. Brooks, 181—874.

**Broker's Commissions.** Instructions on the subject of ratification by a principal of the act of his agent in employing subagents on behalf of the principal, reviewed, and held not to authorize the subagent to recover if the principal, subsequent to the doing of the work by the subagent, made a naked, unsupported promise to pay the subagent for his services. Lenhart v. Bean, 181—85.

**Applicability to Evidence.** Evidence tending to show that a 13 workman was warned of the existence of a danger attending his place of work does not justify an instruction which submits to the jury the question whether the workman was "instructed not to work in the place in question." Harn v. Cedar Valley Elec. Co., 181—1173.

**Applicability to Evidence.** Issues wholly without support in the 14 evidence must not be submitted. So held as to the issue of VOL. 181 1A.—94

## TRIAL Continued

want of consideration and falsity of representations concerning a promissory note. *City Nat. Bank v. Mason*, 181—824.

**Non-Applicability to Evidence.** Instructing on issues wholly without support in the evidence is reversible error. So held in an action on a guaranty. *Rawleigh Medical Co. v. Bane*, 181—734.

**Applicability to Evidence.** Preferably, the court should, on the subject of future pain, instruct that plaintiff may recover for such as it is "*reasonably certain*" he will suffer in the future, but it is not prejudicial error to instruct that he may recover for such future pain as "*he will*" suffer. *Seitsinger v. Iowa City Elec. R. Co.*, 181—739.

**Applicability to Evidence.** Evidence (a) of the character of personal injuries, (b) of the extent of time the party was disabled, and (c) of the present and possible future continuance of said injuries, furnishes basis for instruction as to recovery for loss of time and earning capacity. *Seitsinger v. Iowa City Elec. R. Co.*, 181—739.

**Applicability to Evidence.** Instructions non-applicable to the evidence are properly refused. *Chumbley v. Courtney*, 181—482; *Martens v. Martens*, 181—350.

## VERDICT.

**Amendment by Court.** Verdicts may properly be amended by the court by the addition of interest, such addition being a mere matter of mathematical calculation. *Bridenstine v. Iowa City Elec. R. Co.*, 181—1124.

**Disregard of Instructions.** Verdicts clearly contrary to the instructions will be reversed. *Coleman v. Tierney*, 181—667.

**\$400.** Verdict of \$400 for painful injuries held non-excessive. *De Wall v. City of Sioux City*, 181—332.

## TRIAL Continued

## TO

## TRUSTS

**\$1,800.** Verdict of \$1,800 for personal injuries, loss of time, future pain, and injury to property, sustained. *Seitsinger v. Iowa City Elec. R. Co.*, 181—739.

**\$5,000.** Verdict of \$5,000, reduced by the trial court to \$3,000, for the death of a common laborer, 48 years of age, without much accumulation of property, held not excessive. *Woodard v. Herald Pub. House*, 181—791.

**\$4,000.** Verdict of \$6,000, reduced by the trial court to \$4,000, sustained. Plaintiff, 20 years old, and married, was injured by coming in contact with wires carrying 2,300 volts of electricity. He was apparently dead when picked up, suffered excruciating pain, which was later aggravated by an attack of tetanus, and was confined to his bed for several weeks. He was incapacitated from working at his trade as a painter, and from doing any hard work. Prior to his injury, he was earning \$2.50 per day. Probability and extent of permanent injury were problematical. *Harn v. Cedar Valley Elec. Co.*, 181—1173.

**\$5,000.** Verdict of \$5,000 ordered reduced to \$3,500, or new trial granted. Plaintiff, a young man of moderate earnings, suffered a broken limb, was confined to the hospital for some eleven weeks, suffered at the time much pain, and an actual pecuniary loss of \$1,200, but had apparently fully and permanently recovered from the injury and all suffering therefrom. *Gilbert v. Vanderwaal*, 181—685.

**\$15,000.** Verdict for \$15,000 sustained in an action for breach of promise to marry. Defendant was evasive as to his wealth and earning capacity, but, as an auctioneer, had from 40 to 75 sales per year, from which sales he made from \$20 to \$40 each. Was successful in business, and at time of trial was worth \$40,000. Defendant's conduct towards plaintiff was strikingly flagrant. *Morgan v. Muench*, 181—719.

**TRUSTS.** See **CONTRACTS**, 3; **DIVORCE**, 6; **EVIDENCE**, 20.

**EXPRESS TRUSTS.**

**Spendthrift Trusts**—When Subject to Debts of Cestui. One may not, under the guise of a spendthrift trust, trustee his own

**Trusts Continued**

*property* and place it beyond the reach of his creditors. Evidence reviewed, and held sufficient to show that certain trust property had actually been acquired and in reality purchased by the *cestui que trust*, (a) by reason of a general family settlement of an estate, (b) by reason of the abandonment of a right to contest a will, and (c) by reason of the surrender by the *cestui que trust* of certain property devised to him. *De Rousse v. Williams*, 181—379.

**RESULTING TRUSTS.**

**Conveyance to Non-Owner.** Where property is acquired by one  
2 person, but is conveyed by the grantor to a third person, without any arrangement or understanding with reference thereto, a trust results in favor of the one actually owning the property. *Ludden v. Butters*, 181—94.

**EXECUTION OF TRUST.**

**Personal Liability of Trustee.** A privately appointed trustee for  
3 the benefit of creditors, with full title to and management over the property of the debtor, is *personally* liable for the debts incurred by him, either personally or through his agent, *in the execution of the trust*, unless he provides against such personal liability by agreement with the holders of such debts. *McCoy v. Smith*, 181—707.

**Terms of Trust.** The terms of a trust deed exempting the trustee  
4 from all personal liability in the execution of the trust becomes quite immaterial when it appears that the claim sued upon accrued during the execution of the trust and such terms were never brought to the attention of such creditor. *McCoy v. Smith*, 181—707.

**Trustee as Agent of Trustmaker.** A privately appointed trustee  
5 to whom the title to the debtor's property passes for the benefit of creditors is not the agent of the debtor, the trustmaker. *McCoy v. Smith*, 181—707.

**ESTABLISHMENT OF TRUST.**

**Limitations—Denial of Trust.** The statute of limitations does



**Trusts Continued** **TO** **VENUE**

- 6 not commence to run against an action to enforce a trust until the trustee has in some manner repudiated the trust. *Carter v. Cohen Bros. I. & M. Co.*, 181—588.

**EVIDENCE.**

- Admissions of one Against Whom Trust Sought.** Oral admissions  
7 of the one against whom a partially executed trust is sought to be established, to the effect that he was holding the property in trust, may be competent as *corroborating* the oral testimony of the existence of such trust. *Ratigan v. Ratigan*, 181—860.

- Declaration of One Cestui Not Binding on Others.** Declarations  
8 of one joint beneficiary under a trust agreement as to real estate, denying all interest therein, are not binding on the other beneficiaries. *Ratigan v. Ratigan*, 181—860.

**UNFAIR COMPETITION.** See **TRADE-MARKS AND TRADE NAMES.**

**VENDOR AND PURCHASER.**

- Rescission.** Depreciation in the value of land after the execution of a contract of purchase affords no ground for rescission when the depreciation is due to conditions known to exist at the time of the execution of the contract. So held where the depreciation was due to a threatened change in the course of the Missouri River. *Tuttle v. King*, 181—288.

- Rescission.** Delay, properly explained, of a year in discovering  
2 a fraud, will not deprive an injured party of the right to rescission, or, if rescission is impracticable, to alternative relief in the form of damages. *Bronson v. Lynch*, 181—654.

**VENUE.**

**CHANGE OF VENUE.**

- Fraud in Inception of Contract.** "Fraud in the inception of a  
1 contract" is ground for change of venue to the county of—

## VENUE Continued

TO

## WEAPONS

defendant's residence only when the contract is specifically performable in the county where action is brought. (Sec. 3505, Code Supp., 1913.) *Chumbley v. Courtney*, 181—482.

**Nonresidence of Codefendants.** Defendant, in an action on a  
2 promissory note, may not have the venue changed to the county of his residence unless he shows that his codefendants are nonresidents of the county where the action is brought. (Sec. 3501, Code, 1897.) *Chumbley v. Courtney*, 181—482.

**Carriers—Agency.** A common carrier, sued in a county in or  
3 through which it does not operate any line of railway, is entitled to a change of venue to the county where it does so operate, even though it does have, in the county where sued, an agency, but such agency had nothing whatever to do with the subject matter of the action. (Sections 3497, 3500, Code, 1897.) *Atchison, T. & S. F. R. Co. v. Mershon*, 181—892.

**Estoppel—Evidence.** Evidence in the form of correspondence  
4 reviewed, and held insufficient to estop a carrier from insisting on its right to a change of venue. *Atchison, T. & S. F. R. Co. v. Mershon*, 181—892.

**WATERS AND WATERCOURSES.**

**Diversion.** Equity will enjoin the continued diversion, to the injury of another, of the waters of a natural watercourse. *Durst v. Puffett*, 181—14.

**WEAPONS.**

**Concealed Weapons—Indictment—Negating Exceptions.** An indictment for carrying concealed weapons must negative the exception in favor of those having permits to so carry. (Section 4775-1a *et seq.*, Code Supp., 1913.) *State v. Burns*, 181—1098.

WILLS

**WILLS.**

**CONTRACT TO DEVISE, ETC.**

**Parol Contract—Degree of Proof.** A parol contract to will or  
 1 devise property is enforceable if established by proof which  
 is so cogent, clear and forcible as to leave no reasonable  
 doubt as to its terms and character. Evidence reviewed,  
 and held wholly insufficient to meet this rule. *Sharpe v.*  
*Wilson*, 181—753.

**Evidence—Sufficiency.** Evidence with reference to an alleged  
 2 contract by which plaintiff was to have all of the property  
 of deceased reviewed, and held too indefinite and uncertain  
 to establish said contract. *Hart v. Hart*, 181—527.

**MUTUAL WILLS.**

**Separate Instruments.** A valid mutual or reciprocal will results  
 3 whenever two persons who are under legal or moral obliga-  
 tion to mutually support each other execute, in pursuance  
 of a common intent or agreement, separate wills with  
 identical provisions in favor of each other. *Anderson v.*  
*Anderson*, 181—578.

**TESTAMENTARY CAPACITY.**

**Old Age.** Principle recognized that old age is not, of itself, evi-  
 4 dence of mental incapacity. *Ranne v. Hodges*, 181—162.

**Strangers as Beneficiaries.** Principle recognized that a jury may  
 5 well conclude that it is not rational for a testator to ignore  
 his own children in the disposition of his property, and to  
 bestow his property on stepchildren, and quite largely on  
 an aged second wife who had no need for such an unusual  
 amount of property and had accumulated no part of it.  
*Ranne v. Hodges*, 181—162.

**Unequal Distribution.** Inequalities of distribution between tes-  
 6 tator's children and stepchildren, along with any proper ex-

## WILLS Continued

planation thereof, are proper subjects for the consideration of the jury in determining the actual condition of the testator's mind. *Ranne v. Hodges*, 181—162.

**Unsoundness of Mind—Sufficiency.** Evidence reviewed, and held  
7 ample to carry to the jury the question of testator's sanity.  
*Ranne v. Hodges*, 181—162.

## CONSTRUCTION.

**Non-Self-Executing Clause Penalizing Contest.** A clause in a will  
8 providing that a devisee who contests the same shall forfeit the devise to him, is not self-executing. In other words, a violation of such clause does not, *ipso facto*, invest an heir or devisee who does not contest with title to his portion of the forfeited devise. Such favored heir or devisee is simply armed with an election to take or not to take. *De Rouse v. Williams*, 181—379.

**Substitution on Death of Devisee—Mutual or Reciprocal Wills.**

9 The statutory rule (Sec. 3281, Code, 1897) that the heirs of a devisee shall take the devised property in case the devisee predeceases the testator, has no application to the heirs of a devisee when the right of the devisee to take the devise rests solely on the *unfulfilled* condition that he survive the testator. So held in the case of a devisee under a mutual or reciprocal will. *Anderson v. Anderson*, 181—578.

## PROBATE.

**Mutual or Reciprocal Wills.** The probate of one of two wills  
10 which together constitute, in effect, a valid mutual or reciprocal will, with no provisions for third parties, wholly deprives the unprobated will of any further force or effect as a testamentary instrument. *Anderson v. Anderson*, 181—578.

**Penalizing Contest—Conditions Subsequent.** Principle recognized that forfeitures for breach of conditions subsequent are in disfavor. So held with reference to a will clause penalizing a contest. *De Rouse v. Williams*, 181—379.

## WITNESSES

**WITNESSES.****COMPETENCY.**

**Professional Communications.** A party who, following a particu-

- 1 lar injury, is in turn treated, professionally and separately, by two physicians, may call one of said physicians and prove by him what he discovered concerning said party's physical condition, *without in any manner removing the ban of secrecy on the other physician.* *Jacobs v. City of Cedar Rapids, 181—407.*

**Privileged Communications.** A party who testifies, even on cross-

- 2 examination, *that he had never consulted any doctor prior to his injury in question,* thereby asserts that no doctor exists against whom he might lodge the objection of incompetency to disclose privileged and professional communications occurring prior to such injury. In other words, such testified declaration opens wide the door to any physician to testify fully to any professional treatment furnished by said physician to said party, prior to said injury in question. *Jacobs v. City of Cedar Rapids, 181—407.*

**Immature Children.** The ancient and conclusive presumption

- 3 that a child under the age of nine years was an incompetent witness has no place in our modern law. With us it is simply a fact question whether the child, irrespective of his age, has, *when offered as a witness,* sufficient understanding to comprehend that, when he is placed under oath, he is pledged to tell nothing but the truth and will be punished if he does not. *Held,* a child of seven years was, under the record, competent. *State v. Yates, 181—539.*

**Adequacy of Proposed Drainage Plan.** A nonexpert witness on

- 4 scientific drainage, even though residing in the immediate locality, and having knowledge of local conditions, is not competent to express an opinion as to the *adequacy* of a proposed drainage scheme—that is, whether it would so carry off the waters cast upon it by ordinary rains, seepage, lateral streams, lateral drainage, and tiling, as to avoid overflow. *Hall v. Polk, 181—828.*

## WITNESSES Continued

**Drainage—Physical Conditions, Past and Present. Nonexperts**

- 5 on drainage matters are competent to detail the present physical *fact* conditions surrounding a proposed public drainage improvement, and the past *fact* conditions, as observed by them, as bearing on the adequacy of the proposed improvement and on the preliminary issue of benefits or injury to the lands within the proposed district. *Hall v. Polk*, 181—828.

**Refreshing Memory. A witness may not be permitted to refer**

- 6 to a writing, even though made by himself, and read therefrom, when at said time he has no past or present independent recollection of the accuracy thereof. *State v. Powers*, 181—452.

**Transactions with Deceased—Nonparticipation in Conversation.**

- 7 Principle reaffirmed that a party to an action against the grantee of a deceased grantor is competent to testify to a material conversation between said deceased and a third party *in which said witness took no part*. (Sec. 4604, Code, 1897.) *Hart v. Hart*, 181—527.

**Transactions with Deceased—Allowable Inferences. A party to**

- 8 action against the grantee of a deceased grantor, wherein the cancellation of the deed is sought, is competent to testify to a state of facts relative to a personal transaction with said deceased, from which state of facts the existence of other facts *may be inferred (a rule which the court specifically declines to further extend)*, but is not competent to testify to a state of facts *which leaves absolutely nothing to inference*. *Hart v. Hart*, 181—527.

**Transactions with Deceased—Inferred Facts. Counsel for plain-**

- 8 an action against the grantee of a deceased grantor, wherein son, may not render his client a competent witness as to the terms of such contract by the simple expedient of directing this client to detail the terms of such contract *but to suppress the name of the person with whom such contract was had*, when the deceased was the *only* person with whom the client could have had such a contract. *Minion v. Adams*, 181—267.

WITNESSES Continued

EXAMINATION.

**Leading Questions.** Principle recognized that the trial court has  
 10 a wide discretion in the matter of allowing leading questions, especially in the examination of foreigners handicapped with imperfect knowledge of the English language, plus sluggish temperaments. *Martens v. Martens*, 181—350.

CROSS-EXAMINATION.

**Undue Limitation.** A cross-examiner's right to test the recollection of a witness as to the value of articles sold, when material, is in no wise lessened by the fact that the number of articles is very large. *Hirsch v. Butler*, 181—345.

**Antecedent Character of Witness.** The permissible range of  
 12 cross-examination embraces not only matters bearing more or less directly upon pending issues, but may, as bearing on the general subject of credibility, embrace a showing of the *depraved habits, antecedents and character* of the witness. *State v. Brooks*, 181—874.

CREDIBILITY, IMPEACHMENT, ETC.

**Transactions with Deceased—Nonparticipation in Conversation.**  
 13 That a party was present at the time of a transaction with a deceased, was vitally interested therein, and was enabled to testify thereto by reason of the claim *that he took no part in said transaction*, are facts bearing very properly on the *weight* of the evidence and the *credibility* of the party testifying. *Hart v. Hart*, 181—527.

**Interest and Bias—Attorney as Witness.** The act of an attorney  
 14 in combining the character of attorney and witness in a proceeding in which he is actively interested, and in which his testimony is vital, is a positive breach of professional ethics. *Hull v. Mitchell*, 181—51.

**Impeaching an Impeaching Witness.** An impeaching witness may  
 15 not be impeached. So held where such a witness testified that the reputation of a certain party was bad, and that

WITNESSES Continued TO WORDS AND PHRASES  
 named parties had so told him, such named parties not being permitted to testify that they had not made the statements attributed to them. *State v. Brooks*, 181—874.

**Vouching for Credibility of Witness.** It does not lie in the mouth of a party to insist that his own witness is an artistic falsifier. *Chapman v. Chapman*, 181—801.

## WORDS AND PHRASES.

**"Able to Buy."** *Reynor v. Mackrill*, 181—210.

**"Citizen."** A corporation is not a "citizen" within the meaning of the statute which authorizes "any citizen," etc., to maintain actions for the enjoining of liquor nuisances. *Civic Improvement League v. Hanson*, 181—327.

**"Machine."** *Haller v. Quaker Oats Co.*, 181—389.

**"Pension" and "Compensation" Contrasted.** The term "pension," as employed in the Policemen's Pension Act (Section 932-j *et seq.*, Code Supp., 1913), and the term "compensation," as employed in the Workmen's Compensation Act (Section 2477-m *et seq.*, Code Supp., 1913), are not synonymous. *Dickey v. Jackson*, 181—1155.

**"Show" and "State" Contrasted.** "To show" means to demonstrate by satisfactory proof. *Chumbley v. Courtney*, 181—482.

**"To Become Due."** *Eller v. National Mot. Vehicle Co.*, 181—679.



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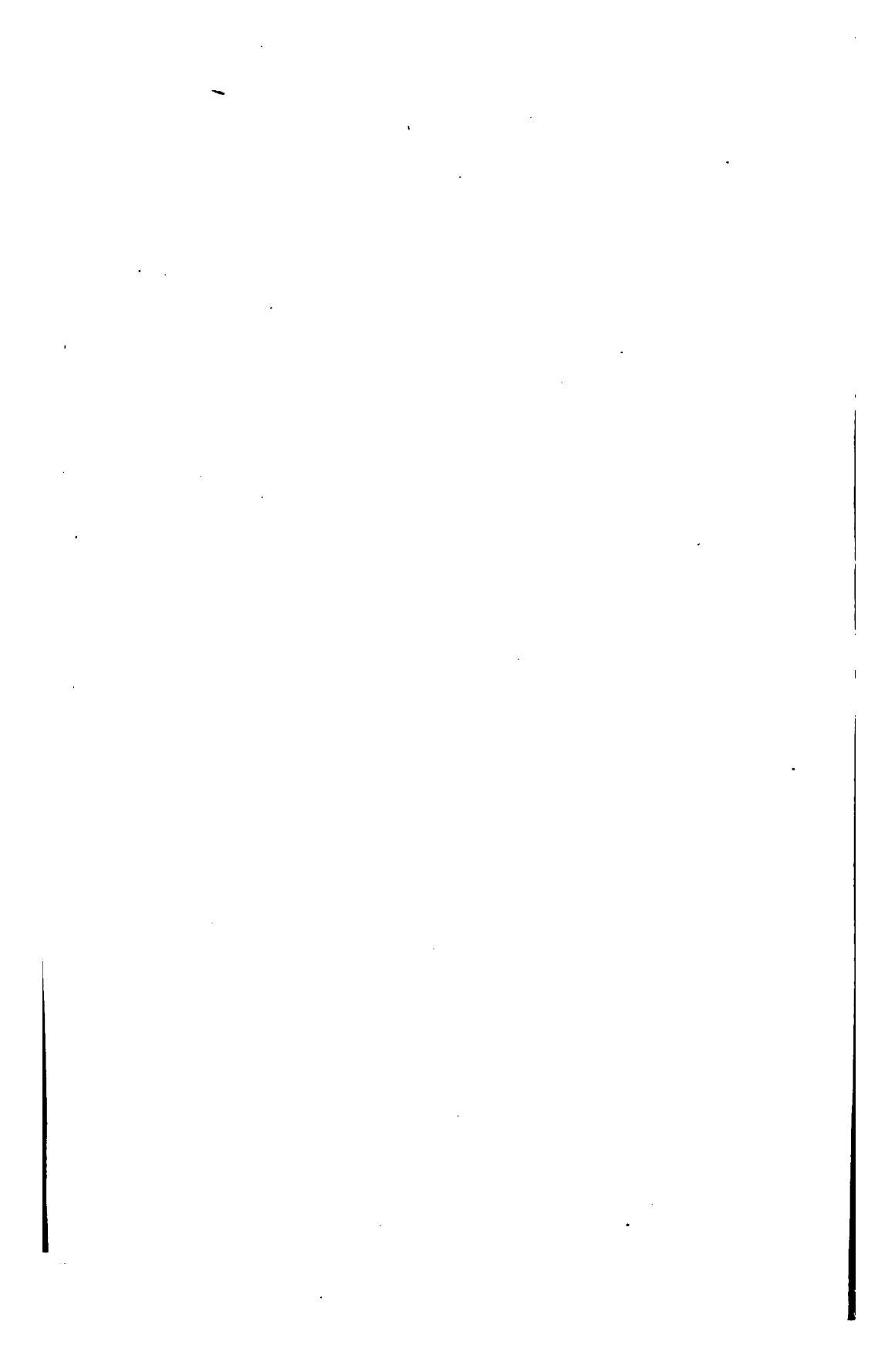
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